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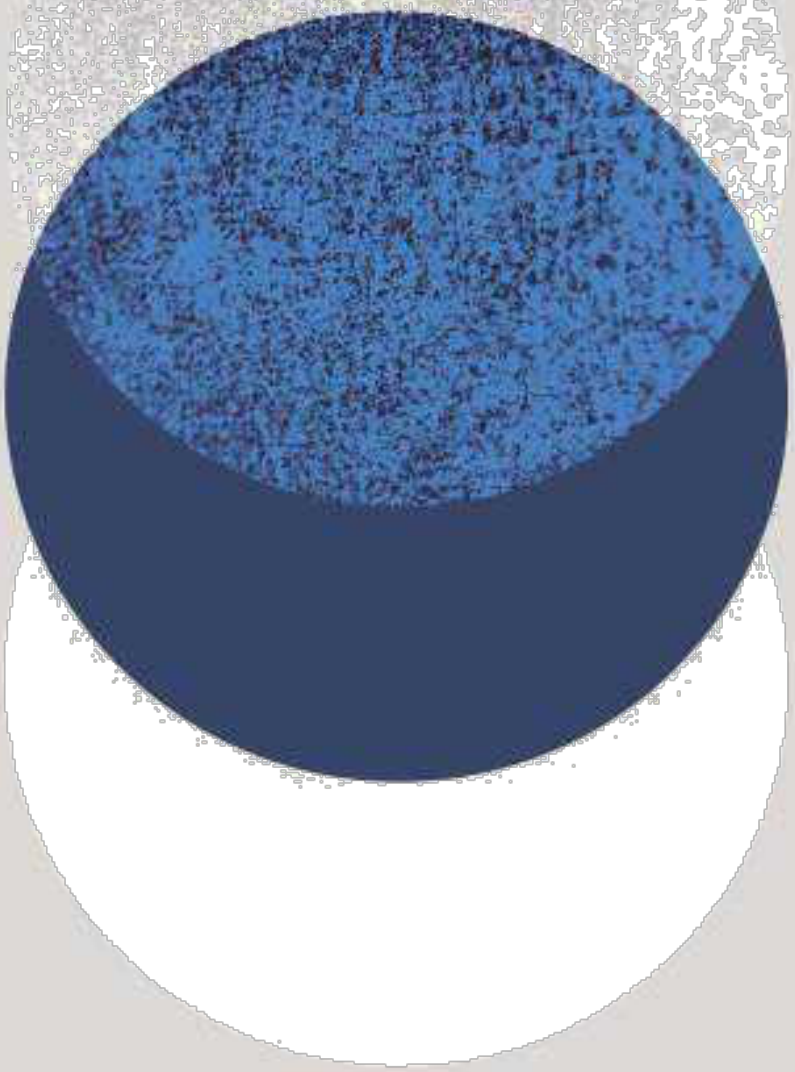
# The Philippine Yearbook of International Law



THE PHILIPPINE SOCIETY OF INTERNATIONAL LAW

# THE PHILIPPINE
# YEARBOOK OF INTERNATIONAL LAW

VOLUME XXI 2022

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VOLUME XXI 2022

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# EDITOR'S NOTE

# ARTICLES

# PHILIPPINE TREATY PATTERNS 1946-2020: ARE TREATY ACTIVITIES ALIGNED WITH FOREIGN POLICY PRIORITIES?

J. Eduardo Malaya
Marianne Bringas
Kieren Roevi Batiles*

At the commencement of each new congressional session, it is customary for Congress to ask the executive branch, through the Department of Foreign Affairs ("DFA"), for the list of international agreements and conventions that are proposed for concurrence by the Senate, or for allocation of budgetary resources by Congress. The assumption is that these agreements and conventions are the priorities of the Government.

The alignment of actual treaty activities by executive agencies on one hand, and the declared foreign policy priorities is crucial as government resources are finite, and therefore treaty activities must be geared towards the pursuit of identified national objectives. The all-important question therefore is whether there is alignment between treaty activities and identified priorities, and if not, why so?

There are varied reasons for States to enter into treaties with other States and international organizations. These may be to expand trade and secure investments, enhance cooperation, generate goodwill, or pursue national security interests. A partner country may also propose entering into an agreement on a certain subject, and in consideration of friendly relations, there may be a desire to accommodate it. By analyzing a country's entry into and withdrawal from treaties through time, patterns and trends will emerge, which can present a vivid picture of the priorities that are being pursued, if any, and the political, social and economic conditions of the times.

The Philippines is, as of this writing, signatory to some subsisting 1,781 agreements, consisting of 1,165 bilateral agreements, 241 conventions within the auspices of the Association of Southeast Asian Nations ("ASEAN")[1]

* Malaya is the Philippine Ambassador to The Netherlands. He was previously Undersecretary of Foreign Affairs (Aug. 2019–Mar. 2021) and served twice as Assistant Secretary for Treaties and Legal Affairs (Apr. 2017–July 2019; 2009–2011). He was also

and 375 United Nations ("UN") and other multilateral conventions. These agreements were concluded by various Philippine presidential administrations in a span of more than 70 years.

In the book *Philippine Treaties in Force 2020* co-edited by the first author of this paper, he noted that "a well-informed understanding of Philippine foreign diplomacy and the country's rights, duties and commitments is best derived from the treaties and other international agreements it has concluded with other countries and international organizations. The breadth and depth of our foreign relations are reflected in this growing number of agreements."

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previously the Philippine Ambassador to Malaysia and the DFA Spokesman. He has written scores of journal articles and newspaper commentaries, and is the author, main co-author and editor of seven books on Philippine diplomacy, Philippine presidency, and law, notably *Philippine Treaties in Force 2020* (*University of the Philippines Law Center (UPLC), 2021)*; *Treaties: Guidance on Practices and Procedures (UPLC, 2018)*; *Forging Partnerships: Philippine Defense Cooperation under Constitutional and International Laws (UPLC/Foreign Service Institute, 2016), Stewards of the Nation: The Presidents of the Philippines and their Inaugural Visions (Anvil Publishing, 2018)*; and *Frontlines of Diplomacy: Conversations with Philippine Ambassadors (Anvil Publishing, 2011)*. He has BA Economics (*cum laude*) and Law degrees from the University of the Philippines. He is Vice President of the Philippine Society of International Law (since 2017) and Member of the Editorial Board of the Philippine Yearbook of International Law (since 2017), and was elected in 2021 to the Executive Council of the Asian Society of International Law.

Bringas is currently Special Assistant at the DFA Undersecretary for Administration and Head of the Department's Bids and Awards Committee Secretariat. Prior to this position, she was previously assigned as Third Secretary and Vice Consul at the Philippine Embassy in The Hague and Vice Consul at the Philippine Consulate General in Dubai from 2018 to 2022 and 2016 to 2018, respectively. She was Acting Director at the DFA Office of Treaties and Legal Affairs from 2015 to 2016. She completed her Juris Doctor degree from the University of the Philippines in 2011, and her bachelor's degree on communication research from the same university in 2002.

Batiles is currently Information Officer at the Philippine Embassy in The Hague. She completed her Master's degree from the University of the Philippines Open University in 2020, and her bachelor's degree on foreign service from Lyceum of the Philippines University – Cavite in 2015.

The views in this paper do not necessarily reflect those of the Department of Foreign Affairs nor the Philippine Government.

[1] Including those between ASEAN and its dialogue partners.

As binding legal texts, treaties come into existence by a political and a legal process. Their interpretation and application are legal operations which take place in a more or less political context.[2] As Robert Kolb noted:

> "when concluding a treaty on a certain subject matter, the States concerned thereby agree to extract that subject matter (for at least a certain time) from the chaotic flow of general political relations between them. They clothe it with a predictable legal regime, underpinned by a set of legitimate expectations as to mutual behavior. When and how this choice is appropriate is a political matter… It is thus no more than a tool of a multifaceted foreign policy."[3]

By reviewing treaty activities through the years, this study hopes to gain understanding and insights into the state and development of Philippine foreign relations. Specifically, it has the following objectives: (1) describe the state and development of treaty activities from 1946 to 2020 and determine patterns and trends with respect to subject matter and country partners; (2) correlate treaty activities with identified foreign policy priorities, notably the "Nine Realities of Philippine foreign policy"; and (3) assess whether there is congruence with and deviation from the priorities, and where appropriate, make recommendations on possible agreements or classes thereof which may be pursued. Focus is on the period 1986 to 2020 as these years are more relevant to the study of contemporary foreign policy. By doing so, this study will hopefully contribute to an understanding of the state and development of Philippine diplomacy and international law.

The perspective taken by this study is therefore neither solely from international law that is concerned about treaties and their application and interpretation, nor from political science which deals with trends in international relations, but a combination of both.

## Quantitative Analysis Approach

[2] GEORG NOLTE, TREATIES AND THEIR PRACTICE - SYMPTOMS OF THEIR RISE OR DECLINE 15-16 (2018).
[3] ROBERT KOLB, THE LAW OF TREATIES: AN INTRODUCTION 5 (2017).

Foreign policy formulation and implementation are complex and multifaceted endeavors involving a state's political institutions, cultures, economic structures, and leadership goals,[4] as well as the external environments with which these operate.

International relations may be viewed from two angles – the "individual" and "international" levels of analysis. The individual level's unit of analysis is the "policy-relevant individual," or in the Philippines' case, the President in light of his being the Head of State and Government who is also considered the "chief architect of foreign policy," and his alter ego, the Secretary of Foreign Affairs, who is in charge of the DFA.

At the individual level, leadership is a key determinant that affects the "behavior" of a State in terms of its foreign relations activities.[5] Leadership is the factor that "examines a leader's policy choices as decision maker and to what extent these make a difference in the state's behavior." The leadership style of the Head of Government can be further comprehended by examining his "personal characteristics" which may be reflected in the latter's pronouncements, decisions, and educational background, among others. These factors may reveal the issue areas that he may prioritize. His "global perspective," if any, will affect how he assesses and balances the demands of his nationals and other interests of his country vis-à-vis the international community.

The international level considers the state's characteristics –economic, political and defense situations of the country and the inter-state relations – as factors in its foreign policy behavior.[6] A key to understanding the conduct of a country's foreign relations is the "bilateral determinant," i.e., the state's relative power capabilities. The resources that a state possesses or lacks affects a state's foreign policy choices and the menu of activity that it can

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[4] James D. Fearon, *Domestic Politics, Foreign Policy, and Theories of International Relations,* 1 ANN. REV. POL. SCI. 289, 302 (1998).

[5] Andrea Chloe Wong, The Philippines as a Small State: Assessing its External Behavior and Foreign Policy in Bilateral Interactions with Small States (2019) (Ph.D. dissertation, University of Canterbury), citing Lloyd Jensen, *Explaining Foreign Policy,* 77 AM. POL. SCI. REV. 812 (1982).

[6] Bill Newmann, *A Brief Introduction to Theories on International Relations and Foreign Policy*, http://www.people.vcu.edu/~wnewmann/468theory.htm.

afford to pursue. Hence, the economic, political and/or security situations of the country will have a large bearing on its activities. States tend to cooperate with another state that has the capacity and resources to support it on matters of mutual concern, highlighting confluences of interests between them.

Assessing the impact of activities in the international arena is hampered by the absence of clear, objective measures of progress, or lack of it, unlike other matters of public concern such as economic growth which is measurable by gross domestic product figures, or campaign for foreign investments through data on actual investment inflows. The conduct of visits – State, Official or Working – may provide clues as to which countries the Government is prioritizing, but such information may not say much on the actual outcomes of the visit.

A good yet imperfect indicator is treaty activities because, as noted earlier, these represent firm undertakings by a country to another. At the same time, a single indicator – treaty activities – of a state's interactions cannot serve as a total representation of a country's inclination to specific kinds of actions and reactions. The aggregate number of signed and ratified treaties may be impressive, but numbers alone may not say much about their substantive contents nor the parties' level of commitment towards them. Some agreements may also be more consequential than others, for instance, a defense alliance compared to a cultural cooperation accord. Furthermore, it could not foretell the actual implementation, which would take place at a later time.

Nonetheless, treaty activities have usefulness as these provide a valuable view from which a state's conduct may be examined and compared in the international system.[7] In a study of Japanese treaty patterns, L. Jerold Adams noted that "by studying treaty activity as an aggregate phenomenon, one is able to describe and measure the international climate as a whole as well as the external stance and activity of one state within international society."[8]

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[7] Gary L. Scott, *Treaties of the People's Republic of China: A Quantitative Analysis,* 13 ASIAN SURV. 496, 496. (1973).
[8] L. Jerold Adams, *Japanese Treaty Patterns*, 12 ASIAN SURV. 242, 243 (1972).

Similarly, Gary L. Scott observed in a study of Chinese treaties that:

> Treaty language may oftentimes be more reliable than normal government communiques regarding state's attitudes toward the international environment … The quantitative approach to the examination of Chinese treaties will be used in order to establish a framework of "hard" data within which one may work in making certain assumptions about Chinese foreign policy practices.[9]

Takashi Shinobu further demonstrated the value of the quantitative analysis approach in another study of Chinese foreign policy.[10]

## Definitions and Parameters

In the Philippine constitutional system, the President or his duly authorized executive officials enter into, sign and ratify treaties, the ratification being subject to the concurrence of the Senate. The 1987 Constitution, in Article VII, Section 21, provides that "no treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the members of the Senate."

The president is "vested with the authority to deal with foreign states and governments, extend or withhold recognition, maintain diplomatic relations, enter into treaties, and otherwise transact the business of foreign relations."[11] In the realm of treaty-making, he has the sole authority to negotiate with other states, subject to constitutional limitations.[12] As the main architect of foreign policy, he is the sole organ and authority in the external affairs of the country.[13]

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[9] Scott, *supra* note 7 at 496-497.

[10] Takashi Shinobu, *China's Bilateral Treaties, 1973-82: A Quantitative Study,* 31 INT'L STUD. Q. 439, 440 (1987).

[11] Pimentel v. Executive Secretary, G.R. No. 158088, July 6, 2005.

[12] *Id.*

[13] J. Eduardo Malaya & Jarie R. Osias, *From "Chief Architect" to "Primary Architect" of Foreign Policy: Treaty Making in Light of Pangilinan v. Cayetano on the Withdrawal from the Rome Statute of the International Criminal Court*, 66 ATENEO L. J. (2022). Previously, the President was called the "chief architect of foreign policy." *See* Bayan v. Zamora, G.R. No. 138570, Oct. 10, 2000.

The Constitution vests the President with supervision and control of the executive departments, bureaus, and offices,[14] including the DFA. The DFA is the lead agency that advises and assists the President in planning, organizing, directing, coordinating and evaluating the total national effort in the field of foreign relations.[15]

There have been 17 Philippine presidents as of this writing, and 13 since the establishment of the Third Philippine Republic in 1946,[16] namely Manuel Roxas (1946 – 1948), Elpidio Quirino (1948 – 1953), Ramon Magsaysay (1953 – 1957), Carlos P. Garcia (1957 – 1961), Diosdado Macapagal (1961 – 1965), Ferdinand E. Marcos (1965 – 1986), Corazon Aquino (1986 – 1992), Fidel V. Ramos (1992 – 1998), Joseph Estrada (1998 – 2001), Gloria Macapagal Arroyo 2001 – 2010), Benigno Aquino III (2010 – 2016), Rodrigo Duterte (2016 – 2022), and Ferdinand "Bongbong" Marcos, Jr. (2022 – present).

This paper uses the term “treaty” as such is defined in the Vienna Convention on the Law of Treaties (“VCLT”), that is, “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”[17] It employs the international law concept of treaty, as distinguished from the understanding of the term in Philippine domestic law which pertains to an international agreement requiring ratification by the President and concurrence of the Senate to said ratification before the agreement becomes valid and effective.[18] The term “treaty” in domestic law is further differentiated from

[14] CONST. art. VII, § 17.

[15] Exec. Order No. 292 (1987), Title I, Book IV, § 2.

[16] The four presidents before 1946 were Emilio Aguinaldo (Jan. 23, 1899 – Mar. 23, 1901), Manuel L. Quezon (Nov. 15, 1935 – Aug. 1, 1944), Jose P. Laurel (Oct. 14, 1943 – Aug. 17, 1945), and Sergio Osmeña (Aug. 1, 1944 – May 28, 1946). Aguinaldo’s presidency presaged the First Philippine Republic in 1899, while Laurel served during the Second Philippine Republic, which was constituted during the Japanese Occupation of the Philippines.

[17] VCLT, art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331. The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (“VCLTIO”) extends the definition of the term to international agreements concluded between one or more States and one or more international organizations, or between international organizations. *See* VCLTIO, art. 2(1)(a).

[18] CONST. art. VII, § 21.

"executive agreement," which is an international agreement requiring only presidential ratification for its effectivity.[19] Both "treaty" and "executive agreement" in domestic law are considered "treaties" in international law.

In the international law sphere, a treaty is an agreement "governed by international law," i.e., the obligations or commitments therein are legally binding and enforceable between and among the parties. Thus, political declarations, joint statements, joint communiques, agreed minutes, and similar instruments are not considered as agreements and also not covered in this study.[20]

The data set in this study is based on the entries in the *Philippine Treaties in Force 2020,*[21] a comprehensive listing of treaties entered into by the Philippines from 1946 to 2020, and edited by the first author of this study and lawyer Gale Dampil-Mandigma. The data set does not cover agreements which have expired by their own terms, been revoked or denounced by the parties, replaced or superseded by other agreements, or otherwise not in force. It also does not include agreements which took effect after mid-2020.[22]

The focus of this study are bilateral agreements and only marginally on agreements concluded under the auspices of the ASEAN, UN and other international organizations. This is the chosen approach since a country has more autonomy of action with respect to agreements with another country, the so-called "bilateral agreement" than with regional and multilateral conventions. For purposes of this study, the terms "treaty," "international

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[19] Exec. Order No. 459 (1997), § 2.

[20] Similarly not included are (a) agreements concluded with foreign government agencies below the national or federal level (e.g., region, province, constituent state); (b) administrative arrangements, implementing arrangements, and agreements in implementation of specific projects ("project agreements"); and (c) agreements which partake of a commercial nature, even if entered into with foreign government-owned corporations.

[21] J. EDUARDO MALAYA & CRYSTAL GALE DAMPIL-MANDIGMA, PHILIPPINE TREATIES IN FORCE 2020 (2021). Treaties in Force included as exceptions to the legally-binding criterion the memoranda of understanding, joint communiques on the establishment of diplomatic relations with other countries, and certain significant declarations, such as the ASEAN-China Declaration on the Conduct of Parties in the South China Sea, in order to also cover commitments of the country which are politically significant.

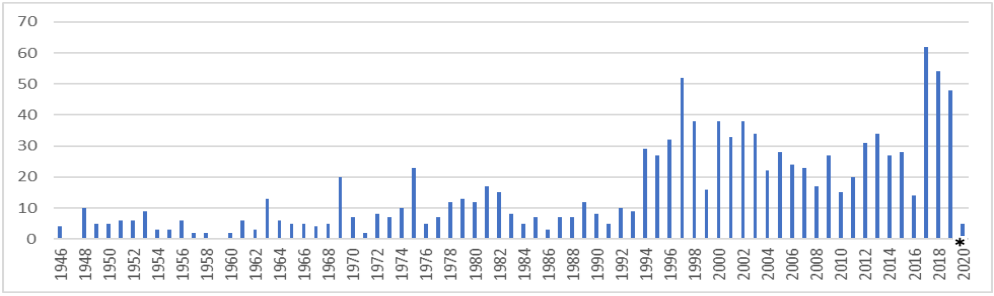
[22] MALAYA & DAMPIL-MANDIGMA, *supra* note 21.

agreement" and "agreements" are used interchangeably. They refer to bilateral agreements, unless otherwise indicated.

## I. AGREEMENT FREQUENCIES, SUBJECT MATTERS AND PARTNERS

As earlier mentioned, the Philippines is party to 1,165 subsisting bilateral agreements from 1946 to 2020. A graph of the agreement frequency year by year over the course of some 70 years is shown below.

**Figure 1. Bilateral Agreement Frequency, 1946-2020**




**partial*

From 1946 to 1993, the country entered into an average of seven bilateral agreements annually, with highs of 10 agreements in 1948 at the start of the Quirino administration, 13 in 1963 in the second year of the Macapagal administration, 20 in 1969 during the first Marcos administration, and 23 in 1975, four years after the imposition of Martial Law in the country. The active treaty-making during the Quirino and Macapagal administrations can be attributed to their earlier experience in diplomacy and familiarity with foreign affairs issues. Quirino served as Vice President to his predecessor Manuel Roxas for two years and held for some time the foreign affairs portfolio in a concurrent capacity after he assumed the presidency,[23] while Diosdado Macapagal previously served as Chief of the Legal Division at the DFA and as second secretary at the Philippine Embassy in Washington DC.[24]

From 1994 onwards, starting with the second year of the Ramos presidency, there has been an upward trend in the number of agreements signed, and this has continued to the present time, with peaks of 54 in 2014

[23] J. EDUARDO MALAYA (ED.), FRONTLINES OF DIPLOMACY: CONVERSATIONS WITH PHILIPPINE AMBASSADORS 271 (2011).

[24] J. EDUARDO MALAYA & JONATHAN MALAYA, STEWARDS OF THE NATIONS: AGUINALDO TO DUTERTE AND THEIR INAUGURAL VISIONS 214-215 (2018).

–midway in the Macapagal-Arroyo presidency –and 62 agreements in 2017, similarly midway in Duterte's. The Ramos Administration ushered in robust foreign policy making and active engagement with the international community, a trend which continued to the present time.

The table below shows the number of international agreements entered into per presidential administration and their annual average.

**Table 1. Agreements Signed per Presidential Administration**

| Administration | Number of Agreements Signed | Annual Average |
|---|---|---|
| Roxas | 5 | 2 |
| Quirino | 40 | 8 |
| Magsaysay | 13 | 3 |
| Garcia | 11 | 3 |
| Macapagal | 26 | 7 |
| Marcos | 194 | 9 |
| C. Aquino | 46 | 8 |
| Ramos | 178 | 30 |
| Estrada | 67 | 22 |
| Arroyo | 255 | 28 |
| B. Aquino | 157 | 26 |
| Duterte | 173 | 43 |
| TOTAL | 1165 | |

***A. By Subject Matter***

Countries enter into various forms and types of agreements and multilateral conventions, such as the establishment of political consultations mechanism, facilitation of trade and cultural exchange, and protection of labor and human rights. These can be grouped by subject matter as follows: diplomacy and administrative; socio-cultural; economic; trade and finance; and security and defense.[25]

These broad categories cover the following subcategories:

- Diplomacy and administrative: establishment of general relations, setting up of bilateral consultations mechanisms, visa facilitation (mostly exemption from visa requirements for holders of diplomatic and official passports).
- Socio-cultural: cultural cooperation, tourism, labor, education.
- Economic: air services (i.e., setting terms for access and frequency of flights by commercial airlines),[26] merchant shipping (minimum standards in shipping vessels), agriculture cooperation, and scientific and technological accords.
- Trade and Finance: trade facilitation, fiscal matters/avoidance of double taxation, investment promotion and protection.
- Security and Defense: defense cooperation, maritime cooperation, anti-terrorism, and transnational crime.

In the 70-year period since 1946, the agreements entered into by the Philippines can be grouped into the following subject matter categories: economic - 331, comprising 28.41%; diplomacy and administrative - 317, or 27.21%; socio-cultural - 212, or 18.20%; trade and finance - 196, or 16.82%; and security and defense - 109, or 9.36%.

Of the 317 diplomacy and administrative agreements, the top subcategories were the establishment of diplomatic relations, setting up of bilateral consultations mechanisms, and visa facilitation. Majority of the 331 economic agreements pertained to air services, merchant shipping, and

[25] These broad categories are adopted from *Philippine Treaties in Force 2020. See* MALAYA & DAMPIL-MANDIGMA, *supra* note 21 at 293-320.

[26] Air Services Agreements cover the basic framework under which commercial airlines are granted economic bilateral rights to fly between two countries. The terms on the frequency, designated airlines of the two signing countries, origin and intermediate points, traffic rights, type of aircraft and tax issues are usually spelled out in a Memorandum of Understanding.

agriculture, scientific and technological cooperation. For the 212 socio-cultural agreements, the top subcategories were cultural cooperation, tourism, labor, and education.

Of the 196 trade and finance agreements, the top subcategories were trade facilitation, avoidance of double taxation, and investment promotion and protection. Lastly, security and defense agreements were mainly on defense cooperation, maritime cooperation, anti-terrorism, and transnational crime.

When the data were segregated into the pre-1986 period (1946-1985) and post-1986 period (1986-2020), as seen in the table below, economic agreements ranked first in both periods, reaching almost a third of all agreements (30.90%) pre-1986 and more than a quarter (27.59%) for post-1986. After 1986, economic (27.59%) and diplomacy and administrative (27.37%) agreements comprised more than half of those concluded.

Security and defense agreements ranked last in both pre-and post-1986 periods, but their numbers rose significantly post-1986 with 89 agreements, as compared with 20 in pre-1986. This indicates a preoccupation with defense and security matters post-1986, with the diversification of the country's defense partnerships with countries beyond its traditional ally, the United States.

**Table 2. Agreement Frequency and Percentage by Major Subject Matter for periods 1946-1985 and 1986-2020**

| Subject Matter | 1946-1985 | Percentage | 1986-2020 | Percentage |
|---|---|---|---|---|
| Economic | 89 | 30.90 % | 242 | 27.59 % |
| Diplomacy and Administrative | 77 | 26.74 % | 240 | 27.37 % |
| Trade and Finance | 67 | 23.26 % | 129 | 14.71 % |
| Socio-Cultural | 35 | 12.15 % | 177 | 20.18 % |
| Security and Defense | 20 | 6.95 % | 89 | 10.15 % |
| **Total** | **288** | **100 %** | **877** | **100 %** |

Accords on the establishment of diplomatic relations and on visa exemption dominated the 77 diplomacy and administrative agreements concluded in the pre-1986. This was expected of a newly independent country in its initial engagements with the rest of the international community. From 1986 onwards, agreements on the setting up of bilateral consultations mechanisms with other foreign ministries rose, to provide structure for the deepening of relations.

Agreements on cultural exchanges, which are meant to foster friendship and goodwill, made up most of the socio-cultural agreements prior to 1986, reflecting the initial contacts with other countries. Thereafter, agreements on tourism, education and labor cooperation, which are more substantive in nature, started to increase in numbers.

On the economic treaties, air services agreements were consistently entered into through the years. Foreign commercial airlines operate in the country, thus the need to have frameworks for their access and frequency of flights. The operations of Philippine Airlines, Cebu Pacific and AirAsia Philippines and the widening reach of their respective flights, as well as the need to enhance air transport to the Philippines to aid the tourism industry, underscore the importance of air services accords. Merchant shipping agreements, notably on the recognition of certificates under regulation 1/10 of the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, gained ground during the Arroyo presidency. This reflected the need to promote and protect the employment of Filipino seafarers in the world's maritime industries and ensure their rights and welfare.

Meanwhile, the frequency of trade and defense cooperation agreements have remained consistent through various presidential administrations.

### *B. By Subject Matter and Presidential Administration*

A further examination of the subject subcategories reveals the hierarchy of agreements in terms of frequency during the pre- and post-1986 periods, respectively.

**Table 3. Agreement Subcategories, 1946 - 1985**

| No. | Agreement Sub-Categories | Total |
|---|---|---|
| 1 | Trade Cooperation | 42 |
| 2 | General Relations | 30 |
| 3 | Air Services | 25 |
| 4 | Cultural Cooperation | 23 |
| 5 | Visa | 20 |
| 6 | Fiscal Matters/Double Taxation | 17 |
| 7 | Defense Cooperation | 13 |
| 8 | Economic/Technical/Technological<br>Postal Matters<br>Scientific and Technological | 11 |
| 9 | Social Security | 8 |
| 10 | Inter-Country Adoption, Technical Cooperation | 6 |

**Table 4. Agreement Subcategories, 1986 - 2020**

| No. | Agreement Sub-Categories | Total |
|---|---|---|
| 1 | Bilateral Consultations | 64 |
| 2 | Defense Cooperation | 51 |
| 3 | General Relations | 41 |
| 4 | Investment Promotion | 40 |
| | Merchant Shipping | 40 |
| 5 | Agriculture | 38 |
| 6 | Visa<br>Fiscal Matters/Avoidance of Double Taxation | 37 |
| 7 | Trade Cooperation | 36 |
| 8 | Tourism | 35 |
| 9 | Air Services | 32 |
| 10 | Scientific and Technological | 29 |

The top three subject matters dealt with in treaties during the 1946-1985 period were trade cooperation (at 42), general relations (30) and air services (25). On the other hand, in the post-1986 period, the top subject matters were the establishment of bilateral consultations mechanism (64), defense cooperation (51), and general relations (41), followed closely by investment promotion and merchant shipping (40) and agriculture (38).

Prioritization on two of the so-called "Three Pillars of Philippine foreign policy" can be noted in the early years after 1986 – i.e., pursuit of national security (as exemplified by defense cooperation, bilateral consultations mechanism) and economic security (investment promotion, agriculture). The promotion of the rights and welfare of overseas Filipino workers – the third pillar –has yet to reach the top ranks, although labor cooperation and merchant shipping agreements started to be signed in the mid-nineties.

Analyzing further the data set by subject matter and presidential administrations indicates the thematic focus of the various administrations, as follows:

**Table 5. Agreement Frequency by Subject Matter and Presidential Administration, 1946-2020**

| | ROXAS | QUIRINO | MAG SAYSAY | GARCIA | MACA PAGAL | MARCOS | C. AQUINO | RAMOS | ESTRADA | ARROYO | B. AQUINO | DUTERTE | TOTAL |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Economic | 0 | 14 | 0 | 1 | 9 | 66 | 19 | 50 | 11 | 83 | 31 | 47 | 331 |
| Diplomacy & Administration | 5 | 15 | 5 | 5 | 9 | 38 | 8 | 51 | 25 | 64 | 51 | 41 | 317 |
| Socio-Cultural | 0 | 2 | 0 | 1 | 4 | 28 | 2 | 30 | 12 | 51 | 44 | 38 | 212 |
| Trade and Finance | 0 | 2 | 5 | 2 | 2 | 56 | 14 | 37 | 15 | 34 | 14 | 15 | 196 |
| Security and Defense | 0 | 7 | 3 | 2 | 2 | 6 | 3 | 10 | 4 | 23 | 17 | 32 | 109 |
| **Total** | **5** | **40** | **13** | **11** | **26** | **194** | **46** | **178** | **67** | **255** | **157** | **173** | **1,165** |

The following observations can be made on treaty activities during the 1946-1986 period, corresponding to the post-World War II years and the 20-year duration of the Ferdinand E. Marcos presidency:

- The Quirino administration was fairly active in treaty-making, with some 40 agreements in effect as of this writing, notably as follows: 15 on diplomacy and administration (mostly on the establishment of diplomatic relations), 14 economic and 7 security (including the 1951 PH-US Mutual Defense Treaty). As earlier mentioned, he was Vice President and concurrent Secretary of Foreign Affairs to President Roxas, making him at ease dealing with foreign affairs matters. He organized the Philippine foreign service, and made the young

Republic's presence felt overseas by opening diplomatic and consular missions in Washington D.C., New York, London, Rome and other major capitals. He also went on a round-the-world goodwill tour, visiting Washington D.C., Paris, Berlin, the Vatican, Cairo, Karachi, and Bangkok, among others.[27]

- Next to Quirino in agreement output was Macapagal, with 26 agreements signed, which can be attributed, as also earlier mentioned, to his earlier diplomatic stints with the DFA.[28]
- The low numbers of agreements entered into during the Roxas and Magsaysay presidencies – at 5 and 13, respectively – can be explained by the short duration of their administrations. Roxas and Magsaysay died while in office and did not complete their four-year term.
- The low number of agreements signed during the Garcia presidency is indicative of his administration's focus on domestic industrialization and rebuilding, as exemplified by the Filipino First policy, than on external engagements.
- A total of 194 agreements were signed during the Marcos administration, and this is on account of its 21-year duration. However, the Marcos's administration's annual average was a modest 9, which is comparable to Quirino's (8), Macapagal's (7) and C. Aquino (8).
- Eighty-nine of the 288 agreements entered into prior to 1986 –or almost a third of the agreements –involved economic matters, 25 of which were air services agreements. There were only 20 agreements on security and defense during this period, mostly with the country's sole treaty ally, the United States.

The composition of agreements entered into post-1986 began to change.

- During the Corazon Aquino administration (1986-1991), 46 agreements were signed, of which 19 (or 41.30%) were economic in nature, mainly air services, agriculture cooperation and scientific and technological accords, while 14 (30.43%) were on trade and finance, specifically trade and investment promotion and avoidance of double taxation. There were some agreements on diplomacy and

[27] MALAYA & MALAYA, *supra* note 24 at 156.

[28] The DFA Office of Legal Affairs was renamed "Office of Treaties and Legal Affairs" in 2018.

administrative (8), security and defense (3) and socio-cultural (2). These trends seemed to reflect the administration's preoccupation with economic stabilization, which was much needed after the political turmoil and economic stagnation in the first half of the eighties.[29]

- The Ramos administration (1992-1998) conducted robust diplomatic activities, with the number of agreements signed rising almost fourfold than during the preceding Aquino administration. With its "economic diplomacy" thrusts, Fidel V. Ramos spearheaded the further strengthening of the country's trade, investment and official development assistance ties with other countries.[30] In terms of subject matter, the agreements entered into comprised the following: diplomacy and administrative (51 out of 178, or 28.65%), economic (50 out of 178, or 28.09%), trade and finance (37 or 20.79%), socio-cultural (30 or 16.85%), and security and defense (10 or 5.62%).
- Joseph Estrada served only two years and a half of the regular six-year term, and this is reflected in the low number of agreements signed. Twenty five of the 67 agreements were on diplomatic and administrative (37.31%), 15 on trade and finance (22.39%), 12 on socio-cultural (17.91%), 11 on economic (16.42%) and four on security and defense (5.97%).
- The highest number of agreements post-1986 was during the term of Gloria Macapagal Arroyo (2001-2010), with a total of 255 agreements. This can be attributed to the nine and a half years that she was in office,[31] and her internationalist outlook, being the daughter of a previous president and having spent years overseas as a graduate student. There was once again priority accorded to economic agreements (83 out of 255, or 32.55%), followed by diplomacy and administrative agreements (64 or 25.1%). Twenty-three agreements, or 9.02%, entered into during this period dealt with security and defense, indicating continued diversification of the

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[29] DEPARTMENT OF FOREIGN AFFAIRS, *Historical Background* (n.d.), https://dfa.gov.ph/about/history-of-dfa#:~:text=The%20DFA%20had%20a%20heyday,Tariffs%20and%20Trade%20(GATT).

[30] *Id.*

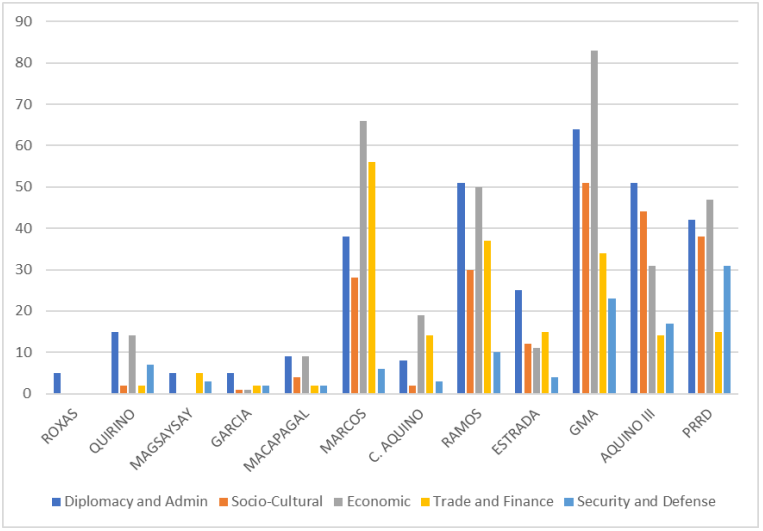
[31] Initially to complete the unexpired term of her predecessor Estrada (Jan. 2001 – June 30, 2004) and then to serve her own six-year term.

country's defense engagements with countries beyond the United States.[32]

- During the Benigno S. Aquino administration (2010-June 2016), a total of 157 agreements were entered into, and of these, 51 dealt with diplomacy and administration (32.48%), followed by socio-cultural (44) and economic (31). The total output was short of but still comparable to that of Ramos, but the administration largely maintained the pace set by his two predecessors.
- Midway through the Duterte presidency, 173 agreements had been entered into during his administration, with economic agreements (47 or 27.17%) and diplomacy and administrative agreements (41 or 23.70%) making up half of the total agreements concluded. Notwithstanding the country's controversial withdrawal from the Rome Statute of the International Criminal Court and the then threatened termination of the PH-US Visiting Forces Agreement, active agreement-making by the administration still kept apace.

Below is a graph of the number of agreements entered into by the various presidential administrations, as a way of summing up this section.

**Figure 2. Agreement Frequency by Subject Matter and Presidential Administration**




### *C. By Treaty Partners*

[32] DEPARTMENT OF FOREIGN AFFAIRS, *supra* note 29.

Vice President and Secretary of Foreign Affairs Elpidio Quirino made an auspicious start for Philippine foreign relations when he undertook a round-the-world goodwill tour in the late forties which took him to Washington D.C., Paris, Berlin, the Vatican, Cairo, Karachi, and Bangkok, and was marked by the signing of agreements with these countries. There has since then been concerted efforts by various administrations to first deepen relations with North America, principally the United States, and then with Europe, Southeast Asia and then rest of Asia, and other regions.

Agreements with Southeast Asian countries gained prominence during the first Marcos administration, prompted by the good neighborliness and sense of regional community with the establishment of the ASEAN in 1967, and this trend continues to this day.

The Arroyo and first Marcos administrations had the most numbers of agreements with Europe – at 72 and 68, respectively (see Table 6) – as well as with Africa – at 14 and 9, respectively, underscoring major outreach to the latter continent during their times in office. The Arroyo, first Marcos and Ramos administrations led in the number of agreements with Asia – at 57, 31 and 30, respectively, while Arroyo and Ramos did the same for the Middle East – at 34 and 26, respectively.

As shown on Table 6, for the period 1946 to 2020, the country's top partners by regional locations were those in Europe at 336 agreements, Asia (outside Southeast Asia) at 221, Southeast Asia at 191, and the Middle East at 146. The least number of agreements were those in Africa (50) and Oceania (48).

At the specific country level, the Philippines' top bilateral partners pre-1986 period were the U.S. (43 agreements), Indonesia (32), Japan (12), Spain (10), and Germany (West), Israel and South Korea (all 8) (see Table 7).

There were remarkable changes in top country partners in the post-1986 period, as follows: China (46), Russia (33), Spain (27), Thailand (26) and South Korea (25) (see Table 8). The US was relegated from first to eighth, while China and Russia took first and second place, respectively. Thailand and

South Korea also replaced Indonesia and Japan among the top partners in the Asian region.

**Table 6. Agreement Frequency by Geographic Region and Presidential Administration**

| | ROXAS | QUIRINO | MAG SAYSAY | GARCIA | MACA PAGAL | MARCOS | C. AQUINO | RAMOS | ESTRADA | ARROYO | B. AQUINO | DUTERTE | TOTAL |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Europe | 1 | 14 | 3 | 1 | 3 | 68 | 17 | 49 | 16 | 72 | 40 | 52 | 336 |
| Asia (outside Southeast Asia) | 0 | 6 | 3 | 4 | 1 | 31 | 9 | 30 | 8 | 57 | 27 | 45 | 221 |
| Southeast Asia | 0 | 3 | 0 | 3 | 7 | 36 | 1 | 36 | 15 | 40 | 24 | 26 | 191 |
| Middle East | 0 | 2 | 0 | 1 | 3 | 11 | 2 | 26 | 9 | 34 | 29 | 29 | 146 |
| Latin America | 1 | 2 | 1 | 0 | 1 | 8 | 6 | 16 | 11 | 23 | 12 | 7 | 88 |
| North America | 3 | 12 | 5 | 2 | 9 | 19 | 6 | 7 | 3 | 5 | 9 | 5 | 85 |
| Africa | 0 | 0 | 1 | 0 | 2 | 9 | 3 | 6 | 5 | 14 | 5 | 5 | 50 |
| Oceania | 0 | 1 | 0 | 0 | 0 | 12 | 2 | 8 | 0 | 10 | 11 | 4 | 48 |
| Total | 5 | 40 | 13 | 11 | 26 | 194 | 46 | 178 | 67 | 255 | 157 | 173 | 1,165 |

**Figure 3. Agreement Frequency by Regional Grouping, 1946-2020**

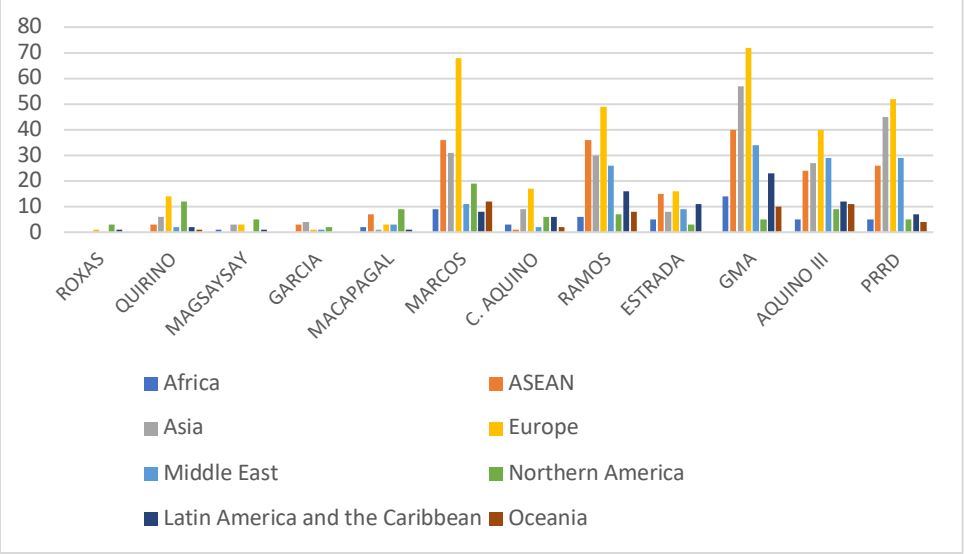



**Table 7. Top Agreement Partners, 1946 – 1985**

| No. | Bilateral Partner | Total |
|---|---|---|
| 1 | United States of America | 43 |
| 2 | Indonesia | 31 |
| 3 | Japan | 12 |
| 4 | Spain | 10 |
| 5 | Germany, Israel, South Korea | 8 |
| 6 | Australia, Austria, Canada, China, Pakistan | 7 |

**Table 8. Top 10 Agreement Partners, 1986 – 2020**

| No. | Bilateral Partner | Total |
|---|---|---|
| 1 | China | 46 |
| 2 | Russia | 33 |
| 3 | Spain | 27 |
| 4 | Thailand | 26 |
| 5 | South Korea | 25 |
| 6 | Viet Nam | 22 |
| 7 | Indonesia | 20 |
| 8 | India, Iran and U.S. | 19 |
| 9 | Qatar | 18 |
| 10 | Australia | 17 |

## II. TREATY ACTIVITIES AND THEIR CORRELATION WITH FOREIGN POLICY PRIORITIES

### *A. Foreign Policy Priorities of Philippine Presidents*

The 1987 Philippine Constitution provides basic guidelines on the conduct of relations with the international community, as follows:

> Art. II, Sec. 2. The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.
> Art. II, Sec. 7. The State shall pursue an independent foreign policy. In its relations with other states, the paramount consideration shall be national sovereignty, territorial

integrity, national interest, and the right to self-determination.

Government strategies, policies and programs that are adopted and implemented have to be informed and guided by these constitutional parameters, especially the pursuit of the national interest.

### *B. Contours of Early Philippine Diplomacy: The first 40 years*

The ten men and two women have served as presidents since the establishment of the Third Philippine Republic in 1946 and have left their imprints in the country's political and diplomatic history. They made pronouncements on their respective foreign policy priorities during inaugural addresses, state of the nation addresses, or speeches at significant occasions. A few issued formal guidelines for the Secretary of Foreign Affairs and the rest of the executive agencies to follow.

In 1982, Pacifico Castro posited that there were five distinct periods of Philippine diplomacy, namely period of initiation (1946-1957), period of *immobilisme* (1957-1965); period of innovation (1966-1981), period of integration (1981-1991) and period of consolidation (1992 - onwards to the 21st century). This framework was critical of the period 1946-1957 during which Philippine diplomacy, as then conducted by the Garcia and then Macapagal administrations, was said to "have lapsed into *immobilisme* during a ferment in other parts of the world… geopolitics instead of economics was the main preoccupation of Filipino actors in diplomacy…"[33] At the same time, this framework can be characterized as laudatory of the succeeding Marcos Sr. administration.[34]

A balanced rendering of the periods of Philippine diplomacy would be as follows: period of initiation (1946-1971), martial law period (1971-1985), post-EDSA period (1986-2015), and contemporary period (2016 to the

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[33] PACIFICO A. CASTRO, TOWARDS AN INTEGRATED PHILIPPINE FOREIGN POLICY. ON DIPLOMACY, LAW AND GOVERNMENT 1-21 (1982). *See also* BENJAMIN B. DOMINGO, THE RE-MAKING OF FILIPINO FOREIGN POLICY 17-25 (1993).

[34] Castro's framework continues to have currency in the present time as seen in SEVERO CANETE MADRONA JR, THE PERIOD OF IMMOBILISME: PHILIPPINE FOREIGN RELATIONS DURING THE ADMINISTRATIONS OF CARLOS P. GARCIA AND DIOSDADO MACAPAGAL 1957-1965 (2021).

present). These are interspersed by significant events at the international level that also influenced domestic developments, including the end of World War II, the need for reconstruction in affected countries and the establishment of the United Nations (1945); convening of the Afro-Asian conference in Bandung and the birth of the Non-Aligned Movement (1955); construction of the Berlin Wall and the heightening of the Cold War (1961); the collapse of the Soviet Union and the end of the Cold War (1991); and the 9-11 attacks in New York and the Pentagon (2001), among others.

The following discussions highlight the key foreign policy thrusts of the various Philippine presidential administrations from 1946 and onwards, with the end in view of discerning trends and continuities in policies, or lack of them, and finding common threads.

President Manuel Roxas assumed office on 28 May 1946 at a time when the country was recovering from the trauma of World War II and experiencing the Cold War between the so-called democracies and the Communist bloc, Roxas strongly allied the country with the U.S. "Our safest course … is in the glistening wake of America whose advance with mighty prow breaks for smaller craft the waves of fear," Roxas said.[35]

Among the primary tasks of the post-war presidential administrations were securing funds for the reconstruction of the country and its economy in order to recover from the devastating damage and loss during the war. Roxas turned to the United States for assistance. The U.S. Congress made available in April 1946 a USD 620 million aid package and free-trade relations for the next eight years, albeit with a price – the amendment of the 1935 Constitution to allow parity rights for U.S. citizens in the exploitation of natural resources and operation of public utilities. With the intensification of the Cold War characterized by intense ideological rivalry and proxy wars, Roxas signed in 1947 the PH-US Military Bases Agreement (now defunct) in order to provide greater security for the country.

Roxas' "Four Pillars of Philippine foreign policy" were the following:

a. Commitment to the United Nations

[35] BENJAMIN B. DOMINGO, THE RE-MAKING OF FILIPINO FOREIGN POLICY 27 (1993).

b. Continued ties with the U.S.
c. Maintenance of friendly relations with neighbors
d. Devotion to world peace[36]

When Elpidio Quirino succeeded Roxas upon the latter's passing in 1948, he was the Vice President and also in-charge of the foreign affairs portfolio. He had earlier organized the DFA and the foreign service, thus he is considered as the Father of the Philippine Foreign Service.[37]

Quirino adopted a three-pronged foreign policy:

> First, the Philippines is committed to the fullest possible cooperation with the U.S. on all matters that are essential to their mutual security.
>
> Second, the Philippines is committed to the fullest support to the peoples of Asia and elsewhere in their struggle for freedom and independence.
>
> Third, the Philippines is committed to the fullest possible cooperation with the United Nations in its efforts to promote the economic, social and cultural progress of mankind and to maintain international peace and security.[38]

The country's war-damaged economy began to recover in the 1950s during the presidency of Quirino. The country's economy grew by a phenomenal 9.43% on average during his six-year term. The Philippines was actively engaged with the then newly organized United Nations. The country was one of the 50 original signatories of the U.N. Charter – one of only three from the Asia-Pacific region – and was a strong advocate of early independence for former colonial territories, which was the second of its three-pronged foreign policy thrusts. His top U.N. diplomat, Carlos P. Romulo, achieved international prominence in 1952 by becoming the first Asian elected as President of the U.N. General Assembly. The year earlier,

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[36] *Id.* at 28.
[37] MALAYA & MALAYA, *supra* note 24 at 156.
[38] DOMINGO, *supra* note 35 at 29.

Romulo, as Quirino's Secretary of Foreign Affairs, signed the PH-US Mutual Defense Treaty, which was in line with the first of the administration's foreign policy thrusts.

Ramon Magsaysay took office after Quirino, further deepening the partnership with the U.S. as Philippine authorities battled the Hukbalahap insurgency. He hosted the Manila Conference in September 1954 which established the Southeast Asia Treaty Organization (SEATO), the now defunct collective security alliance composed of Thailand, Pakistan, Australia, New Zealand, U.S., France, United Kingdom and the Philippines.

The succeeding administration of Carlos P. Garcia adopted a "Filipino First" approach, with its emphasis on import-substitution industrial policy and a preferential treatment for Filipino businesses in the allocation of scarce dollars for use in buying imports. In 1957, Garcia issued six foreign policy guidelines for the administration, as follows:

a. Preservation and enhancement of Philippine-American relations
b. Forging with other free nations of the world concerted measures of vigilance and defense against communism
c. Development of closer ties with our Asian neighbors
d. Increasing faith in and strengthening of the United Nations
e. Recourse to bilateral and multilateral defense arrangement for external security
f. Support for the legitimate aspirations for self-determination of dependent peoples.[39]

The four-fold foreign policy objectives of the Diosdado Macapagal administration were articulated by his Vice President and Secretary of Foreign Affairs, Emmanuel Pelaez, as follows:

> We can plot the future by measuring our course against the four great objectives which, in my view, we should strive to achieve in our foreign policy.
>
> The first of these objectives is to ensure our security.

[39] *Id.* at 30.

> Second, to help promote our internal economic development and progress with special regard to the well-being of the masses of our people.
>
> Third is to strengthen our relations with our friends, especially our neighbors in this part of the world.
>
> And fourth, to contribute, no matter how modestly, to the preservation of peace all over the world.[40]

Macapagal earlier worked with the Department of Foreign Affairs as chief of its legal division and was later assigned as second secretary at the Philippine Embassy in Washington, D.C.. After his election as Congressman, he authored the Philippine Foreign Service Act (Republic Act. No. 708).[41]

Towards the tail-end of his term, Macapagal issued 10 guidelines on the conduct of foreign policy to the DFA, as follows:

a. Vigilant protection of Philippine independence, sovereignty, security and national dignity
b. Opposition to international communism and to communist aggression, subversion, and infiltration in the Philippines
c. Maintenance of defense alliance and continuation of mutually beneficial endeavors with the United States, as well as other allies in the free world
d. Strong support for the United Nations and its agencies
e. Stabilization and expansion of relations with Japan, which is a powerful ally in this part of the free world
f. Maintenance of friendly relations with the free Republic of China, which is a steadfast ally against international communism
g. Continual enhancement of relations with Spain
h. Active relationship and collaborative effort with the nations of the Afro-Asian community with whom we share common post-colonial problems

[40] *Id,* at 32.
[41] Approved on June 5, 1952. Rep. Act No. 708 was repealed in 1991 by Rep. Act No. 7157.

i. Widening of relations and cooperative effort with the nations of Latin America with whom we share common cultural heritage
j. Expansion of Philippine trade not only with the United States but also with other countries in Europe and elsewhere; and encouragement of foreign capital and investments in the Philippines to stimulate our economic development through joint ventures with Filipinos.[42]

Ferdinand E. Marcos served the longest among the presidents since 1946 and was keen on foreign affairs matters. He issued a number of foreign policy guidelines during his extended stay.

The initiative to create a regional organization in Southeast Asia was realized in August 1967 with the signing of the Bangkok Declaration which established the Association of Southeast Asian Nations (ASEAN). Narciso Ramos, Marcos's Secretary of Foreign Affairs, signed for the Philippines.

Marcos unveiled the "7 Postulates of Philippine Foreign Policy" during an address before the Manila Overseas Press Club on 24 February 1968, as follows:

a. Protection of Philippine independence, territorial integrity and national dignity
b. Strengthening linkage with Asia
c. Resistance to communist aggression, infiltration, and subversion
d. Reverence for the rule of law
e. Unswerving support of the United Nations as well as the maintenance of defensive alliances and mutually beneficial relations with the United States and our allies
f. Increased regional cooperation and collaboration in mutually beneficial endeavors
g. Accelerated programs of economic development[43]

[42] DIOSDADO MACAPAGAL, A STONE FOR THE EDIFICE: MEMOIRS OF A PRESIDENT 352-353 (1968). The 10 guidelines were issued on Jan. 12, 1965, with Mauro Mendez serving as Secretary of Foreign Affairs.
[43] DOMINGO, *supra* note 35 at 33.

In his 1970 State of the Nation Address, Marcos articulated the "burdens of the new foreign policy" in the following manner:

a. An overall examination of existing agreements with the United States;
b. Strengthening of regional cooperation along economic and social lines;
c. A continuing search for procedures for easing political tension in the form of an Asian Forum with an all-Asian membership; and
d. Relaxation of relations with socialist countries leading to commercial and cultural exchanges.

Marcos pursued a policy of pragmatism vis-à-vis the then communist/socialist countries, and in pursuit of the "fourth burden" ("d" above), normalized diplomatic relations with the People's Republic of China in 1975 and the USSR (now the Russian Federation) the following year.

In 1978, during the Martial Law period, Marcos enunciated the composite Foreign Policy Guidelines, which started with the "six canons of foreign policy," with focus on the country's engagements with the ASEAN, the socialist states, the Third World, Japan, Arab states and the U.S., and later supplemented with the inclusion of the U.N. and Europe, as follows:

a. To strengthen the U.N. through a review of its Charter and the adoption of other measures to increase its efficiency and effectiveness
b. To intensify efforts to make the ASEAN a strong and viable regional organization and to expand bilateral relations with the members of the ASEAN
c. To seek closer identification with the Third World – all the developing countries of Asia, Africa and Latin America – particularly in the uplift of the poor and the establishment of a new international economic order.
d. To establish diplomatic relations and pursue more vigorously economic and trade relations with the Socialist bloc
e. To clarify and update the guidelines under which beneficial relations with Japan will continue
f. To reorient trade as well as security relations with the United States

g. To seek a firmer basis for vigorous trade and cultural relations with Europe
h. To support the Arab countries in their struggle for a just and enduring peace in the Middle East in accordance with the relevant resolutions of the United Nations
i. To continue the search for procedures to ease political tensions in Southeast Asia, such as the creation of an Asia Forum.[44]

### *C. "Development Diplomacy" and its variations*

The EDSA People Power revolution led to the restoration of democracy in February 1986. The transfer of governmental power to Corazon C. Aquino gave inspiration to other democratic movements against totalitarian regimes. The C. Aquino Administration organized and hosted in 1988 the Conference of Newly-Restored Democracies,[45] which was attended by representatives from 12 other countries, including the Portuguese President Mario Soares.

Aquino's Secretary of Foreign Affairs, Raul S. Manglapus, highlighted "development diplomacy," which was "harnessing and managing all available resources of the nation, internal and external, public and private, official and non-official, in the active pursuit and availment of opportunities abroad in the vital areas of trade, investment, finance, technology and aid." The country became a founding member of the Asia-Pacific Economic Conference (APEC) at its meeting in Canberra, Australia in November 1989.

Fidel V. Ramos, C. Aquino's Secretary of National Defense, won the election in May 1992 and succeeded the latter. His Secretary of Foreign Affairs, Domingo Siazon, enumerated the four core priorities of the administration's foreign policy, as follows:

> First, the enhancement of national security,
> Second, the promotion of economic diplomacy,

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[44] *Id,* at 38-39.

[45] FOREIGN SERVICE INSTITUTE, MANILA DECLARATION OF DEMOCRACY: SPEECHES AND DOCUMENTS ON THE FIRST INTERNATIONAL CONFERENCE OF NEWLY RESTORED DEMOCRACIES (1973-1988), 3-6 JUNE 1988, MANILA, PHILIPPINES (1988).

> Third, the protection of overseas Filipino workers and Filipino nationals abroad, and
> Fourth, the projection of a good image of the country abroad.[46]

The Ramos administration pursued a policy of enhancing national security through a combination of domestic and international initiatives, including playing an active role in the establishment of the ASEAN Regional Forum to promote dialogue and cooperation on security issues among countries in the region. Ramos recognized the importance of regional economic integration and worked to promote the ASEAN Free Trade Area. During his term, the country also joined the World Trade Organization (WTO) in 1995, and hosted 18 heads of states/governments at the APEC Summit in Subic in 1996. Since then, the Philippines has pursued various economic cooperation agreements with other countries, including the ASEAN Free Trade Area, the Japan-Philippines Economic Partnership Agreement, and the Philippines-European Free Trade Association Free Trade Agreement.

While the Administration was focused on political and economic reforms, Flor Contemplacion, a Filipino domestic worker in Singapore, was executed in 1995, highlighting the need for the protection of overseas Filipino workers in distress and the provision of legal assistance and representation. There was an ensuing reorientation in the mandate and work of the Department of Labor and Employment and the DFA. A focal office for migrant workers' concern was established at the DFA, through the Office of the Undersecretary for Migrant Workers Affairs.

As may be noted, the current Three Pillars of Philippine Foreign Policy derives its origins from Ramos' four core priorities,[47] but with the last thrust – projection of a good image of the country – deleted, with good reason. Nonetheless, the fourth core has remained a crucial aspect of Philippine foreign policy work, even if not explicitly stated.

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[46] J. Eduardo Malaya, *Origins of DFA's Three Pillars of Foreign Policy*, PHIL. DAILY INQUIRER (June 23, 2023), https://opinion.inquirer.net/164250/origins-of-dfas-three-pillars-of-foreign-policy. *See also* Domingo Siazon, Jr., *Foreign Affairs, in* JOSE V. ABUEVA ET AL. (ED.), THE RAMOS PRESIDENCY AND ADMINISTRATION: RECORD AND LEGACY (1992-1998) 211-212 (1998).

[47] Aileen S.P. Baviera, *The Influence of Domestic Politics on Philippine Foreign Policy: The Case of Philippines-China Relations since 2004*, (S. Rajaratnam Sch. Int'l. Stud., Working Paper No. 241, 2012), https://www.files.ethz.ch/isn/146442/WP241.pdf.

Gloria Macapagal-Arroyo took over as President in February 2001, and in August 2004, enunciated a foreign policy based on the nine realities in the regional and global environment, as follows:

a. The United States, China and Japan have a determining influence in the security situation and economic evolution of East Asia;
b. Philippine foreign policy decisions have to be made in the context of the ASEAN;
c. The international Islamic community becomes more and more important to the Philippines;
d. Europe will continue to play a significant role in promoting prosperity and stability;
e. The coming years will see the redefinition of the role of multilateral and inter-regional organizations like the WTO in promoting common interests;
f. The defense of the nation's sovereignty and the protection of its environment and natural resources can be carried out to the extent that it gets others to respect its rights over maritime territory;
g. The country's economic growth will continue to require a lot of direct foreign investment;
h. The country can benefit most quickly from international tourism; and,
i. Overseas Filipinos will continue to play a critical role in the country's economic and social stability.[48]

President Benigno Simeon Aquino III largely continued the well-established foreign policies of his recent predecessors, prioritizing national security, economic diplomacy, and protection of the rights and welfare of Filipino nationals abroad. His administration pursued peace and development efforts in Muslim Mindanao, which paid off with the signing of peace agreements with the Moro Islamic Liberation Front. With the tensions

[48] Gloria Macapagal-Arroyo, Philippine President, Reiterating RP's Foreign Policy, Address on Philippine Foreign Policy (Aug. 6, 2004), https://www.officialgazette.gov.ph/2004/08/06/speech-of-president-arroyo-on-the-philippine-foreign-policy/. This was delivered at the Manila Overseas Press Club (MOPC), Makati City. The Realities were originally eight, and then updated to include the importance of Europe in promoting prosperity and stability.

in the West Philippine Sea remaining unabated, the administration brought China to arbitration, where an arbitral tribunal constituted under Annex VII of the U.N. Convention on the Law of the Sea invalidated the latter's 9-dash line claim to the South China Sea.

The succeeding Administration of President Rodrigo Duterte made significant changes in the country's engagements with certain major powers, emphasizing an "independent foreign policy" that sought to reduce reliance on any single nation and diversify partnerships to include non-traditional partners. It also conducted a vigorous campaign against illegal drugs. Faced with alleged human rights abuses in the conduct of said campaign, the administration withdrew the country as a state party to the Rome Statute of the International Criminal Court.

The three key principles of the Duterte foreign policy included a desire to reduce dependence on Washington while maintaining the historic alliance with the U.S; secondly, enhancing relations with China, particularly on economic cooperation, and exploring avenues to ease tensions in maritime disputes; and lastly, enhanced relations with non-traditional partners like Russia and India, and upholding the central role of ASEAN in regional affairs.[49]

Ahead of numerous countries in Asia, Africa and the Middle East which arose from colonialism, the Philippines joined the international community in the mid-1940s faced with the challenges of post-World War II reconstruction and its initial engagements with other countries and the newly formed United Nations. These activities were made complicated by the Cold War rivalry which pitted blocs against each other, notably in the Vietnam War which raged for decades just across the South China Sea.

As the international community entered the globalized world of the 21st Century, with its unprecedented expansion of connectivity in international trade and the exchange of ideas, beliefs and culture, the earlier preoccupation with geopolitics gave way to cooperation, especially in the economic field. This helped enable the Philippines to strike a welcomed

[49] Mico A. Galang, *Understanding President Duterte's "Independent Foreign Policy",* ASIA PACIFIC PATHWAYS TO PROGRESS FOUNDATION, INC. (n.d.), https://appfi.ph/about-us/newsletter/2017-issue-1/40-publications/commentaries/1379-understanding-president-duterte-s-independent-foreign-policy.

balance between the pursuit of national security interests and economic ones, starting with Corazon Aquino's "development diplomacy" and Ramos' "three core priorities/pillars" of foreign policy.

The "Nine Realities of Philippine Foreign Policy" of the Macapagal-Arroyo administration supplemented and amplified the "Three Pillars." The former complemented the latter as these identified the country's requirements and interests, analyzed the external environment and related the two in a manner that made apparent the specific policies that should be pursued. Enunciated in 2004, the Nine Realities largely reflect the conditions of the country at the present time and thus remain relevant and applicable. The Three Pillars and the Nine Realities are valuable guides in the conduct of contemporary Philippine foreign policy.

### *D. Correlating Treaty Activities vis-à-vis the "Nine Realities of Philippine Foreign Policy"*

The "Nine Realities of Philippine Foreign Policy" is thus far the most comprehensive yet succinct distillation of the country's foreign policy approach in contemporary times. It identifies the country's requirements and interests, analyzes the external environment and relates the two in a manner that makes apparent the policy thrusts that should be pursued. Though enunciated in 2004, these have largely reflected the realities of the country in the succeeding administrations and have remained relevant and applicable to the present time.

The issue is whether actual treaty actions from 1986 onwards indicate an alignment with or divergence from the foreign policy approaches as identified in the Nine Realities of Philippine foreign policy, and the reason for it.

1. *The U.S., China and Japan as having a determining influence in the security situation and economic evolution of East Asia*

It is undeniable that the U.S, China and Japan have a determining influence in the security situation and economic evolution of East Asia, and Philippine engagements with them have been more extensive than with others. The U.S. and Japan are key traditional partners of the Philippines,

particularly in the politico-security and economic fields respectively, while China is the ascendant political, military and economic power in the Asia-Pacific region.

The data in Table 10 below affirms such proposition in the field of agreement making with respect to China with 46 agreements signed post-1986, but such is not readily apparent vis-à-vis the U.S. and Japan. The high number of agreements with China (and also Russia) can be attributed to the resumption of normal relations with them in light of the end of the Cold War and the concerted pursuit of enhanced engagements, particularly in the economic and socio-cultural fields. On the other hand, the relatively low number of agreements with the U.S. (19) and Japan (12) can be explained by the fact that relations with the U.S. and Japan have largely matured, and the key agreements with them had been signed and have remained in effect.

Nonetheless, overall trade flows, an equally important metric, confirm the top positions of U.S., China and Japan – or more appropriately China, Japan and U.S., in that order – as the key economic partners of the Philippines. The three countries have consistently been the Philippines' top trading partners. From FY 2017 to 2020, total trade with the three countries amounted to some USD 351 billion, comprising 40.9% share of the country's overall trade during that period (see Table 9).[50]

**Table 9. The Philippines' Top Trading Partners, 2017-2020**[51]

| Country | Value (US$)<br>Trade Volume | Rank |
|---|---|---|
| China | 119,204,921,516 | 1 |
| Japan | 80,910,257,210 | 2 |
| U.S. | 71,403,220,477 | 3 |
| South Korea | 46,373,707,374 | 4 |
| Singapore | 38,906,989,495 | 5 |

A comparison of the frequency of agreements with the U.S., China and Japan by the various presidential administrations provides insights on which administrations prioritized what partner countries. From 1986 to 2020, the

[50] DEPARTMENT OF TRADE AND INDUSTRY, *Philippine Merchandise Exports to the World* (n.d.), http://www.tradelinephilippines.dti.gov.ph:8080/total-trade.
[51] PHILIPPINE STATISTICS AUTHORITY (last visited Sept. 7, 2022).

Philippines entered into a total of 77 agreements on various subject matters with the U.S., China and Japan (see Table 10).

The number of agreements signed with the U.S. ranged between two to four during the 1986-2020 period, while those with Japan were largely flat during the early part of the period but rose during the Arroyo, B. Aquino and Duterte administrations.[52] On the other hand, PH-China agreements rose dramatically during the Arroyo administration with 18 agreements, went down to five during the B. Aquino administration, and up again during the Duterte presidency, to 14 agreements.

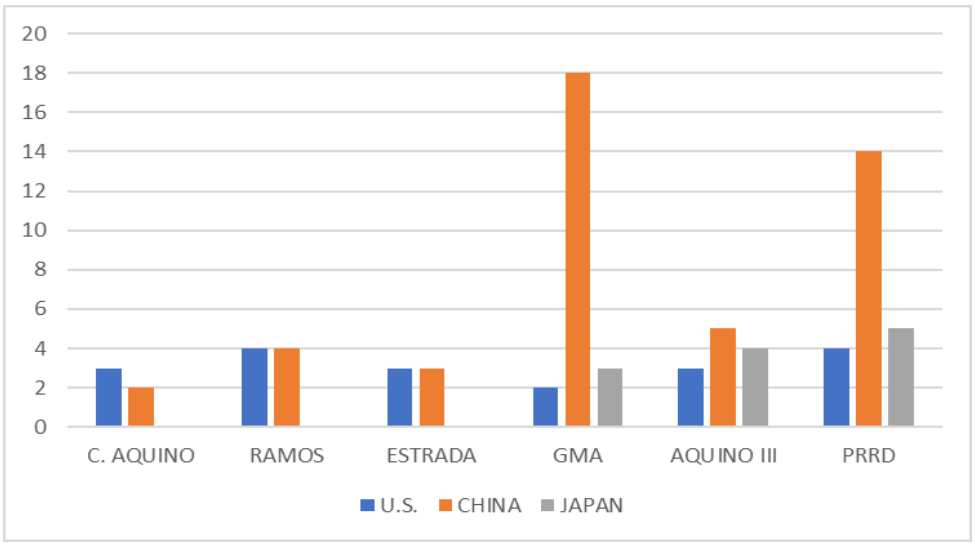
Most of the agreements with China were economic in nature (16), while those with the U.S. were on security and defense (8). The country had five agreements each on economic and security and defense with Japan.

**Table 10. Agreement Frequency by bilateral partners U.S., China and Japan and presidential administrations, 1986-2020**

| | C. AQUINO | RAMOS | ESTRADA | ARROYO | B. AQUINO | DUTERTE | TOTAL |
|---|---|---|---|---|---|---|---|
| US | 3 | 4 | 3 | 2 | 3 | 4 | **19** |
| CHINA | 2 | 4 | 3 | 18 | 5 | 14 | **46** |
| JAPAN | 0 | 0 | 0 | 3 | 4 | 5 | **12** |
| **TOTAL** | **5** | **8** | **6** | **23** | **12** | **23** | **77** |

**Figure 4. Agreement Frequency by bilateral partners U.S., China and Japan and presidential administrations 1986-2020**

[52] Japan also extends significant Official Development Assistance to the Philippines, which are mostly covered by project agreements. Project agreements are not considered as "treaties" or international agreements as such is defined in the Vienna Convention on the Law of Treaties, and therefore not reflected in the treaty data set.




*2. Foreign policy decisions as made increasingly in the context of the ASEAN*

The ASEAN, the regional organization whose missions are to accelerate economic growth, social progress, regional peace and cultural development in Southeast Asia, is a cornerstone of the Philippines' foreign and trade policies. It is the country's primary forum in the promotion of regional peace, security and prosperity. As stated by Secretary of Foreign Affairs Domingo Siazon, "ASEAN policies are Philippine policies."[53]

The treaty data set affirms that the Philippines, a founding member of the ASEAN, has increasingly made its foreign policy decisions in the context of ASEAN, particularly in the areas of economic integration and regional security.

A survey of the ASEAN agreements indicates a steady rise in its numbers, initially covering economic and socio-cultural cooperation, which was its original focus, in the early decades of its operations, and then branching out into the political, security and other fields. A total of 80 ASEAN agreements were signed during the period 1967 to early 2022, comprising 58 economic

[53] Domingo L. Siazon, Contemporary Philippine Foreign Policy: Challenges and Opportunities, Address Before the Philippine Ambassadors Association (Dec. 21, 1995), *in* PREPARING FOR THE 21ST CENTURY: CHALLENGES FOR THE PHILIPPINE FOREIGN POLICY (SPEECHES OF SECRETARY DOMINGO L. SIAZON (1 MAY 1995-30 APRIL 1996), 1996.

agreements, 14 politico-security agreements, and 8 socio-cultural.[54] Among the notable ASEAN agreements are the Convention on Counter-Terrorism, the Convention Against Trafficking in Persons, Especially Women and Children, the Framework Agreement on Enhancing Economic Cooperation, Treaty of Amity and Cooperation in Southeast Asia, and the Treaty on Mutual Legal Assistance. Sixty-one out of the 80 ASEAN agreements are currently in force for the Philippines.

The country has been an active participant in the ASEAN Economic Community, which has laid the groundwork for a single market and production base among ASEAN Member States. The Philippines has worked to enhance trade and investment ties with other ASEAN Member States, and sought to attract foreign investment into the country. In the field of regional security, the country has actively participated in the ASEAN-led forums, notably the ASEAN Regional Forum and the East Asia Summit, which are important platforms for dialogue and cooperation on regional security issues.

Under the theme "ASEAN Centrality,"[55] ASEAN has been the primary driving force in fostering regional collaboration, including efforts to address overlapping maritime claims in the South China Sea through the proposed adoption of a code of conduct. The ASEAN has exerted a profound influence in the country's foreign policy, particularly as the latter engages major countries such as China, India, Japan, Russian Federation, United Kingdom, United States and the European Union.

In 2017, ASEAN marked its 50th anniversary with the Philippines as Chairman, taking the lead in organizing the commemorative activities. At the centerpiece of the Philippines' chairmanship was the signing of the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers, which was aimed at providing better protection to migrant workers across the region, including some 200,000 Filipino workers.

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[54] The figure covers the ASEAN "legal instruments" which are ASEAN legal instruments concluded among and between ASEAN Member States. *See* ASEAN Legal Instruments, http://agreement.asean.org/home/index/16.html (last visited May 15, 2022).

[55] *See* ELIZABETH P. BUENSUCESO, ASEAN CENTRALITY: AN AUTHOETHNOGRAPHIC ACCOUNT BY A PHILIPPINE DIPLOMAT (2021).

### *3. Europe playing significant role in promoting international prosperity and stability*

The Philippines has long-standing interactions with Europe, initially through Spain which was its colonizer for over three centuries. At the present time, Europe is an important trading partner and source of investments for the Philippines, with the Netherlands, United Kingdom and France leading the way.

Europe has historically been a key player in world affairs, and the establishment of the European Economic Community (later European Union) in 1958 and the Single Market has made it more so, in view of the closer coordination of its Member States' economic, security and foreign policies.

A total of 246 agreements with European countries were signed by the Philippines during the period 1986 to 2020 (see Table 11), 70 of which were economic in nature, 64 diplomacy and administrative, 47 trade and finance, and 39 socio-cultural (see Table 12).

The Philippines and the European Union also signed in 2012 a Partnership Cooperation Agreement. This agreement serves as a framework for cooperation and dialogue in areas such as political dialogue, trade and investment, science and technology, and cultural cooperation. This agreement underscores the importance of the PH-EU partnership in promoting mutual prosperity and stability.[56] Philippine exports have been granted entry through the EU's Generalized Scheme of Preference Plus (GSP+) since 2014.[57] This has provided favorable market access for agricultural and other products, contributing significantly to the country's economic growth.

On a bilateral basis, European countries with the most number of agreements with the Philippines post-1986 are Russia with 33, Spain (27), Italy (14), United Kingdom (14) and France (13) (see Table 11). The high

[56] European Union External Action, *Partnership and Cooperation Agreement between the EU and the Philippines Enter Into Force* (Feb. 28, 2018), https://www.eeas.europa.eu/node/40495_en.

[57] Florisa C. Almodiel-Luteijn & Antonio G.M. La Viña, *The Philippines: Positive EU Ties Despite Divisive Rhetoric*, *in* THE SOUTHERN MIRROR: REFLECTIONS ON EUROPE FROM THE GLOBAL SOUTH 51 (2022).

number of agreements with Russia is attributable to the resumption of normal relations with it after the Cold War and the concerted pursuit of enhanced engagements with it during the Duterte Administration. As noted earlier, relations with Spain have been long-standing in view of the Philippines' colonial past.

Of the post-1986 administrations, the Arroyo, Duterte and Ramos presidencies were fairly active in terms of the number of agreements entered into with European countries, with 72, 52 and 49, respectively.

In addition, ASEAN, of which the Philippines is a founding member, has had dialogue relations with the EU for over forty years, and the ASEAN-EU Strategic Partnership was signed in 2020. In September 2021, the EU promulgated its "Strategy for cooperation in the Indo-Pacific" on enhanced engagement with the region, including ASEAN, which aims at helping maintain a free and open Indo-Pacific for all while building strong and lasting partnerships. The EU affirmed in said policy paper its strong support for ASEAN centrality[58] and the ASEAN community building and regional integration efforts.

Overall, the treaty data set affirms the Philippines' and Europe's strong partnership over the years, with cooperation agreements in various field. This partnership has been beneficial for both sides and has helped to promote international prosperity and stability.

**Table 11. Bilateral Agreements with European countries, 1986 to 2020**

| Country | No. of Agreements |
|---|---|
| Russia | 33 |
| Spain | 27 |
| Italy | 14 |
| United Kingdom | 14 |

*Table 11 continued*

| | |
|---|---|
| France | 13 |

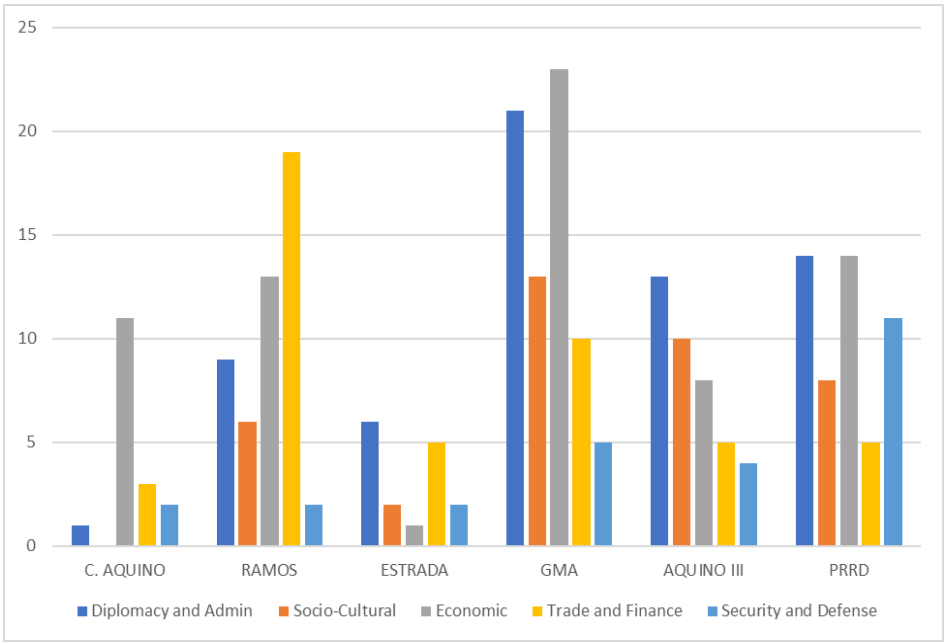
[58] EUROPEAN COMMISSION, *Joint Communication to the European Parliament and the Council: The EU Strategy for Cooperation in the Indo-Pacific* (2021), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021 JC0024.

| | |
|---|---|
| Belgium, Czech Republic, Switzerland | 12 |
| Netherlands | 10 |
| Hungary, Norway, Romania | 9 |
| Poland | 7 |
| Greece, Portugal | 6 |
| Croatia, Denmark | 5 |
| Austria, Cyprus, Slovakia | 4 |
| Finland, Sweden, Ukraine | 3 |
| Belarus, Estonia, Germany, Ireland, Lithuania, Luxembourg, Slovenia | 2 |
| Albania, Bosnia and Herzegovina, Bulgaria, Holy See, Iceland, Malta, Monaco, Montenegro | 1 |
| **TOTAL** | **246** |

**Table 12. Bilateral Agreements with European countries by subject matter and presidential administration, 1986-2020**

| | C. AQUINO | RAMOS | ESTRADA | ARROYO | B. AQUINO | DUTERTE | TOTAL |
|---|---|---|---|---|---|---|---|
| Economic | 11 | 13 | 1 | 23 | 8 | 14 | **70** |
| Diplomacy and Admin | 1 | 9 | 6 | 21 | 13 | 14 | **64** |
| Trade and Finance | 3 | 19 | 5 | 10 | 5 | 5 | **47** |
| Socio-Cultural | 0 | 6 | 2 | 13 | 10 | 8 | **39** |
| Security and Defense | 2 | 2 | 2 | 5 | 4 | 11 | **26** |
| **TOTAL** | **17** | **49** | **16** | **72** | **40** | **52** | **246** |

**Figure 5. Bilateral Agreements with European countries by subject matter and presidential administration, 1986-2020**




4. *The international Islamic community*[59] *as increasingly important to the Philippines*

In the 1970s, Filipino workers started to be deployed to Saudi Arabia and other countries in the Middle East at a boom in construction and infrastructure development there.

Successive administrations sought to ensure the rights and welfare of overseas Filipino workers by assigning labor and welfare attachés to Philippine embassies and consulates general in the region and signing labor cooperation agreements with countries where Filipinos work.

The Philippines has a significant Muslim population, particularly in Mindanao. Engagement with the international Islamic community is therefore all the more important.

[59] The international Islamic community includes Muslim countries outside the Middle East, notably Indonesia, Malaysia, Pakistan, Bangladesh, Iran and others. Only countries in the Middle East are covered for present purposes.

Successive administrations had sought to forge peace agreements with secessionist movements in Muslim Mindanao, and for this purpose, the former reached out for support to countries in the Middle East and the Organization for the Islamic Conference (OIC). A Peace Agreement was signed with the Moro National Liberation Front in 1996 in Manila and the Moro Islamic Liberation Front in 2014 in Kuala Lumpur, Malaysia. The Bangsamoro Autonomous Region of Muslim Mindanao was later established in 2019.

The importance of engagements with the Middle East and the international Islamic community find reflection in 129 agreements signed with them (see Table 13), with high numbers reached during the post-1986 administrations, with the exception of the first Aquino and Estrada administrations. Of the 129 agreements signed, 12 dealt with labor cooperation matters,[60] ensuring protection for Filipino workers.

The DFA[61] identified three *Os* that characterized the country's interests with its engagements with the Middle East – oil, OIC and OFWs. The Middle East is a crucial source of oil for the Philippines, and as such, maintaining good relations with the region is essential to ensuring stable supply of this vital resource for the country's economic development. Secondly, the OIC members in the Middle East were crucial for the Philippines' efforts to maintain peace and foster development in Muslim Mindanao. Finally, the Middle East is home to a significant number of Filipino migrant workers, or OFWs, who contribute greatly to the country's economy through their remittances. Ensuring their safety and well-being is an important aspect of the country's relationship with the Middle East.

**Table 13. Bilateral Agreements with Middle East Countries, 1986-2020**

| Country | No. of Agreements |
|---|---|
| Iran | 19 |

[60] Labor cooperation agreements were concluded with Kuwait (1998), Libya (2006), United Arab Emirates (2007), Qatar (2008), Jordan (2011), Kuwait (2012), Lebanon (2012), Saudi Arabia (2015), United Arab Emirates (2018), Israel (2 agreements, 2019) and Jordan (2018). *See* MALAYA AND DAMPIL-MANDIGMA, *supra* note 21 at 331.

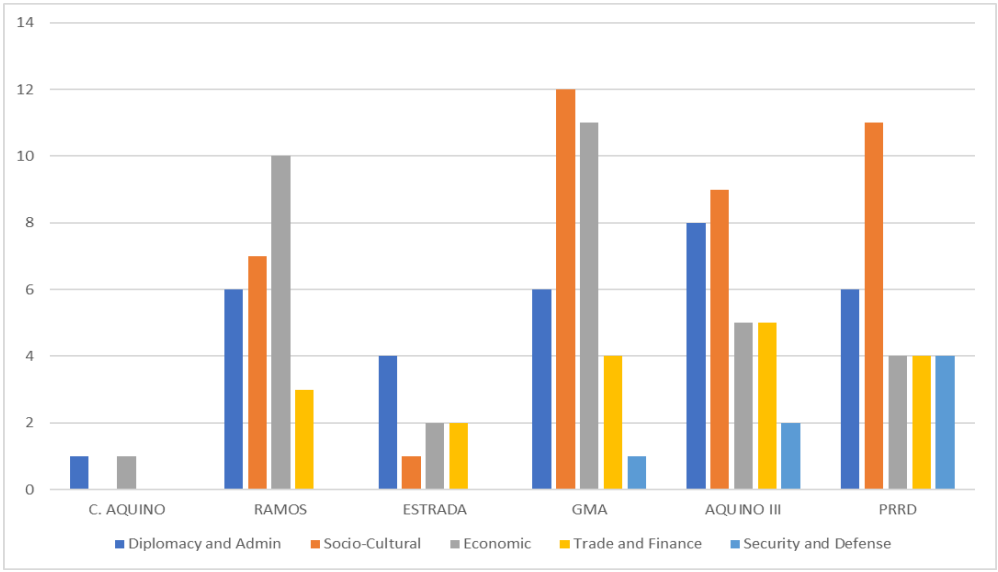
[61] Norberto Basilio, *The Philippines and the Middle East*, *in* WORLD TRENDS AND NEW DIRECTIONS FOR PHILIPPINE FOREIGN POLICY 2004-2010 (2003).

| | |
|---|---|
| Qatar | 18 |
| Turkey | 15 |
| Israel | 14 |
| Bahrain, Kuwait | 12 |
| Saudi Arabia | 10 |
| United Arab Emirates | 7 |
| Jordan, Syria | 6 |
| Oman | 5 |
| Libya | 3 |
| Lebanon | 2 |
| **Total** | **129** |

**Table 14. Bilateral Agreements with Middle East Countries by subject matter and presidential administration, 1986-2020**

| | C. AQUINO | RAMOS | ESTRADA | ARROYO | B. AQUINO | DUTERTE | TOTAL |
|---|---|---|---|---|---|---|---|
| Socio-Cultural | 0 | 7 | 1 | 12 | 9 | 11 | 40 |
| Economic | 1 | 10 | 2 | 11 | 5 | 4 | 33 |
| Diplomacy and Admin | 1 | 6 | 4 | 6 | 8 | 6 | 31 |
| Trade and Finance | 0 | 3 | 2 | 4 | 5 | 4 | 18 |
| Security and Defense | 0 | 0 | 0 | 1 | 2 | 4 | 7 |
| **TOTAL** | **2** | **26** | **9** | **34** | **29** | **29** | **129** |

**Figure 6. Bilateral Agreements with Middle East Countries by subject matter and presidential administration, 1986-2020**




5. *Redefinition of the role of WTO and other multilateral and inter-regional organizations in promoting common interests*

The Philippines is a state party to some 375 conventions entered into under the auspices of the UN and other international organizations from 1946 to 2020, of which 192 were concluded after 1986. This paper will examine the more significant ones, namely the Charter of the UN signed in 1946, the 1994 WTO Agreement and the 1994 United Nations Framework Convention on Climate Change ("UNFCCC"), specifically what have been their roles and in what manner these roles are being redefined.

**World Trade Organization**. The Philippines joined the General Agreement on Tariffs and Trade ("GATT"), the predecessor of the WTO, in 1973 as a provisional member and formally acceded to it in 1980. It participated actively in the "Uruguay Round" negotiations (the 8th Round of GATT Talks), until the Final Act of the GATT Agreement and the Marrakesh Agreement Establishing the WTO[62] were signed in 1994. The Philippine Senate ratified the Final Act in 1994 and became a "founding member" of WTO effective 1 January 1995.

[62] Adopted Apr. 15, 1994, entered into force Jan. 1, 1995, 1867 UNTS 154.

President Ramos advocated for the ratification of the WTO Agreement, underscoring that it was crucial to the country's economic development, as it would slash tariffs by an average of 24% over 10 years for developing nations and 36% over a six-year period for developed countries, thus boosting world trade. The use of unilateral sanctions was to be renounced and replaced by the referral of trade disputes before an independent dispute settlement system.[63]

It was believed that the free development of market forces and a corresponding cutting back of regulation, both in the domestic and international sphere, would spur economic recovery, growth and general welfare.[64] It was envisioned to usher a more level field where countries can more fairly compete. This was the vision or intended role for the WTO. During the ratification process, the WTO was the subject of robust debate. Critics claimed that the WTO was an "imperialist tool aimed at keeping the Philippines under former colonial powers" and lead to the collapse of the agricultural sector.[65]

After the establishment of the WTO, the succeeding rounds of negotiation have stalled. Developing countries pressed for opening by developed countries of their markets for agricultural products, while developed countries wanted to bring new issues such as investment protection and e-commerce to the negotiating table. "The WTO Treaty regime has not developed very well. The situation seemed promising at the outset, but the WTO did not develop as envisaged by its founders."[66]

In view of the impasse at the WTO, some countries sought progress by negotiating large-scale regional trade agreements elsewhere, such as the

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[63] The Philippines has utilized the WTO's dispute settlement mechanism, having been a complainant in five cases, respondent in six, and a third party in 18 cases. These include cases against Brazil (regarding measures affecting desiccated coconut), Australia (regarding certain measures affecting the importation of fresh fruit and vegetables), and Thailand (customs and fiscal measures on Philippine cigarettes). The Philippines has been a respondent in two cases regarding taxes on distilled spirits, which were filed by the US and the EU.

[64] NOLTE, *supra* note 2 at 124.

[65] Pepper Rodriguez, *Philippines Ratifies GATT*, UNITED PRESS INTERNATIONAL (Dec. 14, 1994), https://www.upi.com/Archives/1994/12/14/Philippines-ratifies-GATT/6176787381200/.

[66] NOLTE, *supra* note 2 at 129.

Comprehensive and Progressive Agreement on Trans-Pacific Partnership,[67] and the Regional Comprehensive Economic Partnership,[68] to which the Philippines belong.

Some observers have said that the mega-regional trade agreements undermine the WTO system, leading to a fragmentation of the global trading system into competing trade blocs.[69] This is the way the world trading system is being redefined.

**Environment**. There is perhaps no critical challenge which have been the sustained focus of both policy makers and concerned citizenry around the world than on the deteriorating state of the environment, particularly climate change. In 1994 countries signed the UNFCCC, a multilateral environmental agreement that aimed to stabilize global climate at a level that would prevent dangerous anthropogenic interference with the climate system, within a timeframe sufficient to allow ecosystems to adapt naturally to climate change. As of 2019, the agreement has 197 States Parties, comprising all UN Member States. The Philippines is a Party to the UNFCCC, having signed the instrument on 12 June 1992, and ratified the same on 2 August 1994.

The two main policy responses to climate change under the UNFCCC are mitigation and adaptation. Mitigation refers to human interventions that are meant to reduce the sources of, and enhance the sinks for, greenhouse gases. Adaptation, on the other hand, refers to adjustments in human and natural systems in response to the impacts of the changing climate.

The Philippines is identified as one of the most vulnerable countries to the adverse impacts of climate change due to its geography and topography. This is further exacerbated by the increasing rates of development and population growth.

The Philippines submitted two national communications to the UNFCCC; the first on 19 May 2000, and the second on 29 December 2014. In its more

[67] *Id,* at 125.
[68] *Id.*
[69] NOLTE, *supra* note 2 at 138.

recent national communication,[70] the country identified the energy sector to be its greatest source of greenhouse gas emissions, with the sector accounting for 55% of total country-wide emissions. Agriculture is the second largest source of greenhouse gas emissions at 29%, followed by waste and industry at 9% and 7%, respectively. The Philippines contributes about 0.3% of global greenhouse gas emissions.[71]

An offshoot of the UNFCCC process, the Paris Agreement is a multilateral environmental agreement adopted in 2015 following a four-year negotiation process under the former Convention. This document was thereafter adopted by the 21st Conference of the Parties to the Convention in Paris, France, in 2015. The Paris Agreement seeks to further enhance the implementation of the objectives of the UNFCCC by establishing a process of ambition and implementation.

The Philippines signed the Paris Agreement on 22 April 2016, and ratified the same on 23 March 2017. In a show of good faith alongside other UNFCCC States-Parties, the Philippines submitted in April 2021 its Nationally Determined Contributions. In it, the country conveyed its intention to undertake a greenhouse gas emissions reduction and avoidance of 75% for the period 2020 to 2030.[72] This reduction was meant to originate from the energy (including transport), waste, forestry, and industry sectors, and was conditioned on the availability of financing resources, technology development and transfer, and capacity building.

The Philippines is also a signatory to a number of other multilateral environmental agreements, notably the Kyoto Protocol (signed 1997, ratified 2003), the Montreal Protocol (signed 1987, ratified 1993) on climate change and ozone depletion, the Convention on Biological Diversity (signed 1992, ratified 1993), the Cartagena Protocol on Bio-Safety (signed 2000, ratified

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[70] REPUBLIC OF THE PHILIPPINES, *Second National Communication to the United Nations Framework Convention on Climate Change: Philippines* (2014), https://unfccc.int/documents/139241.

[71] Ben O. De Vera, *PH Adds Only 0.3% to Gas Emissions but Faces P506.1-B Losses Due to Climate Change*, INQUIRER.NET (Nov. 3, 2021), https://newsinfo.inquirer.net/1509670/ph-adds-only-0-3-to-greenhouse-gas-emissions-but.

[72] REPUBLIC OF THE PHILIPPINES, *Nationally Determined Contribution Communicated to the UNFCCC on 15 April 2021*, https://unfccc.int/sites/default/files/NDC/2022-06/Philippines%20-%20NDC.pdf.

2006) and the International Tropical Timber Agreement (signed and ratified 1994).

In his remarks during the 76th Session of the UN General Assembly in September 2021, President Duterte appealed for an urgent climate action by all States, and reaffirmed the Philippines commitment to reducing greenhouse gas emissions by 75% in 2030.[73]

**United Nations.** The Philippines has been an active participant in the shaping of international governance through the UN. It was one of the 50 original members of the organization. Carlos P. Romulo also became President of the UN General Assembly in 1949, the first Asian to occupy the position. The country was elected as a non-permanent Member of the UN Security Council four times – in 1957, 1963, 1980-1981 and 2004-2025.

The Philippines is one of the more active countries in Asia in terms of support to the UN, particularly in peacekeeping missions, having sent military and police officers and personnel to 10 troubled spots. Various UN specialized agencies and bodies have kept a close partnership with the Philippine government. The UN Country Team in the country comprises 17 agencies, funds and programmes, notably the Food and Agriculture Organization, International Labour Organization, International Maritime Organization, United Nations Children's Fund, United Nations Entity for Gender Equality and Empowerment of Women, and United Nations Human Settlements Programme.

There have been calls through the years for urgent and comprehensive reforms of the UN system, particularly the Security Council. On 23 September 2022, a "Joint Statement on the Call to Action for Reform of the UN Security Council" was issued by 32 countries calling for a more inclusive, responsive and participatory international governance architecture. They cited the urgent "need [for] reformed and effective multilateralism to deliver solutions for the pressing and evolving challenges of our time, developmental

[73] PRESIDENTIAL COMMUNICATIONS OFFICE, *President Rodrigo Roa Duterte addresses the 76th Session of the United Nations General Assembly High-Level General Debate on 22 September 2021*, https://pco.gov.ph/photo_gallery/president-rodrigo-roa-duterte-addresses-the76th-session-of-the-united-nations-general-assembly-high-level-general-debate-on-22-september-2021/.

challenges, poverty, climate change, pandemics, global food security, international conflicts and crises, and international terrorism."[74]

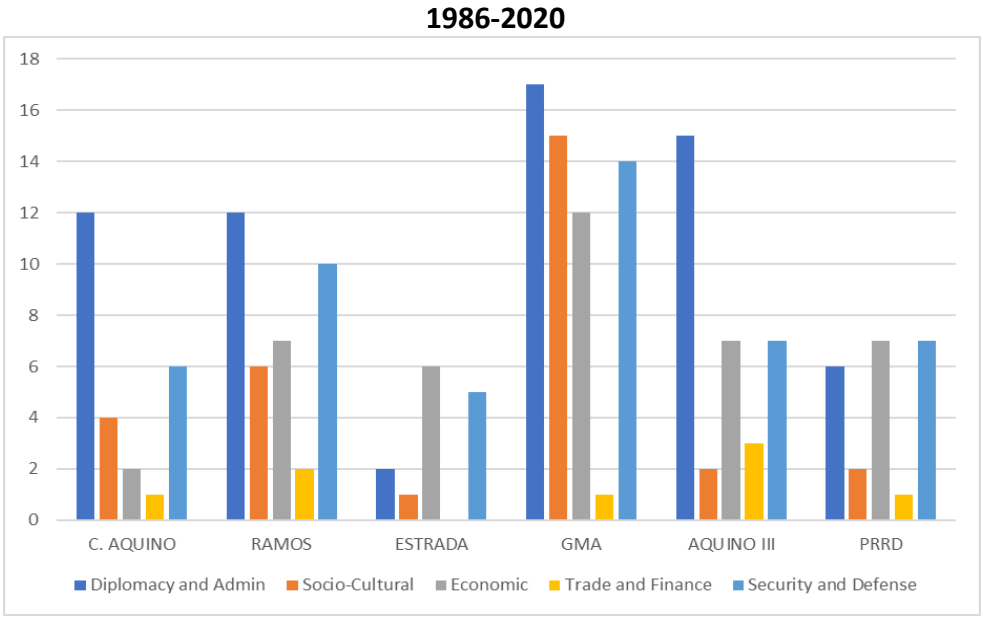
The Arroyo, Ramos and B. Aquino administrations had the most multilateral conventions signed, at 59, 37 and 34, respectively (see Table 15). There were fewer conventions entered during the Estrada and Duterte administrations, at 14 and 23 (partial figure), respectively. There was also a rare treaty withdrawal during the Duterte presidency, which was from the Rome Statute of the International Criminal Court, taking effect in March 2019.

**Table 15. Multilateral Conventions by subject matter and presidential administration, 1986-2020**

| | C. AQUINO | RAMOS | ESTRADA | ARROYO | B. AQUINO | DUTERTE | TOTAL |
|---|---|---|---|---|---|---|---|
| **Diplomacy and Admin** | 12 | 12 | 2 | 17 | 15 | 6 | 64 |
| **Security and Defense** | 6 | 10 | 5 | 14 | 7 | 7 | 49 |
| **Economic** | 2 | 7 | 6 | 12 | 7 | 7 | 41 |
| **Socio-Cultural** | 4 | 6 | 1 | 15 | 2 | 2 | 30 |
| **Trade and Finance** | 1 | 2 | 0 | 1 | 3 | 1 | 8 |
| **Total** | **25** | **37** | **14** | **59** | **34** | **23** | **192** |

**Figure 7. Multilateral Conventions by subject matter and administration,**

[74] Joint Statement - A Call to Action for Reform of the U.N. Security Council (2022), https://www.mea.gov.in/outoging-visit-detail.htm?35743/Joint+Statement++A+Call+to+Action+for+Reform+of+the+UN+Security+Council.




6. *Defense of national sovereignty and protection of the environment and natural resources; ensuring rights over maritime territory*

The Constitution states that in the formulation and implementation of Philippine foreign policy, paramount consideration shall be given to national sovereignty and territorial integrity, among others.[75] The Constitution also obligates the State to "protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone."[76] Does treaty activities bear this out?

There has been increased attention to defense and security, with 105 agreements signed during the period 1986 to 2020 (see Table 16). With the heightened challenges in the West Philippine Sea/South China Sea and the broadening of the country's security partners, defense cooperation agreements with other countries steadily rise, starting during the Ramos Administration at 8 and picking up once more during the Arroyo (11), B. Aquino (12) and Duterte (17) administrations.[77] Cooperation agreements on

[75] CONST. art. II, § 7.
[76] CONST. art. XII, § 2.
[77] J. EDUARDO MALAYA & MARIA ANTONINA MENDOZA-OBLENA, FORGING PARTNERSHIPS: PHILIPPINE DEFENSE COOPERATION IN CONSTITUTIONAL AND INTERNATIONAL LAWS (2016).

anti-terrorism and transnational crimes were also up during the last three presidential administrations.

**Table 16. Security and Defense Treaties, 1986 - 2020**

| | C. AQUINO | RAMOS | ESTRADA | ARROYO | B. AQUINO | DUTERTE | TOTAL |
|---|---|---|---|---|---|---|---|
| **Defense Cooperation** | 1 | 8 | 2 | 11 | 12 | 17 | **51** |
| **Maritime Cooperation** | 0 | 1 | 2 | 3 | 0 | 1 | **7** |
| **Anti-Terrorism** | 0 | 0 | 0 | 5 | 1 | 4 | **10** |
| **Transnational Crime** | 0 | 0 | 0 | 4 | 3 | 3 | **10** |
| **Coast Guard Cooperation** | 2 | 0 | 0 | 0 | 0 | 3 | **5** |
| **Trafficking In Persons** | 0 | 0 | 0 | 0 | 1 | 1 | **2** |
| **Maritime Delimitation** | 0 | 0 | 0 | 0 | 0 | 1 | **1** |
| **Security** | 0 | 0 | 0 | 0 | 0 | 1 | **1** |
| **TOTAL** | **3** | **9** | **4** | **23** | **17** | **31** | **87** |

Of relevance to the ensuring rights over maritime territory and protecting the environment and natural resources are agreements in the following areas: maritime cooperation – 6, including with Vietnam (2002) and Taiwan (2007); coast guard cooperation – 5, including with China (2016) and Japan (2017); and maritime delimitation –1 (with Indonesia).

Nine bilateral agreements on environmental protection were also signed since 1986, notably with Malaysia (1996) and China (2017).[78] The Philippines is also signatory to two ASEAN environmental conventions, namely the Agreement on Conservation of Nature and Natural Resources (signed 1985, ratified 1986) and the Agreement on Transboundary Haze Pollution (signed 2002). The more significant treaties on the environment are the UNFCCC and the Paris Agreement, which were discussed earlier.

[78] These nine agreements were signed during the following administrations – Ramos (3), Estrada (1), Arroyo (3), B. Aquino (1) and Duterte (1).

The Philippines filed an extended continental shelf claim over the Benham/Philippine Rise off the east coast of Luzon, which the Commission on the Limits of the Extended Continental Shelf recommended in 2012. The Philippines concluded an Exclusive Economic Zone (EEZ) delimitation agreement with Indonesia in 2014 on the basis of the equidistance principle. The two countries are currently in talks on continental shelf delimitation, and the Philippines is also engaged in EEZ delimitation talks with Palau. The country has yet – as of this writing – to enact laws defining the country's maritime zones and designating archipelagic sea lanes in its archipelagic waters.

Piracy and armed robbery against ships have been a perennial concern in the region, and bilateral and sub-regional cooperation have been pursued to address them. To address the incidence of kidnapping for ransom and other transnational crimes at sea, the Indonesia-Malaysia-Philippines Cooperation in the Sulu Sea was established in 2017.

Serious challenges to the EEZ of the Philippines and other littoral states in the South China Sea have remained. These came to a boil in the stand-off in 2012 with the Chinese Coast Guard vessels and fishing militia at the Scarborough Shoal, which is within the Philippines' EEZ. This prompted the administration of President Benigno Aquino to institute arbitral proceedings in 2013 against China under Annex VII of the United Nations Convention on the Law of the Sea. The resulting 2016 *South China Sea Arbitration* award found China's "nine-dash line" claim to be invalid to the extent that it exceeds the geographic and substantive limits of Chinese maritime entitlements under the Convention. Tensions in the South China Sea continue as of this writing.

The unresolved maritime claims have contributed to the continuing serious environmental degradation in the South China Sea, notably the destruction of coral reefs, ocean acidification, overfishing, and plastic pollution, with long-term negative impact on marine life, notably species which are endangered.[79] It has also hampered efforts to urgently address the

[79] James Borton, *Potential Danger to Biodiversity and Economic Productivity in the East Sea*, *in* ISLANDS AND ROCKS IN THE SOUTH CHINA SEA: POST HAGUE RULING (2017).

management and conservation of living and non-living resources, a major concern of which is the incidence of illegal, unregulated and unreported fishing (IUU fishing), which if not managed may lead to a collapse of the fishery resources in the area.

The ASEAN Member States and China have been engaged in negotiations on a proposed code of conduct (COC) to manage the disputes for nearly three decades. The resolution of the issues has thus far eluded them, and the talks on the proposed code remain a work in progress.

*7. Economic growth as requiring direct foreign investment*

Economic development has been a priority for all presidential administrations, and this requires huge amounts of investments, both domestic and foreign. Foreign direct investments have been viewed as key drivers in any economy, including of the Philippines, as it creates opportunities for employment, transfer of technology, foreign exchange from exports, and sharing of knowledge and managerial know-how.

To attract foreign investments, it has been deemed necessary to provide protection to them. Most investment treaties have provisions on guarantee of "fair and equitable treatment," a "most-favored nations" clause, no uncompensated expropriation, and the right of private investor to initiate proceedings against the host State.

The treaty data set affirms the campaign to attract and facilitate the entry of foreign investments as reflected in the number of bilateral investment treaties signed since 1987, although there has been a downward trend in recent years.

To attract foreign investments, the Corazon Aquino administration launched the Development Diplomacy policy, which among others yielded five trade agreements, four avoidance of double taxation agreements and three agreements on investment promotion and protection (also known as bilateral investment treaty ["BIT"]). The campaign gained momentum during the Ramos administration with its economic diplomacy – or "diplomacy for economic ends," as enunciated by his Secretary of Foreign Affairs, Roberto

Romulo[80] – resulting in 14 BITs and 10 agreements on avoidance of double taxation. These high numbers were rivalled only by the succeeding Arroyo administration's 11 BITs and 10 avoidance of double taxation agreements.

In sum, there were significant signing of BITs after 1986, yielding 14, 8 and 11 during the Ramos, Estrada and Arroyo administrations, respectively. However, there has been a noticeable drop in the signing of BITs during the B. Aquino and Duterte administrations, with none and four, respectively.

**Table 17. Investment and Trade Treaties, 1986 – 2020**

| | C. AQUINO | RAMOS | ESTRADA | ARROYO | B. AQUINO | DUTERTE | TOTAL |
|---|---|---|---|---|---|---|---|
| **Trade** | 5 | 11 | 3 | 9 | 2 | 6 | 36 |
| **Fiscal Matters/ Avoidance of Double Taxation** | 4 | 10 | 1 | 10 | 8 | 4 | 37 |
| **Investment Promotion and Protection** | 3 | 14 | 8 | 11 | 0 | 4 | 40 |
| **Custom Matters** | 2 | 0 | 1 | 3 | 2 | 0 | 8 |
| **Trade and Investment** | 0 | 0 | 0 | 1 | 1 | 0 | 2 |
| **TOTAL** | 14 | 35 | 13 | 34 | 13 | 14 | 123 |

The souring on the BITs has largely been due to their provision on investor-state arbitration, a standard feature that has been much criticized by developing countries for having been abused by some investors.[81] In the Philippines' case, the German airport operator Fraport sued the Philippine Government on its concession agreement for the then newly constructed

[80] Roberto Romulo, Address Before the Makati Business Club (Jan. 18, 1993), *in* DOMINGO, FOREIGN AFFAIRS, 249-255.

[81] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *Investor-State Dispute Settlement* (2012), https://www.oecd.org/daf/inv/investment-policy/ISDSconsultationcomments_web.pdf.

Terminal 3 of the Ninoy Aquino International Airport before the International Centre for Settlement of Investment Disputes (ICSID). An ICSID tribunal found that illegalities associated with Fraport's initial investment resulted in a lack of subject matter jurisdiction under the 1997 Germany-Philippines bilateral investment treaty. At the same time, the tribunal declined jurisdiction over counterclaims pertaining to Fraport's alleged corruption and fraud.[82]

The downward trend in the signing of BITs has been observed in most other countries. Georg Nolte noted that "[w]hereas the number of treaties concluded has risen sharply during the 1990s, this trend has slowed down considerably after 2001. This is not because most States had by then concluded an investment treaty with those other States in which their nationals hold or could hold investments – far from it. Rather, it seems that the practice under the treaties and their context have given States second thoughts about investment treaties generally."[83] States and other observers have voiced concerns that arbitral tribunals under investment treaties are rendering decisions which are unexpectedly friendly to investors and disregard legitimate policy choices of States.[84]

Nonetheless, despite the slowdown in BITs, the entry of foreign investments into the Philippines (as well as other countries) has continued, as there are other equally important considerations for investing. Reform legislations have been enacted in recent years to make the investment climate of the Philippines more competitive and friendlier to foreign investors. These include amendments to the Foreign Investment Act,[85] which enables foreign investors to fully own domestic enterprises in the Philippines;

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[82] Matthew Levine, *German Investor's Claim Against the Philippines over Manila Airport Concession Fails for the Second Time at ICSID,* INT'L INST. SUSTAINABLE DEV. (May 21, 2015), https://www.iisd.org/itn/en/2015/05/21/german-investors-claim-against-the-philippines-over-manila-airport-concession-fails-for-the-second-time-at-icsid/.

[83] NOLTE, *supra* note 2 at 146.

[84] *Id.*, at 147-148, citing Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM L. R. 1521 (2005) and GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 175-184 (2007).

[85] Rep. Act No. 11647, An Act Promoting Foreign Investments, Amending Thereby Republic Act No. 7042, Otherwise Known as the "Foreign Investment Act of 1991," https://www.officialgazette.gov.ph/2022/03/02/republic-act-no-11647/.

the Philippine Public Service Act,[86] which allows full foreign ownership of certain public services enterprises, such as telecommunications, and the Retail Trade Liberalization Act,[87] which eased some requirements for foreign investors to engage in retail trade.

At the international level, there has also been an ongoing movement to reform BITs with a more diversity of procedures, larger policy space for host States, and an increased importance of multilateral treaties.[88]

*8. Quick benefits from international tourism*

Tourism is considered as another key contributor to economic development. The benefits from international tourism are not only the revenues generated from foreign tourists but also the employment that tourism and related establishments generate. The tourism industry is labor-intensive, and tourist spots abound in the countryside, thus employment generation is spread out. The tourism industry, including hotel and hospitality, provides the largest number of employment in the country – 5.7 million in 2019, or 13.6% of the total population.[89]

To this end, there have been concerted efforts to sign tourism cooperation agreements, yielding 35 such agreements. Among these were two tourism cooperation agreements with China, signed in 2000 and 2002, as sizable numbers of tour groups from China have visited the Philippines.

**Table 18. Tourism Treaties, 1986 - 2020**

| | C. AQUINO | RAMOS | ESTRADA | ARROYO | B. AQUINO | DUTERTE | TOTAL |
|---|---|---|---|---|---|---|---|
| **Tourism** | 1 | 7 | 5 | 11 | 5 | 6 | 35 |

[86] Rep. Act No. 11659, An Act Amending Commonwealth Act No. 146, Otherwise Known as the Public Service Act, https://www.officialgazette.gov.ph/2022/03/21/republic-act-no-11659/.

[87] Rep. Act No. 11595, An Act Amending Republic Act No. 8762, Otherwise Known as the "Retail Trade Liberalization Act of 2000," https://www.officialgazette.gov.ph/2021/12/10/republic-act-no-11595/.

[88] NOLTE, *supra* note 2 at 159.

[89] Kristhel Anne M. Caynila, Katherine T. Luna & Sarah Amabelle A. Milla, *The Philippine Tourism Sector Amid the Pandemic: Developments and Prospects*, BANGKO SENTRAL NG PILIPINAS (May 2022), https://www.bsp.gov.ph/Media_And_Research/Publications/EN22-02.pdf.

The Ramos administration spearheaded significant developments in the tourism industry, notably the increased flights and routes, new airlines, constructions of the Ninoy Aquino International Airport's Terminals II and III, new Batangas port, and deregulation and privatization of transportation.[90]

The Arroyo administration also established the roll-on roll-off program, connecting the islands which resulted in easier access to a number of island destinations at reduced travel cost. Improvements were made at the airports, including the Kalibo airport, the gateway to the renown Boracay island, and other land and water transportations.[91]

On the policy front, the B. Aquino administration signed Executive Order No. 29 in March 2011[92] on the "pocket-open skies" policy, which eased restrictions on foreign airlines and allows them to land in selected international airports outside Metro Manila.[93] E.O. 29 gives secondary gateways the opportunity to be connected to international and local markets, bringing tourists and investors directly to destinations such as Clark, Laoag, Cebu, Davao and Puerto Princesa. In doing so, more foreign travelers on planes charging lower fares are able to visit the Philippines.

In 2016, the Philippines signed on to the ASEAN Open Sky Policy, paving the way for full third, fourth and fifth freedom rights for ASEAN carriers.[94] The Philippines was the last holdout to ratify Protocol 5 and 6 of the Multilateral Agreement on Air Services, opening Manila to all Southeast Asian carriers.

A more liberalized aviation rule dispenses with the need to negotiate bilateral Air Services Agreement each time, thus the downtrend in the signing of such agreement starting B. Aquino's (at 6) and Duterte's administrations (3).

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[90] *Id.*
[91] *Id.*
[92] Exec. Order No. 29 (2011), Authorizing the Civil Aeronautics Board and the Philippine Air Panels to Pursue More Aggressively the International Civil Aviation Policy.
[93] Jocelyn R. Uy, *DOT: Philippine airlines to survive 'pocket-open skies',* PHIL. DAILY INQUIRER (Sept. 10, 2011), https://newsinfo.inquirer.net/61119/dot-philippine-airlines-to-survive-%E2%80%98pocket-open-skies%E2%80%99.
[94] Rosa Ocampo, *Philippines signs ASEAN open skies agreement,* TTG ASIA (Feb. 11, 2016), https://www.ttgasia.com/2016/02/11/philippines-signs-asean-open-skies-agreement/.

The COVID-19 pandemic heavily affected the country's tourism sector with the fall of international and domestic tourist arrivals at 80% in 2020 and some 90% in 2021, which led to the closure of a significant number of hotels, travel agencies and other travel-related entities. With the pandemic over and the tourism sector fully open again, foreign tourists have started returning.[95]

9. *Overseas Filipinos playing critical role in economic and social stability*

A significant feature of Philippine contemporary society is the presence of millions of Filipinos residing overseas as contract workers and immigrants. Most of them went abroad in search of better livelihood opportunities, and send financial support to their families back home. Overseas Filipino workers ("OFWs") or more broadly, overseas Filipinos, significantly contribute to the continuing vitality of the Philippine economy by way of their foreign exchange remittances and the technical and managerial knowledge they bring home, thus the title "*mga bagong bayani*" (new heroes). In 2020, remittances of overseas Filipinos were estimated at PHP 134.77 billion.[96]

Started as an experimental program in the early 1970s of deploying Filipino engineers and manpower to the oil fields and construction sites in the Middle East, the number of deployed workers ballooned through the years. Together with long-term immigrants in North America and elsewhere, overseas Filipinos now number over 10 million around the world. These huge numbers present unprecedented challenges to the Philippine Government, especially the Departments of Foreign Affairs and Labor, in servicing their requirements and ensuring them welfare and labor protection.[97]

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[95] Ellie Aben, *Philippine Tourism Tipped to Recover Faster than Global Average*, ARAB NEWS (Apr. 22, 2022), https://www.arabnews.com/node/2068306/world.

[96] PHILIPPINE STATISTICS AUTHORITY, *2020 Overseas Filipino Workers (Final Results)* (Mar. 7, 2022), https://psa.gov.ph/content/2020-overseas-filipino-workers-final-results#:~:text=Total%20remittance%20sent%20in%202020,billion%20pesos%20reported%20in%202019.&text=On%20average%2C%20about%2086.81%20thousand,sent%20per%20OFW%20in%202019.

[97] Undersecretary for Migrant Workers Affairs Jose S. Brillantes identified a number of pressing problems that should be addressed by the government and other mechanism that need to be undertaken to ensure protection of Filipino migrant workers, as follows: need for protective measures to keep the balance between concerns of market development and workers' welfare; job mismatch and reskilling; reintegration of returning workers;

To address these challenges, the Philippine Congress enacted Republic Act No. 8042, as amended by Republic Act No. 10022 – the Migrant Workers and Overseas Filipinos Act of 1995 to institute policies on overseas employment and establish a higher standard of protection for migrant workers and their families. The law also created the Assistance to Nationals Fund and the Legal Assistance Fund. In 2022, Congress established the Department of Migrant Workers, consolidating into that department the many agencies and offices dealing with migrant workers deployment and assistance.[98]

Foreign Affairs Secretary Albert del Rosario noted in 2011, "the sheer magnitude of the Filipino diaspora prompted the Philippine Government to pursue and enhance bilateral agreements, regional arrangements and international standards affecting migrant workers."[99]

The question is whether treaty activities bear this out? The data indicate that presidential administrations starting with Ramos have prioritized the signing of bilateral labor agreements, particularly in countries where there are significant concentrations of Filipino workers. Twenty-seven (27) labor agreements have been signed thus far, notably with countries in the Middle East where most OFWs work, namely Kuwait (1997, 2012), Libya (2006), United Arab Emirates (2007, 2017), Qatar (2008), Jordan (2010, 2018), Lebanon (2012), Saudi Arabia (2013) and Israel (2 agreements, 2019). The

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concentration of women migrants in vulnerable occupations; consequences on social structures and value systems; illegal recruitment; and trafficking in persons and human smuggling. *See* Philippine Migrants Rights Groups' Written Replies to the List of Issues Relating to the Consideration of the Initial Report of the Philippines (Mar. 2009), https://www2.ohchr.org/english/bodies/cmw/docs/ngos/pmg_philippines10.pdf.

[98] *Id*. Other legal frameworks on overseas employment include Exec. Order No. 325 creating the Presidential Anti-Illegal Recruitment Task Force (signed in July 2004), Rep. Act No. 9208 or the "Anti-Trafficking in Persons Act of 2003," Presidential Decree No. 442 or the "Labor Code of the Philippines", and Exec. Order No. 797 (enacted in 1982) which facilitated the streamlining of procedures, systems and operations with respect to overseas employment, created the Philippine Overseas Employment Administration, and then the Overseas Workers Welfare Administration.

[99] Albert del Rosario, Sec'y. of Foreign Aff., Address Before the Diplomatic Corps (Apr. 4, 2011), https://www.officialgazette.gov.ph/2011/04/04/remarks-of-foreign-affairs-secretary-del-rosario-during-the-first-diplomatic-reception/.

Arroyo, B. Aquino and Duterte administrations had the most number of labor agreements signed, at 11, 8 and 7, respectively (see Table 19).

Philippine foreign policy is also geared at putting the migrant workers agenda in regional and international fora inasmuch as the transmigration of people is a global reality, and is a part and parcel of the human rights agenda.[100] As earlier noted, the centerpiece of the Philippines' ASEAN chairmanship in 2017 was the signing of the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers, which aimed at providing protection to all migrants workers across the region, including some 200,000 Filipinos.

The Philippines is one of the first signatories to the UN Migrant Workers' Convention signed in 1993,[101] and actively campaigned for the Global Compact on Safe, Orderly and Regular Migration, which was adopted in December 2018 by 152 States, including states in Europe, Americas, Africa, Asia and all Arab labor-receiving States.

Agreements related to the promotion of the welfare of overseas Filipinos were also entered into, notably on consular matters (4 agreements), transfer of sentenced persons (3) and trafficking in persons (2). Thirteen agreements on social security have been signed after 1985,[102] specifically three during the Aquino and Ramos administrations, four during Arroyo's, two during B. Aquino's and four during Duterte's.

**Table 19. Labor and related Agreements, 1946-2020**

| | C. AQUINO | RAMOS | ESTRADA | ARROYO | B. AQUINO | DUTERTE | TOTAL |
|---|---|---|---|---|---|---|---|
| **Labor Cooperation** | 0 | 1 | 0 | 11 | 8 | 7 | 27 |

[100] SIAZON, *supra* note 53.

[101] *Id.*

[102] Social security agreements, also known as totalization agreements, are designed to coordinate the social security systems of two countries to ensure that individuals who have worked in both countries are not doubly taxed or ineligible for benefits due to differences in eligibility requirements. These agreements are important for individuals who work or have worked in both countries and help to facilitate cross-border trade and investment.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| **Consular Matters** | 0 | 2 | 0 | 1 | 1 | 0 | 4 |
| **Transfer of Sentenced Persons** | 0 | 0 | 0 | 3 | 0 | 0 | 3 |
| **Trafficking in Persons** | 0 | 0 | 0 | 0 | 1 | 1 | 2 |
| **TOTAL** | 0 | 3 | 0 | 15 | 10 | 8 | 36 |

## CONCLUSIONS AND SUGGESTED WAYS FORWARD

On the basis of the foregoing discussions, the following observations can be drawn:

For the Philippines' first five decades, from 1946 to 1993, the average annual number of bilateral agreements entered into by the country was seven, a modest output. From 1994 onwards, however, starting with the Ramos presidency, there have been significant numbers of agreements signed, averaging between 20 to 40 annually. The latter period indicates robust diplomacy and active engagement with the international community. It coincided with the thawing of the Cold War and the onset of globalization which saw unprecedented growth in international trade and the exchange of ideas, beliefs, and culture.[103]

Second, the agreements entered into in the early decades were mostly soft-type ones aimed at fostering friendship and goodwill, notably establishing diplomatic relations and enhancing cultural exchanges, which reflected the initial contacts with other countries. Thereafter, accords on education, labor and related cooperation, which are more substantive in nature, started to increase in numbers. At the same time, economic agreements figured prominently in both early and later periods, averaging a third of all agreements (30.90%) during the period 1946-1985 and more than a quarter (27.59%) for 1986-2020, reflecting the priority given to promoting and sustaining economic growth.

Third, as can be expected, the foreign policy outlook – whether outward- or inward-looking – of the president has significant influence on his administration's foreign policy making. The proactive engagement with the international community of the Quirino and Macapagal administrations can be attributed to both presidents' earlier stints in diplomacy. The same can be said of the administration of Ramos and Arroyo, who both studied in foreign universities. The reverse can be said of the low number of agreements signed during the Garcia presidency, whose administration prioritized domestic industrialization and rebuilding.

Fourth, Philippine external relations, as reflected in agreements signed, were initially geared towards engagements with the United States, and then with Europe, Southeast Asia, the rest of Asia, and other regions. Agreements with Southeast Asian neighbors started gaining prominence in the late sixties, ushered in by the establishment of the regional organization ASEAN in 1967, and this trend continues to this day. The least number of agreements were those with Africa and Oceania.

Fifth, at the country-specific level, the Philippines' top bilateral partners during the period 1946-1985 were the U.S., Indonesia, Japan, Spain, and Germany, Israel and South Korea. There were remarkable changes in the top country partners in the 1986-2020 period, as follows: China, Russia, Spain, Thailand and South Korea. During the later period, the U.S. was relegated from first to eighth, while China and Russia took first and second place, while Thailand and South Korea replaced Indonesia and Japan.

On whether there have been alignment or discontinuities of treaty activities with foreign policy priorities, as enunciated in the Nine Realities of Foreign Policy, a positive correlation between the treaty activities and the identified foreign policy priorities has been observed, with the following information on each of them:

- The treaty data affirm that the United States, China and Japan have a determining influence in the security situation and economic evolution of East Asia, including the Philippines. The country's engagements with these three countries have been more extensive than with others. The U.S. and Japan are its key traditional partners, particularly in the politico-security and economic fields respectively, while China is the ascendant political, military and economic power

in the Asia-Pacific region. During the post-1985 period, most of the agreements with China are economic in nature (16), while those with the U.S. are on security and defense (8). The country has five agreements each on economic and security and defense with Japan.

- On Philippine foreign policy decisions being increasingly made in the context of the ASEAN, the data on agreements concluded under the auspices of the ASEAN show a steady rise in its numbers, initially covering economic and socio-cultural cooperation, which was its focus during the early decades of its existence, and then branching into the political, security and other fields. A total of 80 legal instruments concluded among and between ASEAN Member States from 1967 up to the present, comprising 58 economic agreements, 14 politico-security agreements, and 8 socio-cultural agreements. Sixty-one of the 80 ASEAN agreements are currently in force for the Philippines. The ASEAN is the country's primary forum in the promotion of regional peace, security and prosperity, and its ASEAN partners are among its closest collaborators on international issues.
- The importance of the international Islamic community to the Philippines is reflected in the 129 bilateral agreements with countries in the Middle East, with high numbers reached in the post-1985 administrations. Eleven of the 129 agreements deal with labor protection and cooperation. Three "Os" characterized the country's interests vis-à-vis the Middle East – oil, the OIC and the OFWs. With the signing of peace agreements with the MNLF and then MNLF, the significance of the OIC has ebbed, but the country's dependence on oil from the Middle East and the significant number of Filipino workers there will keep relations with that region foremost to the Philippines.
- On Europe playing a significant role in promoting prosperity and stability, some 246 agreements with European countries were signed by the Philippines during the period 1986 to 2020. The Philippines and the European Union also have a Partnership Cooperation Agreement, and Philippine exports have been granted entry through the EU's Generalized Scheme of Preference Plus (GSP+). In addition, ASEAN has had dialogue relations with the EU for over forty years, and the ASEAN-EU Strategic Partnership was signed in 2020. Through its "Strategy for cooperation in the Indo-Pacific," the EU conveyed in 2021 its determination to enhance engagement with the region,

including ASEAN. Overall, the treaty data affirms the strong PH-EU partnership[104] through the years, with cooperation agreements in various fields.

- On the redefinition of the role of multilateral and inter-regional organizations in promoting common interests, the Philippines is state party to some 375 conventions entered into under the auspices of the UN and other international organizations from 1946 to 2020, of which 192 were concluded after 1986. In a globalized world which thrives on trade and investments, foremost among the international organization is the WTO. However, succeeding rounds of negotiation after its establishment in 1994 have stalled on issues such as investment protection, e-commerce and the entry of agricultural products. In view of this impasse at WTO, the trend is towards negotiating of large-scale regional trade agreements, such as the Comprehensive and Progressive Agreement on Trans-Pacific Partnership[105] and the Regional Comprehensive Economic Partnership, leading to fears of a fragmentation of the global trading system into competing trade blocs.

On the other hand, the challenge of climate change has led policy makers and concerned citizenries around the world to look to international institutions to take the lead in addressing it. Parties to the 1994 UNFCCC meet annually to coordinate policies and actions with the aim of stabilizing global climate at a level that would prevent dangerous anthropogenic interference with the climate system, within a timeframe sufficient to allow ecosystems to adapt naturally to climate change. The Philippines is identified as one of the most vulnerable countries to the adverse impacts of climate change due to its geography and topography. This is further exacerbated by the increasing rates of development and population growth. Climate change is an existential challenge like no other, and how it is addressed will have long term consequences on the livability of planet earth.

- On the defense of the nation's sovereignty, protection of its environment and natural resources and ensuring respect of its rights over its maritime territory, Philippine diplomacy has given priority

[104] Notwithstanding the aloof attitude of EU Members States and other Western countries towards the Duterte Administration, 52 agreements were signed during the period. *See* Table 12.

[105] NOLTE, *supra* note 2 at 125.

attention to defense and security matters, with 88 agreements signed in the period 1986 to 2020. With the heightened challenges in the West Philippine Sea/South China Sea and the broadening of the country's security partners, the number and quality of defense cooperation agreements have steadily risen, starting during the Ramos Administration with eight agreements and increasing further during the Arroyo (11), B. Aquino (12) and Duterte (17) administrations.[106] Cooperation agreements on anti-terrorism and transnational crimes were also up during the last three administrations.

- On economic growth requiring a lot of direct foreign investment, the treaty data set affirms that presidential administrations have conducted sustained campaigns to attract and facilitate the entry of foreign investments, as reflected in the number of bilateral investment treaties signed since 1987, although there has been a downward trend in recent years. There were significant number of signings of bilateral investment treaties (BITs) after 1986, yielding 14, 8 and 11 during the Ramos, Estrada and Arroyo administrations, respectively. However, there were noticeable drops in the signing of BITs during the B. Aquino and Duterte administrations, at none and four, respectively. As discussed earlier, the souring on the BITs has largely been due to the provision on investor-state arbitration. This downward trend in the signing of BITs has been observed in most other countries.
- On the country benefitting most quickly from international tourism, the various administrations, through the tourism department, have conducted concerted efforts to conclude tourism cooperation agreements, yielding 35 such agreements, in a bid to facilitate the entry of foreign tourists to the country. Among these were two tourism cooperation agreements with China, signed in 2000 and 2002, which organizes tour groups to other countries. Most countries though leave tourism matters to their private sector and the traveling to decide upon, and for the latter, it is not so much the presence of tourism cooperation agreements which are crucial, but the attractiveness of the place to visit and its accessibility (availability of flights, travel time required, ready infrastructure, safety and

[106] MALAYA & MENDOZA-OBLENA, *supra* note 77.

security, among others). Measures to address the latter are what would make the country tourist-friendly in the long-term.

- On overseas Filipinos playing a critical role in the country's economic and social stability, presidential administrations from Ramos onwards have prioritized the signing of bilateral labor agreements with countries where there are significant concentrations of Filipino workers. Twenty-seven (27) such agreements have been signed thus far, notably ten with countries in the Middle East where most OFWs work. On the policy level, the Philippines has also placed the migrant workers agenda in regional and international fora in the realization that the transmigration of people is a global reality, and should be part and parcel of the human rights agenda.

At a time of scarce resources, notably the valuable time and attention of relevant foreign policy actors, the challenge is how to ensure that foreign policy activities, especially treaty making actions, are pursuant to identified foreign policy priorities. Having foreign policy plans and roadmaps, notably the medium-term DFA Strategic Plan and the National Security Plan, are helpful starting points. These though need to be referred to, fleshed out in implementing details and reviewed and updated as needed.

In addition, constant dialogue and engagement need to be undertaken with Congress, particularly the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs, in order to solicit the latter's views and guidance. Furthermore, regular dialogue should also be undertaken with the academe, law practitioners, business community, and the general public in order for the formulation and implementation of foreign policy to be inclusive, transparent and representative of the views of key sectors of society. A best practice in public consultation was conducted on 4 December 2017 during the Colloquium on International Law Issues which was convened by the Department of Foreign Affairs' Office of Treaties and Legal Affairs, in partnership with the U.P. Law Center's Institute for International Legal Studies ("UP-IILS"). The Colloquium solicited inputs from law practitioners in the private and public sectors, including law firms and the academe, on a proposed priority agenda for the Philippines in international law; and brought together Filipino international law experts and practitioners as a starting point for a domestic international law interest group that the Department can engage with on various international law issues, especially

on the two major themes of international legal and judicial cooperation; and trade and investment facilitation. A number of recommended ratifications and accessions to treaties were raised, of which at least five were carried out and implemented in succeeding years.[107]

[107] See proceedings of the 2017 Colloquium on International Law Issues in the 2017 Philippine Yearbook of International Law, pp. 143-229. On legal and judicial cooperation, presentors recommended accessions to the Apostille Convention, the Service Convention, and the Child Support Convention, all within the auspices of the Hague Conference on Private International Law, which have since then been carried out. In the field of trade and investment facilitation, the following were recommended: ratification of the UN Convention on the Use of Electronic Communications in International Contracts (ECC), (b) signing of the Framework Agreement on the Facilitation of Cross-Border Paperless Trade in Asia and the Pacific (FA), and ratification of the UN Convention on Contracts for the International Sale of Goods (CISG). The first and second recommendations have been carried out, but the third one – arguably the most important to competitiveness and efficiency of businesses – remains a work in progress.

# The Sabah Question in International Law

Judge Frank E. Lobrigo (Ret.)[*]

## I. Introduction

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

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

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

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[*] Judge Frank Lobrigo assumed office as presiding judge of RTC Legazpi City Branch 3 in 2010 and optionally retired in 2019 as acting presiding judge of RTC Pasig City (San Juan Station) Branch 160 and assisting judge of Branch 68 of the same judicial station. He practiced law for 20 years before joining the Bench. He holds a Master of Laws degree from San Beda University, Manila.

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

## II. The Sultanate of Sulu - A historical perspective

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

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

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

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

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

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

[4] *Id*.

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

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

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

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

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

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

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

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

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

### III. The Sulu sultan's ownership of North Borneo

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## IV. The Philippine territorial claim over Sabah

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

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

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

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

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

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

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

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

[32] *Id*.

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

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

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

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

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

## V. Critique of the Philippine claim of sovereignty

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[37] Ortiz, supra note 2 at 43.

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

*Residual Sovereignty*

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

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

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

[38] *Id.* at 27.

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

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

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

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[39] *The Island of Palmas (or Miangas),* HAGUE JUSTICE PORTAL, http://www.haguejusticeportal.net/index.php?id=6142 (last accessed: 18 August 2018)
[40] Las Palmas, supra note 34 at 840.

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

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

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

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

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

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

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

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

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

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

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

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

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[45] *Id*.

[46] Brownlie, supra note 28 at 134.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## VI. Conclusion

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

# Conclusions and Questions:
## The Peremptory Norms of General International Law

Prof. Rommel J. Casis*

*Jus cogens have the abbreviations JC and there was another fellow, very long ago, who could walk on water, who could turn water into wine and who also had the initials JC and I think this is suggesting something about the power of jus cogens and the impact that they potentially could have*
- Dire Tladi, UN Special Rapporteur[1]

### I. Introduction

The concept known as a peremptory or *jus cogens* norm[2] can potentially change the international law landscape. The term *"jus cogens"* means "compelling law"[3] while "peremptory" means "final; absolute; conclusive; incontrovertible."[4] This norm is the highest of all norms and invalidates all other sources of law in conflict with it. *Criddle* says that the "rise of peremptory norms over the past century has sent shock waves across international legal theory."[5]

On the one hand, such a powerful norm may usher in an era of a rule of law in the international community. But on the other hand it may de-stabilize the current system based on state sovereignty and consent. *Linderfalk* says

* Associate Professor University of the Philippines College of Law; Director, UP Institute of International Legal Studies; LL.M, Columbia Law School; B.A. Political Science and LL.B, University of the Philippines College of Law.

[1] Ana Zdravkovic, *Finding the Core of International Law – Jus Cogens in the Work of International Law Commission,* 5 South Eastern Europe and the European Union - Legal Issues, 141, (2019).

[2] In this paper these two terms are used interchangeably.

[3] Evan J Criddle, & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 Yale J. Intl L. 331 (2009).

[4] Black's Law Dictionary (9th ed. 2009)

[5] Criddle, *supra* note 3 at 332.

that "if we take the existence of peremptory international law to its logical consequence…most actors on the international arena will consider the effects unacceptable."[6] Considering the great promise and peril posed by peremptory norms it is no surprise that there is a great body of literature written about peremptory norms. Adding to the pile is the most recent work of the International Law Commission (ILC).

In 2022, the ILC issued the "Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens) (DCILCPN)". The ILC also issued commentaries on each of the draft conclusions (Commentary). The DCILCPN is intended to settle many of the issues surrounding peremptory norms. The question is whether it has clarified the issues or has it added to the confusion.

This paper analyzes the DCILCPN and refers to the current legal scholarship on peremptory norms where appropriate. The paper also briefly situates the Philippine jurisprudence pertinent to peremptory norms in the current scholarship. The paper concludes by summarizing what is now clear and what is still confusing about the concept of peremptory norms. Thus, this paper hopes to provide the Philippine legal scholar or practitioner in orienting information on the current state of law and jurisprudence on peremptory norms.

### *A. Historical development of peremptory norms*

Some would argue that the concept has its roots early in legal history. Some say that similar to many international law principles, "[t]he roots of *jus cogens* lie in Roman law: *jus publicum privatorum pactis mutari non potest*."[7] *Shelton* points out that "[s]ome early writers found the source of compulsory law in divine or religious law binding on all human and human institutions."[8] Other writers would say that, "[p]eremptory norms have been recognized

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[6] Ulf Linderfalk, *The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did you Ever Think About the Consequences?*, 18 European Journal of International Law, 853, (2008).

[7] Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, 665 (2008).

[8] Dinah Shelton, *Sherlock Holmes and the Mystery of Jus Cogens*, 46, Netherlands Yearbook of International Law, 23, 26,(2016).

and justiciable since the late 18th century."[9] But according to *Suy*, "the actual words *jus cogens* are not found in any text prior to the nineteenth century."[10] However, since 1945 there seems to be a consensus on the existence of this concept.[11]

The concept only obtained formal acceptance in international law, with the codification of the Vienna Convention on the Law of Treaties (VCLT). Article 53 of VCLT provided the definition of peremptory norms and the effect of existing peremptory norms on newly concluded treaties, while Article 64 provided for the effect of new peremptory norms to pre-existing treaties. Article 71 provides for further consequences of invalidity of treaties in conflict with peremptory norms. But the VCLT did not address all of the issues surrounding peremptory norms.

### *B. Issues with peremptory norms*

#### *1. Justificatory theory*

Perhaps the main issue is which justificatory theory[12] provides a legal basis for the existence of peremptory norms.

a. Natural Law

One view is that peremptory norms emanate from natural law principles which "were unchangeable even by God [and thus] necessarily bound all sovereigns on earth."[13] If peremptory norms did form part of natural law then this would explain why they are hierarchically superior to other norms. However, if this is the case, peremptory norms are anachronistic and have no place in the current international legal community dominated by positivism.

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[9] William E. Conklin, *The Peremptory Norms of the International Community*, 23, European Journal of International Law, 837, 838 (2012).
[10] Shelton, *supra* note 8 at 28.
[11] Villiger, *supra* note 7 at 666.
[12] *See* Matthew Saul, *Identifying Jus Cogens Norms: The Interaction of Scholars and International Judges*, 5, Asian Journal of International Law, 26-27 (2015).
[13] Shelton, *supra* note 8 at 27.

b. Logical or legal necessity

Another view is that logical or legal necessity requires the existence of peremptory norms.[14] This "public order theory"[15] argues that "*jus cogens* norms exist as imperative and hierarchically superior to other international law in order to promote the interests of the international community as a whole and preserve core values."[16] *Shelton* points out that "any society operating under the law must have fundamental rules [which allow] no dissent if the existence of the law and society is to be maintained."[17] It is said that "the *ratio legis* of *jus cogens* is to protect the common concerns of the subjects of law, the values and interests considered indispensable by a society at a given time."[18] This view aligns with the idea that peremptory norms reflect and protect fundamental values.[19] But this view also requires that the international community has reached a point of cohesion that it shares common values. Given the current state affairs in international relations, such a cohesion or unity in the international community can hardly be seen.

c. General principles of law

Yet another view is that peremptory norms originate from general principles of law recognized in all legal systems.[20] *Shelton* points out that "[d]omestic laws generally provide for the invalidity of agreements that conflict with public policy."[21] *Magallona* argues that peremptory norms or norms hierarchically superior to others are common in municipal legal systems.[22] But the current list of accepted peremptory norms[23] do not seem to correspond with principles applicable in the domestic legal system.

d. Consent of states

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[14] Shelton, *supra* note 8 at 28.
[15] Shelton, *supra* note 8 at 29.
[16] *Id.*
[17] Shelton, *supra* note 8 at 28.
[18] Shelton, *supra* note 8 at 29.
[19] *See* discussion under Part II B 1 a.
[20] Shelton, *supra* note 8 at 30.
[21] *Id*.
[22] Merlin M. Magallona, *International Law Issues in Perspective*, (1996).
[23] *See* Annex of the DCILCPN.

Finally, scholars like *Magallona* would argue that peremptory norms in the international plane arise from the consent of states. They contend that "states themselves had recognized peremptory norms and their effect in customary international law."[24] *Dubois* would disagree and argue that an attempt to justify this using "a voluntarist consensual basis is incoherent, unconvincing and ultimately relies on a certain form of circular reasoning."[25] *Criddle*, would point out that "[b]y placing limits on state action, jus cogens challenges the positivist orthodoxy that views state consent as the wellsping of all international obligations."[26] Despite these objections, it may be argued that peremptory norms "came into positive law with the [Vienna Convention on the Law of Treaties.]"[27] The basis is that "Article 53 of the VCLT sanctioned the 'positivization' of natural law."[28]

This last view seems to be the prevailing view as "[m]ost contemporary commentators continue to view *jus cogens* through the prism of state consent." [29] Furthermore in one case[30]the ICJ "concluded that the prohibition against torture is a norm of *jus cogens* based on 'widespread international practice and on the *opinio juris* of States.'"[31] The problem with this view is that a consent-based system seems inconsistent with a norm that binds even states who do not give their consent. *Shelton* says "[t]he positivist concept of peremptory norms thus reaches a conundrum in having a consensual process with a non-consensual result - the imposition of rules adopted by a large majority on dissenting states."[32]

### *2. Practical value*

[24] Shelton, *supra note 8* at 32.
[25] Dan Dubois, *The Authority of Peremptory Norms in International Law: State Consent of Natural Law?,* 78, Nordic J. Int'l L., 133, 134 (2009).
[26] Criddle, *supra* note 5 at 332.
[27] Shelton, *supra note 8* at 33.
[28] *Id.*
[29] Shelton, *supra note 8* at 34.
[30] Question relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Judgment, 2012 I.C.J. ¶ 99 (Jul 20) cited in Shelton, *supra* note at 34.
[31] Shelton, *supra note 8* at 34.
[32] *Id.*

Another issue raised against the concept of peremptory norms is that it does not provide any practical value. Despite its popularity, the application of peremptory norms in practice has been limited.[33] *Zdravkovic* states that peremptory norms "were usually invoked in case law of international courts just to strengthen the moral appeal of some relevant arguments."[34] *Shelton* would argue that the concept of a peremptory norm "is largely if not entirely a literary construct, a theoretical proposal for what ought to be, rather than what was or is."[35] Thus, its actual function is to merely provide "symbolic expression or declaration of societal values."[36]

Despite these issues, peremptory norms remain prominent in legal scholarship. This popularity of peremptory norms in an international legal system dominated by the positivist point of view is surprising if it belongs to natural law.[37] Aside from legal scholarship, some have noted increasing references to peremptory norms in domestic and international courts.[38] Perhaps this is what prompted the ILC to come up with the DCILCPN.

### *C. Recent developments*

As mentioned, the ILC issued the DCILCPN in 2022. This was intended to clarify many of the issues raised by scholars over the years. But the DCILCPN did more than clarify outstanding issues. It created new rules that affected other sources of international law. It also added new requirements in existing rules (e.g., reservations, interpretation of treaties). Thus, in the process of clarifying the issues, the DCILCPN created new questions. As it generated additional requirements and concepts, some confusion may arise.

The DCILCPN is intended to provide "guidance to all those who may be called upon to determine the existence of peremptory norms of general international law (*jus cogens*) and their legal consequences."[39] These may be

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[33] Dubois, *supra* note 25 *at* 136.
[34] Zdravkovic, *supra* note 1 at 158.
[35] Shelton, *supra* note 8 at 24.
[36] Shelton *supra* note 8 at 35.
[37] *See for example* Dubois, *supra* note 25 at 133.
[38] Hélène Ruiz Fabri, *Enhancing the Rhetoric of Jus Cogens*, 23, 4, European Journal of International Law, 1049, (2012). 9; UN General Assembly, *Report of the International Law Commission,* 77th Sess. at 17 par. 2, U.N. Doc. A/77/10, (Aug. 12, 2022).
[39] A/77/10, *supra note 38* at 17 par. *2.*

judges, legislators and policymakers. Thus, it is important for those with these roles in government to be aware of the DCILCPN.

The DCILCPN is "concerned primarily with the method for establishing whether a norm of general international law has the added quality of having a peremptory character."[40] This addresses one of the main issues raised against the concept, which is the criteria or methodology of determining whether a norm is peremptory or not.

Apart from identification, the DCILCPN deals with the legal consequences of peremptory norms. But the conclusions only "address general legal consequences of peremptory norms."[41] The ILC recognizes that individual peremptory norms "may have specific consequences that are distinct from the general consequences flowing from all peremptory norms"[42] but the conclusions are not concerned with them. Furthermore, "[t]he draft conclusions are significant because they draw upon, clarify and at times expand upon the previous work of the [ILC]."[43]

Thus, a thorough analysis of the provisions of the DCILCPN is very important.

## II. Identification of Peremptory Norms

### *A. Terminologies*

As explained by the Commentary, *jus cogens*, *peremptory norms* and *peremptory norms of general international law* "are sometimes used interchangeably in State practice, international jurisprudence and scholarly writings."[44] In this paper, the preferred term is "peremptory norm" and is deemed equivalent to the term "jus cogens norm."[45]

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[40] A/77/10, *supra* note 38 at 17 par. 4.
[41] A/77/10, *supra* note 38 at 17 par. 6.
[42] *Id.*
[43] *See* A/77/10*, supra* note 38 at 60 conclusion 15.
[44] A/77/10, *supra* note 38 at 17-18 par. 7.
[45] However, the more popular term in legals scholarship is "jus cogens" hence that term is retained when quoting from the works of scholars.

*1. Definition of a peremptory norm of general international law (jus cogens)*

Conclusion 3 provides:

> A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law (*jus cogens*) having the same character.

Clearly, this definition is founded on Article 53 of the VCLT albeit "with modifications to fit the context of the draft conclusions."[46] This underscores the fact that this definition "has come to be accepted as a general definition of peremptory norms of general international law (*jus cogens*) that applies beyond the law of treaties."[47] It is "the most widely accepted definition in the practice of States and in the decisions of international courts and tribunals [and] commonly used in scholarly writings."[48]

Based on this definition, a peremptory norm consists of two main elements: [49]

- a norm of general international law; and
- "accepted and recognized by the international community of States as a whole as one from which no derogation is permitted, and which can only be modified by a norm having the same character."

Similarly, these constitute "the criteria for the identification of peremptory norms".[50]

## III. Domestic, bilateral regional *jus cogens*

[46] A/77/10, *supra* note 38 at 27 par. 1.
[47] *Id.*
[48] A/77/10, *supra* note 38 at 27 par. 2.
[49] A/77/10, *supra* note 38 at 27, par.3.
[50] *Id.*

The Commentary explains that *jus cogens* norms in domestic legal systems, do not form part of the coverage of the draft conclusions neither do norms of a purely bilateral or regional character.[51] This supports the justificatory theory for peremptory norms based on general principles of law. It also suggests that not only are there national peremptory norms but also, regional or bilateral norms.

## IV. Norm

The Commentary further explained that the term *norm* is used because it is understood to have a broader meaning than "rules" and "principles" although they can be used interchangeably.[52] Furthermore, *norm* was chosen in order to be consistent with the VCLT.[53]

### *A. Nature of peremptory norms of general international law*

Conclusion 2 describes the nature of peremptory norms using *three essential characteristics*: [54]

> Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community. They are universally applicable and are hierarchically superior to other rules of international law. [55]

#### *1. Three essential characteristics*

##### a. Reflect and Protect Fundamental Values

The first of these characteristics is that peremptory norms "reflect and protect fundamental values of the international community."[56] The terms

[51] A/77/10, *supra* note 38 at 18 par. 8.
[52] A/77/10, *supra* note 38 at 18 par. 9.
[53] *Id.*
[54] A/77/10, *supra* note 38 at 18 par. 1.
[55] A/77/10, *supra* note 38 at 18.
[56] A/77/10, *supra* note 38, 18 par. 2.

*reflect and protect* "underline the dual function that fundamental values play in relation to peremptory norms of general international law."[57]

The term *reflect* indicates that fundamental values "provide, in part, a rationale for the peremptory status of the norm of general international law at issue" and "seeks to establish the idea that the norm in question gives effect to particular values."[58] This suggests that the peremptory norm is not the value itself but is based on or is a consequence of a fundamental value. Perhaps what is meant is similar to the relationship between good faith and *pacta sunt servanda*. The former being the principle that the latter is based on.

The term *protect* communicates that a peremptory norm "serves to protect the value(s) in question."[59] This further clarifies that the value is not the norm. How peremptory norms protect values was not explained by the Commentary but examples were provided.

In *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion,*[60] the ICJ "linked the prohibition of genocide [a peremptory norm] to fundamental values."[61] Particularly, it noted:

> that the prohibition was inspired by the commitment 'to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations.[62]

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[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] International Court of Justice, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion 1951 I.C.J. 15, 23 (May 28).
[61] A/77/10, *supra* note 38 at 19 par. 3.
[62] *Id.*

The court's further reference to the *conscience of mankind* and *moral law* is said to "evoke fundamental values shared by the international community."[63]

In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the Court suggested a relationship between peremptory norms and "obligations which protect essential humanitarian values."[64]

The Commentary further notes that "[t]he connection between values and the peremptory character of norms has also been made by other international courts and tribunals."[65] This link "can also be found in the practice of States,[66] in the decisions of national courts,[67] and in scholarly writings."[68]

That peremptory norms reflect and protect fundamental values imply that the latter determine the existence of peremptory norms. In other words, in order for a peremptory norm to exist, there must be a fundamental value involved. What is not clear from the Commentary is what exactly are fundamental values and how they are determined. While the conclusion explained the nature of peremptory norms, unfortunately it created a new term to be defined and explained.

The only guidance given by the Commentary is that "these values are not static and may evolve over time" and are "generally humanitarian in nature" but may include "other values, as long as they are shared by the international community."[69]

*Shelton* also points out that "only when there is a minimum degree of community feeling does it elevate certain values as necessary, with primacy over others."[70] Thus, peremptory norm start "to appear in positive law as

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[63] A/77/10, *supra* note 38 at 19 par. 4.
[64] *Id.*
[65] *Id.*
[66] A/77/10, *supra* note 38 at 20 par. 5.
[67] *Id.*
[68] A/77/10, *supra* note 38 at 21 par. 6.
[69] A/77/10, *supra* note 38 at 22 par. 7.
[70] Shelton, *supra* note 8 at 29.

international society develops from relatively unorganized into an increasingly organized one with common interests and values."[71] The question therefore arises whether the international community has reached that point.

Noticeably, conclusion 2 also says that these fundamental values are "of" the *international community*, suggesting that these emanate from this group. The reference to "international community" is significant because other draft conclusions refer to the *international community of States as a whole*.[72] The latter "is used in respect of the criteria for peremptory norms ... because in so far as the application of the criteria is concerned, it is the views of States that matter."[73] In contrast, the term *international community* "includes other actors beyond States, which may play an important role in the emergence of fundamental values."[74] Thus, while the opinions of non-state actors do not matter with respect to identifying peremptory norms, they do matter with respect to identifying fundamental values.

b. Universally applicable

That peremptory norms are universally applicable "means that they are binding on all subjects of international law that they address, including States and international organizations."[75] Thus, this characteristic deals with the coverage of peremptory norms. Individuals and other possible subjects of international law are not mentioned by the Commentary. But since the universal applicability of peremptory norms "flows from non-derogability"[76] peremptory norms should be binding on all subjects of international law. It makes no sense for peremptory norms to bind only states and international organizations and not individuals and other subjects of international law.

The universal applicability of peremptory norms, as defined by the Commentary, has two implications.[77] The first implication is that "the

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[71] *Id.*
[72] A/77/10, *supra* note 38 at 23 par. 9.
[73] *Id.*
[74] *Id.*
[75] A/77/10, *supra* note 38 at 23 par. 10.
[76] *Id.*
[77] A/77/10, *supra* note 38 at 24 par. 13.

persistent objector rule or doctrine is not applicable to peremptory norms".[78] The second implication is that peremptory norms "do not apply on a regional or bilateral basis."[79] Thus, while customary international law can be regional or local, a peremptory norm cannot have this character. This further implies that regional customs cannot ripen into peremptory norms.

c. Hierarchically superior

The third characteristic is that "peremptory norms ... are hierarchically superior to other norms of international law."[80] This means that other norms have no effect if it is in conflict with a peremptory norm. The Commentary however does not appear to adopt a theory justifying why peremptory norms are hierarchically superior.

*2. Characteristics not criteria*

The Commentary clarifies that these characteristics "are themselves not criteria for the identification of peremptory norms"[81] and are not "additional criteria for the identification of peremptory norms."[82] Thus, "[t]o identify a norm as a peremptory norm ...it is not necessary to advance evidence of the characteristics in draft conclusion 2."[83] However, "[t]hough they themselves are not criteria, the existence of the characteristics contained in draft conclusion 2 may provide context in the assessment of evidence for the identification of peremptory norms."[84] Thus:

> [E]vidence that a norm reflects and protects fundamental values of the international community, is hierarchically superior to other norms of international law and is universally applicable, may serve to support or confirm the peremptory status of a norm.[85]

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[78] *Id.*
[79] *Id.*
[80] A/77/10, *supra* note 38 at 24 par. 14.
[81] A/77/10, *supra* note 38 at 26 par. 18.
[82] *Id.*
[83] *Id.*
[84] A/77/10, *supra* note 38 at 27 par. 19.
[85] *Id.*

However, the Commentary explains that "[t]his supplementary evidence cannot, however, in and of itself, constitute the basis for identifying peremptory norms."[86]

There is however a problem created by this clarification that the characteristics are not criteria. Suppose a norm exists which has all three characteristics. But the implication of the Commentary's clarification is that this fact does not mean it is a peremptory norm if the criteria are not met. If such a norm exists, and it is not necessarily a peremptory norm as the Commentary clarifies, what type of norm is it? It would be better if the characteristics are simply considered the consequence of norms having a peremptory character instead of insisting that they do not necessarily mean that the norms are peremptory.

### *B. Criteria for Identification*

Conclusion 4 provides for the criteria for identifying a peremptory norm. It says:

> To identify a peremptory norm of general international law (*jus cogens*), it is necessary to establish that the norm in question meets the following criteria:
>
> 1. it is a norm of general international law; and
> 2. it is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The Commentary explains that the phrase *it is necessary to establish* "indicates that the criteria must be shown to be present and that they should not be assumed to exist."[87] Moreover:

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[86] *Id.*

[87] A/77/10, *supra* note 38 at 29 par. 2.

> It is thus not sufficient to point to the importance or the role of a norm in order to show the peremptory character of that norm. Rather, "it is necessary to establish" the existence of the criteria enumerated in the draft conclusion.[88]

Thus pointing out that the norm is important to protect fundamental values is not sufficient. Furthermore, both criteria must be present.

*1. First Criterion: A Norm of General International Law*

a. The meaning of "general"

The term *general* in "refers to the scope of applicability of the norm in question."[89] Another way to define "general" is to distinguish it from "specialist systems" such as human rights law and environmental law. But *Zdravkovic* points out that "this kind of distinction might preclude some rules …from acquiring the status of *jus cogens*."[90] If peremptory norms can only emanate from general international law, then rules from such specialist systems will not obtain such a status. Thus, defining general international law as a scope of applicability is appropriate because this will not "deprive any branch of international law the chance to acquire the *jus cogens* status."[91] The Commentary elaborates that *norms of general international law* are "those norms of international law that ...must have equal force for all members of the international community."[92]

If *general* is defined in this way then it is identical with the characteristic that peremptory norms must be universally applicable. If both terms refer to the same concept then there is an overlap between characteristics and criteria and the insistence of the Commentary that the characteristics are not criteria becomes meaningless.

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[88] *Id.*
[89] A/77/10, *supra* note 38 at 31 par. 2.
[90] Zdranovic, *supra* note 1 at 145.
[91] *Id.*
[92] A/77/10, *supra* note 38 at 31 par. 2.

The criterion that the norm in question must be a norm of general international law is further explained in Conclusion 5 which provides that the "bases of peremptory norms of general international law" are, as follows:

1. Customary international law is the most common basis for peremptory norms of general international law (*jus cogens*).
2. Treaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*).

If the term *general* refers to scope of applicability then there are problems with the two bases mentioned in Conclusion 5. First, while customary international law generally is applicable to all states, there are exceptions. One exception are regional or local customs. International law recognizes the possibility of customs arising between states and not all states as a whole. Second, while there may be treaties that are binding on most states of the world, a treaty by definition is binding only on state parties and are therefore not applicable to all.

The Commentary admits that "[t]reaties, in most cases, are not 'general international law' since they do not usually have a general scope of application with 'equal force for all members of the international community.'"[93] But it also explains that, "[t]he phrase "treaty provisions" is used instead of 'treaties' to indicate that what is at issue are the one or more norms contained in the treaty rather than the treaty itself."[94] But this does not solve the problem because every individual treaty provision is also only binding on parties.[95]

Perhaps it would be better to understand *general* not as scope of applicability but requirement that a peremptory norm emanates from the three formal sources of law.[96]

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[93] A/77/10, *supra* note 38 at 33 par. 8.
[94] *Id.*
[95] The inclusion of treaty provisions as a source of peremptory norms suggests that these treaty provisions must first become custom before they can become peremptory.
[96] Technically only two (i.e., custom and general principle of law), if a treaty provision is required to become customary before it can become peremptory.

b. Bases as Sources

The title of Conclusion 5 is "Bases for peremptory norms of general international law (*jus cogens*)."

The Commentary explains that the terms *basis* in paragraph 1 and *bases* in paragraph 2 of draft conclusion 5 "are to be understood flexibly and broadly" as "[t]hey are meant to capture the range of ways that various sources of international law may give rise to the emergence of a peremptory norm."[97] It further adds that "[t]he Commission decided not to use the words 'source' or 'sources' as these might create confusion with the notion of sources of international law in Article 38, paragraph 1, of the Statute of the International Court of Justice."[98] This implies however that the words *bases* and *basis* should be understood as being the equivalent of "source" and "sources." This also means that peremptory norms need to begin either as customary rules or treaty provisions or general principles of law before becoming peremptory norms. This further bolsters the argument that "general" does not mean "scope of applicability" but based on the formal sources of law.

Conclusion 5 paragraph 1 identifies customary international law, as "the most common basis for peremptory norms."[99] The Commentary explains that "[t]his is because customary international law is the most obvious manifestation of general international law."[100] But as pointed earlier not all customs are general in scope. However, "international tribunals often use 'general international law' and 'customary international law' as synonyms."[101]

Conclusion 5 paragraph 2 provides that treaty provisions and general principles of law may also serve as bases for peremptory norms. The Commentary explains that "[t]he words 'may also' are meant to indicate that while there is little practice to support the emergence of peremptory norms

[97] A/77/10, *supra* note 38 at 33 par. 5.
[98] *Id.*
[99] A/77/10, *supra* note 38 at 31 par. 4.
[100] *Id.*
[101] Zdravkovic, *supra* note 1 at 146.

from these sources, the possibility of these other sources of international law forming the basis of peremptory norms ... cannot be *a priori* excluded."[102] As mentioned earlier, some scholars consider general principles of law as justification for the existence of peremptory norms in international law. If they are correct, then a general principle of law serving as the basis of peremptory norms is not so far-fetched.

*2. Second criterion: Accepted and Recognized*

The second criterion requires that "the norm must be accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted, and which can be modified only by a norm having the same character."[103] *Zdravkovic* argues that these criteria are actually steps such that "only after it has been determined that a norm belongs to the general international law"[104] can this next step of determining acceptance and recognition proceed.

The Commentary clarifies that "this second criterion, though composed of various elements, is a single composite criterion"[105] and further explains that:

> the non-derogation and modification elements are not themselves criteria but rather, form an integral part of the "acceptance and recognition" criterion. It is in this sense that the second criterion, though composed of several elements, constitutes a single criterion.[106]

It may be argued that it is sufficient that it is accepted and recognized that the norm is non-derogable regardless of whether in fact it has been non-derogable in practice.

a. A distinct acceptance and recognition

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[102] A/77/10, *supra* note 38 at 33 par. 7.
[103] *Id.* at 29, par. 3.
[104] Zdravkovic, *supra* note 1 at 149.
[105] A/77/10, *supra* note 38 at 29 par. 3.
[106] A/77/10 *supra* note 38 at 30 par 6.

The meaning of "acceptance and recognition" is further explained in Conclusion 6 which states:

> 1. The criterion of acceptance and recognition referred to in draft conclusion 4, subparagraph (*b*), is distinct from acceptance and recognition as a norm of general international law.
> 2. To identify a norm as a peremptory norm of general international law (*jus cogens*), there must be evidence that such a norm is accepted and recognized by the international community of States as a whole as one from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character.

The Commentary explains that *acceptance and recognition* "denote[s] the range of ways that States may show their view that a norm has peremptory character."[107]

The acceptance and recognition in Conclusion 6 is distinct from *acceptance as law* (*opinio juris*),[108] as an element for the identification of customary international law, or *recognition*,[109] as an element for the identification of general principles of law.[110] Acceptance and recognition in Conclusion 6 is "qualitatively different"[111] because it "concerns the question of whether the international community of States as a whole recognizes a rule of general international law as having peremptory character."[112] This suggests that states must specifically indicate their acceptance and recognition that the norm is peremptory in character and not simply recognize its binding effect.

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[107] A/77/10 *supra* note 38 at 37 par. 4.
[108] A/77/10 *supra* note 38 at 36 par. 2. The Commentary states: "Acceptance as law (*opinio juris*) addresses the question of whether States accept a practice as a rule of law and is a constitutive element of customary international law".
[109] *Id.* The Commentary states: "Recognition as a general principle of law addresses the question of whether a principle has been recognized as provided for in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice"
[110] *Id.*
[111] *Id.*
[112] *Id.*

The determination of acceptance and recognition "involves the weighing and assessment of evidence."[113] Thus, merely making a claim of acceptance and recognition is not sufficient  There must be evidence as described in Conclusions 8 and 9.[114]

As to the actual practice of acceptance and recognition, *Shelton* notes that "few if any examples can be found where states have expressly indicated their intent to identify or create a peremptory norm; identification is thus by implication."[115]  Only time will tell if the DCILCPN would encourage states to be more proactive in accepting and recognizing peremptory norms.

b. International Community of States

Conclusion 7 paragraph 1 states:

1. It is the acceptance and recognition by the international community of States as a whole that is relevant for the identification of peremptory norms of general international law (*jus cogens*).

Thus, the acceptance and recognition must be made by the international community of States as a whole.  The acceptance and recognition by other subjects of international law would not be relevant.[116]

The Commentary explains that "the words 'as a whole' are meant to indicate that it was not necessary for the peremptory nature of the norm in question 'to be accepted and recognized ... by all States' and that it would be sufficient if 'a very large majority did so.'"[117] As Conclusion 7 paragraph 2 states, "[a]cceptance and recognition by a very large and representative majority of States is required and not necessarily "by all States."" Thus, what is required is not a simple majority but a very large majority.[118]  The

[113] A/77/10 *supra* note 38 at 37 par 5.
[114] *Id.*
[115] Shelton, *supra* note 8 at 34.
[116] A/77/10, *supra* note 38 at 38 par. 3.
[117] A/77/10, *supra* note 38 at 40 par. 6.
[118] A/77/10, *supra* note 38 at 40 par. 7.

Commentary further explains that determining a very large majority is not "a mechanical exercise in which the number of States is to be counted. Rather than a purely quantitative assessment in which a majority was determined, the assessment had to be qualitative"[119] as "captured by the word 'representative' to qualify 'majority of States.'"[120] This means "the acceptance and recognition be across regions, legal systems and cultures."[121] The Commentary further explains that "[t]he combination of the phrases 'as a whole' and 'community of States' serves to emphasize that it is States as a collective or community that must accept and recognize the non-derogability of a norm."[122] *Zdrakovic* proposes that "at least two-thirds of all members of the international community, including the most powerful states in economic and military terms, should accept the norm in question."[123]

c. Evidence of acceptance and recognition

Conclusion 8 provides for the forms of evidence for acceptance and recognition. It states:

> 1. Evidence of acceptance and recognition that a norm of general international law is a peremptory norm (*jus cogens*) may take a wide range of forms.
> 2. Forms of evidence include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; constitutional provisions; legislative and administrative acts; decisions of national courts; treaty provisions; resolutions adopted by an international organization or at an intergovernmental conference; and other conduct of States.

[119] *Id.*
[120] A/77/10, *supra* note 38 at 40 par. 8.
[121] *Id.*
[122] A/77/10, *supra* note 38 at 40 par. 6.
[123] Zdrakovic, *supra* note 1 at 150.

The list of possible forms listed on paragraph 2 is not exclusive and "any material capable of expressing or reflecting the views of States would be relevant as evidence of acceptance and recognition."[124]

The Commentary clarifies that the forms identified are "not, individually, conclusive of the peremptory character of a norm [because] [t]he materials have to be weighed and assessed together, in their context, in order to determine whether they evince acceptance and recognition of the international community of States as a whole." Thus, a single source of evidence may not be enough. Multiple sources, taken collectively may be necessary.

It is noticeable that the kinds of evidence listed in paragraph 2 "are similar to forms of evidence of acceptance as law"[125] or the forms of evidence for *opinio juris.* This is "because the forms of evidence identified are those from which, as a general matter, the positions, opinions and views of States can be gleaned."[126] Thus, the same material used to establish *opinio juris* may be used to establish acceptance and recognition for purposes of establishing a peremptory norm.

While the use of similar evidence is understandable, one negative consequence is that the problems related to the issue of determining *opnio juris* is carried over into the identification of peremptory norms. The issues surrounding the concept of *opinio* juris are well documented in legal scholarship. It is very possible that these same issues will now hound acceptance and recognition of peremptory norms.

Furthermore, courts have the tendency to use the same evidence for both *opinio juris* and state practice resulting in double counting. Because of Conclusion 8 paragraph 2, this troubling tendency will be aggravated by the fact that the same evidence used to prove *opinio juris* and state practice will also be used to prove acceptance and recognition.

### *C. Subsidiary means for determining peremptory norms*

[124] A/77/10, *supra* note 38 at 41 par. 2.
[125] A/77/10 *supra* note 38 at 38 par 4.
[126] *Id.*

*1. Courts and tribunals*

Conclusion 9 paragraph 1 states:

> 1. Decisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for determining the peremptory character of norms of general international law. Regard may also be had, as appropriate, to decisions of national courts.

The Commentary explains that "the word subsidiary in this context is not meant to diminish the importance of such materials, but is rather aimed at expressing the idea that those materials facilitate the identification of 'acceptance and recognition' but do not, in themselves, constitute evidence of such acceptance and recognition."[127] Thus, this provision is similar to Article 38 (1) (d) of the ICJ Statute.

Unlike Article 38, the second sentence of the paragraph makes it clear that even decisions of national courts may be a subsidiary means. But the "use the phrases 'may also' and 'as appropriate'... indicate that "although decisions of national courts may serve as subsidiary means for the determination of peremptory norms ... they should be resorted to with caution. In particular, the weight to be accorded to such national decisions will be dependent on the reasoning applied in the particular decision."[128] Thus, decisions of international courts and tribunals rank higher than decisions of domestic courts.

But it must be remembered that under Conclusion 8, decisions of national courts may also be evidence of acceptance and recognition. Thus, decisions of national courts can be either a subsidiary means for determining the peremptory character of norms or evidence of acceptance and recognition. The Commentary attempts to clarify this issue by stating that:

> When relied upon under draft conclusion 8, decisions of national courts provide evidence of the acceptance and

[127] A/77/10, *supra* note 38 at 43 par. 1.
[128] A/77/10, *supra* note 38 at 45 par. 5.

> recognition of the State in question. In that context, the relevance of the decision of the court concerns whether it evidences that State's position and not its broader assessment of the recognition and acceptance of the norm in question by the international community of States as a whole as peremptory in nature.[129]

Thus, courts are free to use national court decisions for either purpose.

*2. Expert bodies and most highly qualified publicists*

Conclusion 9 paragraph 2 states:

> The works of expert bodies established by States or international organizations and the teachings of the most highly qualified publicists of the various nations may also serve as subsidiary means for determining the peremptory character of norms of general international law.

The use of the phrase "may also" in paragraph 2 as opposed to "are" in paragraph 1 indicate that the works of expert bodies and teachings of the most highly qualified publicists are given "less weight ... in comparison to judicial decisions."[130] This is a departure from Article 38 (1) (d) of the ICJ statute where no such hierarchy is provided. It would be interesting to see whether this hierarchical approach would later on affect ICJ interpretation of the application of Article 38 (1) (d).

The Commentary explains that the relevance of these works and teachings "depends on various factors" such as "the extent to which the views expressed are accepted by States and the extent to which such views are corroborated either by other forms of evidence listed in draft conclusion 8 or decisions of international courts and tribunals."[131] Thus, the rules propounded by these works and teachings cannot stand on their own despite their number, unanimity and consistency. Works and teachings must be corroborated by the acceptance of states and the decisions of courts and

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[129] A/77/10, *supra* note 38 at 45 par. 6.
[130] A/77/10, *supra* note 38 at 45 & 46 par. 7.
[131] *Id.*

tribunals. This seems to be an unfortunate limitation as new rules would require state practice before works and teachings become relevant. It's also not clear whether the corroboration must be made by a majority of states. If such is the case then works and teachings become redundant and meaningless. It is submitted that perhaps works and teachings should be given weight when evidence of acceptance by the state is limited due to the nature of the norm in question. Peremptory norms in certain situations may result in restricting state sovereignty. In such cases it may be expected that states may be less vocal in their acceptance of such norms.

With respect to expert bodies "the phrase 'established by States or international organizations' indicates that the paragraph refers to organs established by international organizations and subsidiary bodies of such organizations, such as the International Law Commission and expert treaty bodies."[132] The Commentary further explained that "[t]he qualification was necessary to emphasize that the expert body in question had to have an intergovernmental mandate and had to be created by States."[133] Thus, the voice of private expert bodies no matter how influential will not be heard. However, their individual members might arguably be considered as the most *highly qualified publicists.*

*3. Other subsidiary means*

The Commentary explains that "[i]t is worth pointing out that the subsidiary means identified in paragraphs 1 and 2 of draft conclusion 9 are not exhaustive" but are merely "the most common subsidiary means."[134] This opens the door to other forms of subsidiary means which are not available under Article 38 (1) (d).

## V. Legal Consequences of Peremptory Norms

Peremptory norms "are hierarchically superior to other norms of international law and therefore override such norms in the case of

[132] A/77/10, *supra* note 38 at 46 par. 8.
[133] *Id.*
[134] A/77/10, *supra* note 38 at 47 par. 12.

conflict."[135] This hierarchical superiority is the primary reason why peremptory norms must be identified and is the legal justification for its invalidating effect on other sources of obligations.

### *A. Treaties Conflicting with Peremptory Norms*

The invalidity of treaties that conflict with a peremptory norm is the legal effect that is most closely associated with it.[136]

According to *Shelton*, "the invalidity of a treaty due to conflict with a jus cogens norm appears to have arisen only once since the adoption of the VCLT."[137] This was in the *Aloeboetoe* case at the Inter-American Court of Human Rights. In this case the Court ruled that an entire treaty would be void if it violated a peremptory norm.[138]

The Commentary explains that "[t]he fact that treaties have rarely been invalidated on account of a conflict with peremptory norms is, however, not because the rule in article 53 is not accepted by States, but simply because States do not generally enter into treaties that conflict with peremptory norms."[139] Therefore, the fact that no treaty has been invalidated on the basis of being in conflict with a peremptory norm is taken as proof that the rule is valid. The other possible explanation is that until the DCILCPN there was lack of clarity on what rules are to be considered as peremptory norms.

#### *1. A new treaty and an existing norm*

##### a. Void in its entirety ab initio

Conclusion 10 paragraph 1 states:

> 1. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (*jus cogens*). The provisions of such a treaty have no legal force.

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[135] A/77/10, *supra* note 38 at 56 par. 3.
[136] A/77/10, *supra* note 38 at 48 par. 1.
[137] Shelton*, supra* note 8 at 36.
[138] *Id.*
[139] A/77/10, *supra* note 38 at 48 par. 1.

Thus, a treaty which from the very beginning conflicts with an existing peremptory norm is deemed to have never existed. It does not matter if states have validly given their consent and that it complies with the requirements of entry into force. The entire treaty is void *ab initio*.

Conclusion 11 paragraph 1 adds that such a treaty "is void in whole, and no separation of the provisions of the treaty is permitted."

If the norm already exists prior to the treaty, the entire treaty is void and not just the conflicting treaty provisions. Thus, the entire treaty is rendered void even if only one of its provisions are in conflict with a peremptory norm. This reasoning is based on Conclusion 11 paragraph 2 which deals with a treaty in conflict with a new peremptory norm. Under paragraph 2 (a) "the provisions that are in conflict with a peremptory norm ... are separable from the remainder of the treaty with regard to their application." As paragraph 1 states in the case of conflict with a pre-existing peremptory norm "no separation of the provisions of the treaty is permitted."

b. Legal obligations of parties

Conclusion 12 paragraph 1 states:

1. Parties to a treaty which is void as a result of being in conflict with a peremptory norm of general international law (*jus cogens*) at the time of the treaty's conclusion have a legal obligation to:
    a. eliminate as far as possible the consequences of any act performed in reliance on any provision of the treaty which conflicts with a peremptory norm of general international law (*jus cogens*); and
    b. bring their mutual relations into conformity with the peremptory norm of general international law (*jus cogens*).

Conclusion 12 paragraph is identical to Article 71 paragraph 1 of the VCLT. Considering that the same rules are provided for by the VCLT, the value of Conclusion 12 paragraph 1 would be to make the rules binding on non-parties to the VCLT or to treaties not governed by the VCLT. However, if Article 71 has crystallized into custom after its adoption in Vienna in 1969[140] then Conclusion 12 paragraph 1 merely confirms the universal nature of the rules.

These rules recognize that particular consequences may have been produced by "acts ...performed in good faith in reliance on the void treaty."[141] Under subparagraph (a) the obligation is to "eliminate as far as possible" such consequences. It is an obligation of conduct, not of result because best efforts are sufficient.[142] It must be noted that only the consequences of acts performed *in reliance* on any part of the treaty, are to be eliminated.[143] Noticeably, these obligations only pertain to acts in relation to a treaty provision in conflict with an existing peremptory norm. Acts taken by parties in relation provisions of the treaty not in conflict with a peremptory norm are not covered by this rule.

Subparagraphs (a) and (b) appear to overlap. But one way to distinguish the two would be to consider that subparagraph (a) corrects past conduct, while subparagraph (b) corrects current and future conduct.

*2. An existing treaty and a new norm*

Conclusion 10 paragraph 2 states:

> 2. Subject to paragraph 2 of draft conclusion 11, if a new peremptory norm of general international law (*jus cogens*) emerges, any existing treaty which is in conflict with that norm becomes void and terminates. The parties to such a treaty are released from any obligation further to perform the treaty.

[140] Villiger, *supra* note 11 at 882.
[141] A/77/10, *supra* note 38 at 53 par. 3
[142] A/77/10, *supra* note 38 at 54 par. 4.
[143] *Id.*

The situation covered by this rule is that case where a new peremptory norm emerges and becomes in conflict with an existing treaty and covers the same rule provided by Article 64 of the VCLT.[144]

Unlike the earlier case of a pre-existing norm, the treaty, in this case is not void *ab initio* "but only *becomes* void at the emergence of the peremptory norm." Specifically, "[t]he treaty becomes void from the moment the norm in question is recognized and accepted as one from which no derogation is permitted."[145]

Because this rule has repercussions on parties being freed from complying with the treaty, the exact point in time a treaty becomes void is crucial. The treaty does not automatically become void upon the emergence of the peremptory norm. Both the VCLT and the DCILCPN provides for a procedure for termination under this ground.

a. Procedure

A party to a treaty cannot unilaterally declare that a treaty is contrary to a peremptory norm and excuse itself from the duty to perform under the treaty. Conclusion 21 provides for the proper procedure.

b. Separability

The clause, "[s]ubject to paragraph 2 of draft conclusion 11" means that "paragraph 2 of draft conclusion 10 should be read together with draft conclusion 11 which makes provision for separability in certain cases."[146]

Conclusion 11 paragraph 2 states:

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[144] "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."
[145] A/77/10, *supra* note 38 at 50 par. 5.
[146] A/77/10, *supra* note 38 at 50 par. 6.

> 2. A treaty which is in conflict with a new peremptory norm of general international law (*jus cogens*) becomes void and terminates in whole, unless:
>
> a. the provisions that are in conflict with a peremptory norm of general international law (*jus cogens*) are separable from the remainder of the treaty with regard to their application;
> b. it appears from the treaty or is otherwise established that acceptance of the said provisions was not an essential basis of the consent of the parties to be bound by the treaty as a whole; and
> c. continued performance of the remainder of the treaty would not be unjust.

Conclusion 11 paragraph 2 is based on Article 44 paragraph 3 of the VCLT. The general rule is that the entire treaty becomes void if it conflicts with a peremptory norm even in cases where the peremptory norm emerges subsequent to the conclusion of the treaty.[147] The exception is when all three conditions in Conclusion 11 paragraph 2 are fulfilled.

c. Legal effect

Conclusion 12 paragraph 2[148] states:

> 2. The termination of a treaty on account of the emergence of a new peremptory norm of general international law (*jus cogens*) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to the termination of the treaty, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law (*jus cogens*).

[147] A/77/10, *supra* note 38 at 51 par. 4.
[148] A/77/10, *supra* note 38 at 52 par. 5. "The formulation in paragraph 2 of draft conclusion 12 follows closely the text of article 71, paragraph 2, of the 1969 Vienna Convention."

The text of Conclusion 12 paragraph 2 follows the text of Article 71 paragraph 2 (b) of the VCLT. Because the treaty only becomes invalid after the emergence of the peremptory norm, rights, obligations and legal situations created pursuant to the treaty prior to the emergence of the norm remain valid.[149] But such rights, obligations or legal situations subsist "only to the extent that their continued existence is not itself a violation of a peremptory norm."[150] So rights, obligations and legal situations in conflict with the new peremptory norm are terminated even if they existed prior to the norm. In this sense it can be argued that the emergence of a new peremptory norm can have retroactive effect.

### *B. Reservations and Peremptory Norms*

Conclusion 13 provides:

1. A reservation to a treaty provision that reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply as such.
2. A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law (*jus cogens*).

The first paragraph applies in situations where the "a treaty provision reflects a peremptory norm." It specifies that a reservation to that provision in no way affects the binding nature of the norm. Thus, "while the reservation may well affect the legal effect of the treaty provision in respect of the reserving State, the norm, as a peremptory norm ...will not be affected and will continue to apply."[151] It also appears that it does not matter whether the norm emerges earlier or later than the treaty provision. However, it may be argued that a reservation to a treaty provision which reflects an existing peremptory norm should be void. This is because a reservation is a right granted under a treaty and the VCLT. As a treaty-based right it terminates or is *void ab initio* if it is in conflict with a peremptory norm.

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[149] *Id.*
[150] *Id.*
[151] A/77/10, *supra* note 38 at 54 par. 2.

The second paragraph states that "[a] reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm." This can be considered an additional rule on the validity of reservations. It does not seem to require that the treaty provision subject to the reservation be reflective of a peremptory norm. The reservation is invalid if the legal effect of a reservation would be contrary to a peremptory norm.

### *C. Customary international law conflicting with peremptory norms*

Similar to treaties, peremptory norms "prevail over conflicting rules of customary international law."[152] This is significant.

#### *1. A new custom and an existing norm*

Conclusion 14 paragraph 1 states:

> 1. A rule of customary international law does not come into existence if it would conflict with an existing peremptory norm of general international law (*jus cogens*). This is without prejudice to the possible modification of a peremptory norm of general international law (*jus cogens*) by a subsequent norm of general international law having the same character.

This means that even if the twin elements of state practice and *opinio juris* are met, a custom will still not arise if it conflicts with a pre-existing peremptory norm. In effect, this rule creates an additional requirement for the establishment of custom.

However, the same paragraph states that this rule is without prejudice to the modification of the pre-existing peremptory norm by a custom which is also a peremptory norm. It is not clear how this process can take place. Before a norm can obtain peremptory character, it must be a norm of general international law which means it must take the form of a treaty provision,

[152] A/77/10, *supra* note 38 at 56 par. 4.

custom or general principle of law. But if a new custom in conflict with a peremptory norm cannot even exist, there can never be a subsequent peremptory norm that originated as a custom.

*2. An existing custom and a new norm*

Conclusion 14 paragraph 2 states:

> 2. A rule of customary international law not of a peremptory character ceases to exist if and to the extent that it conflicts with a new peremptory norm of general international law (*jus cogens*).

A custom that existed prior to a peremptory norm simply ceases to exist if it conflicts with the latter. It is also possible that the custom ceases to exist only "to the extent that it conflicts with a peremptory norm." This implies that there is a "part" of the custom that does conflict with the peremptory norm. This is difficult to imagine considering that most customs are simple rules and do not have "parts" like treaties.

Perhaps an alternative interpretation would be to consider different "applications" and not parts. By nature, customs are of a general nature and can apply in a variety of situations. Thus, this rule can apply in a situation where a pre-existing custom has a broader scope or application than a new peremptory norm. The custom would only cease to exist with respect to how the custom conflicts with the peremptory norm's narrower application.

*3. Persistent objector rule and a peremptory norm*

Conclusion 14 paragraph 3 states:

> 3. The persistent objector rule does not apply to peremptory norms of general international law (*jus cogens*).

The persistent objector rule states that "a rule of customary international law is not opposable to a State that has persistently objected to

that rule of customary international law while it was in the process of formation for as long as that State maintains its objection."[153]

The concept of a persistent objector only matters in the context of a custom. This means that paragraph 3 contemplates a situation where the peremptory norm began as a custom. If a state is a persistent objector to a custom, it is not obligated to comply with the custom. But the same state becomes bound if that custom becomes a peremptory norm.

This rule also means that "a peremptory norm .. can … emerge in the face of persistent objection of one or a few States."[154] This is possible because "because persistent objection to a rule of customary international law by a few States does not prevent the rule's emergence; rather, such objection merely renders that rule not opposable to the State or States concerned for so long as the objection is maintained."[155] However, the existence of several persistent objectors may affect the acceptance and recognition of a rule of general international law and prevent it from becoming a peremptory norm.[156] This is because the existence of peremptory norms requires the acceptance and recognition of a very large and representative majority of states. While the presence of several persistent objector, while not enough to prevent the establishment of custom, may be sufficient "preclude the norm from being recognized as a peremptory norm."[157]

### *D. Obligations created by unilateral acts and peremptory norms*

Conclusion 15 states:

> 1. A unilateral act of a State manifesting the intention to be bound by an obligation under international law that would be in conflict with a peremptory norm of general international law (*jus cogens*) does not create such an obligation.

[153] A/77/10, *supra* note 38 at 58 par. 9.
[154] A/77/10, *supra* note 38 at 59 par. 11.
[155] *Id.*
[156] A/77/10, *supra* note 38 at 59 par. 12.
[157] *Id.*

> 2. An obligation under international law created by a unilateral act of a State ceases to exist if and to the extent that it conflicts with a new peremptory norm of general international law (*jus cogens*).

In 2006, the ILC issued "Guiding Principles applicable to unilateral declarations of States."[158]

But the scope of Conclusion 15 is broader than these guidelines because the latter is limited to unilateral declaration while the former covers unilateral acts in general.

The rules in Conclusion 15 is similar to that of treaties and customs except that it uses broader phrases, such as "'does not create such an obligation' and 'ceases to exist' so as to capture more fully the broader context of the draft conclusion, which is addressing unilateral acts in a broader sense."[159]

### *E. Obligations created by resolutions, decisions or other acts of international organizations*

Conclusion 16 provides that:

> A resolution, decision or other act of an international organization that would otherwise have binding effect does not create obligations under international law if and to the extent that they conflict with a peremptory norm of general international law (*jus cogens*).

This rule only covers resolutions, decisions and other acts of international organizations which have binding effects. Such acts of international organizations would only be binding if the treaty creating such international organization provides for binding effect.

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[158] UN General Assembly, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*, with commentaries thereto 2006, 58th Sess, U.N. Doc. A/61/10, (Aug. 11, 2006).
[159] A/77/10, *supra* note 38 at 61 par. 2.

### *F. Peremptory norms and obligations erga omnes*

Conclusion 17 provides:

> 1. Peremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole (obligations *erga omnes*), in relation to which all States have a legal interest.
> 2. Any State is entitled to invoke the responsibility of another State for a breach of a peremptory norm of general international law (*jus cogens*), in accordance with the rules on the responsibility of States for internationally wrongful acts.

This rule states that every peremptory norm is an *erga omnes* obligation. Therefore, this conclusion settles the connection between peremptory norms and *erga omnes* obligation.

As a result of this status, any State is entitled to invoke the responsibility of another State for a breach of a peremptory norm. It is presumed that all states are injured by the breach of a peremptory norm. All states have a legal interest in peremptory norms. The phrase *legal interest* "encompass the protection of the legal norm as such, including rights and obligations."[160] Thus, all states have a legal interest in the *protection* of the rights covered,[161] *observance* of the obligation in question,[162] and the *prevention* of acts covered by *erga omnes* obligations.[163]

However, this rule does not mean that all *erga omnes* obligations are peremptory norms.

### *G. Peremptory norms and circumstances precluding wrongfulness*

Conclusion 18 provides:

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[160] A/77/10, *supra* note 38 at 67 par. 4.
[161] A/77/10, *supra* note 38 at 67 par. 5.
[162] *Id.*
[163] *Id.*

> No circumstance precluding wrongfulness under the rules on the responsibility of States for internationally wrongful acts may be invoked with regard to any act of a State that is not in conformity with an obligation arising under a peremptory norm of general international law (*jus cogens*).

A state may excuse itself from responsibility for an internationally wrongful act if it can prove the existence of a circumstance precluding wrongfulness. But Conclusion 18 reiterates that rule found in the ARSIWA that a circumstance precluding wrongfulness cannot be invoked against a breach of a peremptory norm. This rule "applies even where the circumstance precluding wrongfulness itself involves a peremptory norm."[164]

### *H. Serious breaches of peremptory norms*

Conclusion 19 provides for the consequences of serious breaches of peremptory norms.

#### *1. Definition of Serious breach*

A serious breach of a peremptory norm "involves a gross or systematic failure by the responsible State to fulfil that obligation."[165] This does not mean that there are breaches of peremptory norms that are "less than serious [but] it is intended to convey the sense that particular consequences flowed from [certain] breaches of peremptory norms."[166]

#### *2. Obligations*

a. Cooperate

States are obligated to "cooperate to bring to an end through lawful means any serious breach by a State of an obligation arising under a

[164] A/77/10, *supra* note 38 at 69 par. 2.
[165] A/77/10, *supra* note 38 at 15 conclusion 19 par. 3.
[166] A/77/10, *supra* note 38 at 78 par. 17.

peremptory norm."[167] This obligation "builds on the general obligation to cooperate under international law."[168]

The duty to cooperate does not mean that unilateral measures consistent with international law that are intended to bring to an end a serious breach of a peremptory norm are prohibited but only that the emphasis is on collective measures.[169]

b. Non-recognition and non-assistance

Conclusion 19 further obligates states not to "recognize as lawful a situation created by a serious breach by a State of an obligation arising under a peremptory norm nor render aid or assistance in maintaining that situation."[170] These are *negative duties* which "require States to refrain from acting."[171]

However, the obligation of non-recognition should "not...be implemented to the detriment of the affected population and deprive it of any advantages derived from international cooperation."[172]

The ILC explains that the duties of non-recognition and non-assistance are "concerned with a 'situation created by a serious breach' rather than the breach itself. Thus, contribution or support of the actual breach, while possibly entailing responsibility for that breach, is not covered under this draft conclusion."[173]

### *I. Interpretation and application of other rules of international law*

Conclusion 20 provides that in case of a conflict between a peremptory norm and another rule of international law, "the latter is, as far as possible, to be interpreted and applied so as to be consistent with the former." While

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[167] A/77/10, *supra* note 38 at 15 conclusion 19 par. 1
[168] A/77/10, *supra* note 38 at 70 & 71 par. 2.
[169] A/77/10, *supra* note 38 at 72 par. 7.
[170] A/77/10, *supra* note 38, at 15 conclusion 19 par. 2.
[171] A/77/10, *supra* note 38 at 76 par. 12.
[172] A/77/10, *supra* note 38 at 76 par. 15.
[173] A/77/10, *supra* note 38 at 76 par. 16.

the conflict is not defined, "it may be understood, in this context, as the situation where two rules of international law cannot both be simultaneously applied without infringing on, or impairing, the other."[174] Thus, to the extent possible conflicts between peremptory norms and other sources of international law are to be avoided.

This harmonization should be done "as far as possible" means that "in the exercise of interpreting rules of international law in a manner consistent with peremptory norms ...the bounds of interpretation may not be exceeded."[175] This means that "the rule in question may not be given a meaning or content that does not flow from the normal application of the rules and methodology of interpretation in order to achieve consistency with peremptory norms."[176]

### *J. Procedure for invocation of conflict with peremptory norms*

Conclusion 21 provides for the procedure for the invocation of invalidity of rules of international law in conflict with peremptory norms. A State cannot simply assume that a rule of international law is invalid or terminated. The procedure outlined, follows the prescribed procedure under Article 65 of the VCLT.

A state seeking to invalidate or terminate a rule of international law should first notify other States of its claim.[177] This notification should be in writing and should indicate the measure proposed to be taken with respect to the rule of international law in question.[178] The notification should specify a reasonable period, not less than three months, within which an objection must be made.[179] The waiting period may be less than three months "in cases of special urgency."[180] The proposed measure may be carried out by the invoking state if no state raises an objection within the specified period.

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[174] A/77/10, *supra* note 38 at 79 and 80 par 1.
[175] A/77/10, *supra* note 38 at 80 par. 2.
[176] *Id.*
[177] A/77/10, *supra* note 38 at 16 conclusion 21 par. 1.
[178] *Id.*
[179] A/77/10, *supra* note 38 at 83 par. 7.
[180] A/77/10, *supra* note 38 at 16 conclusion 21 par. 2.

If "any State concerned raises an objection, the States concerned should seek a solution through the means indicated in Article 33 of the Charter of the United Nations."[181]

The invoking state still cannot carry out its proposed measure even if after 12 months no solution is reached provided that and the objecting State offers to submit the matter to the International Court of Justice or to some other procedure entailing binding decisions.[182] The invoking State must wait until the dispute is resolved.

### *K. Non-Exhaustive list*

The Annex of the DCILCPN provides for a non-exhaustive list of peremptory norms.

Curiously, in making the list, the ILC admitted that it did not apply the methodology it set forth in draft conclusions 4 to 9.[183] ILC explained that the list was simply "intended to illustrate, by reference to previous work of the Commission, the types of norms that have routinely been identified as having peremptory character, without itself, at this time, making an assessment of those norms."[184] Thus, this list raises the following questions. Are the norms on the list peremptory norms since it is not established that they comply with the standards set by the current state of international law? If the norms on the list are peremptory norms without complying with the standards set by the conclusions, does that mean that it is possible for norms to achieve a peremptory character without complying with the conclusions? For example if the ICJ or some other international court identifies a new peremptory norm would that identification be sufficient even if the said court did not undergo the process outlined in the DCILCPN?

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[181] A/77/10, *supra* note 38 at 16 conclusion 21, par. 3.
[182] *Id.*
[183] A/77/10, *supra* note 38 at 85 par. 3.
[184] *Id.*

The list includes the following norms:[185]

a. The prohibition of aggression;
b. the prohibition of genocide;
c. the prohibition of crimes against humanity;
d. the basic rules of international humanitarian law;
e. the prohibition of racial discrimination and apartheid;
f. the prohibition of slavery;
g. the prohibition of torture;
h. the right of self-determination.

*Zdravkovic* criticizes this list because "at the very moment [the non-exhaustive list] was chosen…all of the norms that did not find their place in the list was deemed to be seen as ones that have not yet gained the *jus cogens* status."[186]

## VI. Peremptory Norms under Philippine law

There are a few Philippine cases that discuss peremptory or *jus cogens* norms.

A case that seems to discuss *jus cogens* norms in detail is *Vinuya v. Romulo*.[187] In this case, the Court had occasion to rule that "even the invocation of *jus cogens* norms and *erga omnes* obligations will not alter … analysis" in the earlier part of the Decision that the State had no duty to exercise diplomatic protection. The Court expressed doubt as to whether *jus cogens* norms existed in 1951. This reflects the view that peremptory norms only began to exist after the VCLT.

The Court further noted that the petitioners failed to show that the crimes committed by the Japanese army violated *jus cogens* prohibitions at the time the Treaty of Peace was signed, or that the duty to prosecute perpetrators of international crimes had attained the status of *jus cogens.* Thus, it did not say that these peremptory norms did not exist but only that

[185] A/77/10, *supra* note 38 at 89 par. 16.
[186] Zdravkovic, *supra* note 1 at 155.
[187] Vinuya v. Romulo, 633 PHIL 538-589 (2010).

the petitioners failed to prove that peremptory norms existed at the time the crimes were committed.

In the process of explaining peremptory norms the Decision stated:

> The term is closely connected with the international law concept of jus cogens. In international law, the term "jus cogens" (literally, "compelling law") refers to norms that command peremptory authority, superseding conflicting treaties and custom. Jus cogens norms are considered peremptory in the sense that they are mandatory, do not admit derogation, and can be modified only by general international norms of equivalent authority.
>
> Early strains of the *jus cogens* doctrine have existed since the 1700s, but peremptory norms began to attract greater scholarly attention with the publication of Alfred von Verdross's influential 1937 article, Forbidden Treaties in International Law. The recognition of *jus cogens* gained even more force in the 1950s and 1960s with the ILC's preparation of the Vienna Convention on the Law of Treaties (VCLT). Though there was a consensus that certain international norms had attained the status of *jus cogens,* the ILC was unable to reach a consensus on the proper criteria for identifying peremptory norms.
>
> After an extended debate over these and other theories of *jus cogens*, the ILC concluded ruefully in 1963 that "there is not as yet any generally accepted criterion by which to identify a general rule of international law as having the character of jus cogens." In a commentary accompanying the draft convention, the ILC indicated that "the prudent course seems to be to . . . leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals." Thus, while the existence of *jus cogens* in international law is undisputed, no consensus exists on its substance, beyond a tiny core of principles and rules. (citations omitted)

Thus, the Court ruled as it did because of the apparent lack of criteria to determine the existence of peremptory norms.

However, in an earlier decision the Court recognized the existence of peremptory norms. *Bayan Muna v. Romulo,*[188] the Court in process of explaining why the US can exercise jurisdiction over crimes not covered by their domestic legislation explained that such crimes have attained the status of *jus cogens* norms. It added:

> The term *'jus cogens'* means the 'compelling law'. Corollary, "a *jus cogens* norm holds the highest hierarchical position among all other customary norms and principles." As a result, *jus cogens* norms are deemed "peremptory and non-derogable." When applied to international crimes, *"jus cogens* crimes have been deemed so fundamental to the existence of a just international legal order that states cannot derogate from them, even by agreement".
>
> These *jus cogens* crimes relate to the principle of universal jurisdiction, *i.e.,* "any state may exercise jurisdiction over an individual who commits certain heinous and widely condemned offenses, even when no other recognized basis for jurisdiction exists." The rationale behind this principle is that the crime committed is so egregious that it is considered to be committed "against all members of the international community" and thus granting every State jurisdiction over the crime.
>
> Therefore, even with the current lack of domestic legislation on the part of the US, it still has both the doctrine of incorporation and universal jurisdiction to try these crimes. (citations omitted)

[188] Bayan Muna v. Romulo, 656 PHIL 246-336 (2011).

While the description of peremptory norms as holding the highest hierarchical position is correct, the reference to universal jurisdiction is incorrect.

In *Province of North Cotabato v. Government of the Republic of the Philippines*[189]
the Court ruled that:

> The sovereign people may, if it so desired, go to the extent of giving up a portion of its own territory to the Moros for the sake of peace, for it can change the Constitution in any it wants, so long as the change is not inconsistent with what, in international law, is known as Jus Cogens.

This brief statement suggests that constitutional amendments are limited by peremptory norms. In making this statement the Court cited as authority *Planas v. Commission on Elections,*[190] where the Court similarly said that a constitutional convention was "legally free to postulate any amendment it may deem fit to propose — save perhaps what is or may be inconsistent with what is now known, particularly in international law, as Jus Cogens." This ruling suggests Philippine state practice placing a superior hierarchical position to *jus cogens* norms as early as 1973.

In *Pangilinan v. Cayetano*,[191] the Court said that:

> Generally, *jus cogens* rules of customary international law cannot be amended by treaties. As Articles 121, 122, and 123 allow the amendment of provisions of the Rome Statute, this indicates that the Rome Statute is not *jus cogens*.

The first sentence is not accurate. Not only are peremptory norms not amendable by treaties *generally* but are not amendable *absolutely*. Under international law under no circumstance can any treaty change the content or binding effect of a peremptory norm. The statement of the *ponente* in this

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[189] Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain, 589 PHIL 387-732 (2008).
[190] Planas v. Commission on Elections, 151 PHIL 217-296 (1973).
[191] Pangilinan v. Cayetano, G.R. Nos. 238875, 239483 & 240954, (2021).

case is reflective of the general view posed by the decision in this case that domestic law is superior to international law.[192] It must also be noted that this portion of the decision may be considered as *obiter dictum.*

## VII. Summary

### *A. Creation*

The DCILCPN created new rules or amended existing ones.

#### *1. Reservations*

The second paragraph of Conclusion 13 effectively adds to the requirements for a valid reservation. It states that "[a] reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm." Thus, even if a reservation complies with the requirements of a valid reservation under the VCLT it would be void.

#### *2. Customs and unilateral declarations*

Because the rule on peremptory norms can only be found in the VCLT, the concept only affected treaties. But with the DCILCPN, there is now a legal basis for invalidating customs and unilateral declarations on the basis of being in conflict with peremptory norms.

It can also be argued that the DCILCPN adds another requirement apart from the twin elements of general practice and acceptance as law (*opinio juris*). This is because Conclusion 14 paragraph 1 states that a custom does not come into existence if it conflicts with an existing peremptory norm. Thus, even if the twin requirements are met, the custom does not arise.

The same can be said about unilateral declarations. Even is a state makes a public declarations and manifested the will to be bound[193] it would not create an obligation if it conflicts with a peremptory norm.

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[192] *See* Moot and Academic.

[193] *See* Principle 1, Guiding Principles Applicable to Unilateral Declarations of States.

## *B. Clarity*

The DCILCPN provided clarity to the legal regime governing peremptory norms.

### *1. Definition*

Previously, the definition of peremptory norms was only found in the VCLT. Thus, it was not clear if this definition applied also when the issue does not involve treaties. It also raised questions as to the effect of peremptory norms on conflicting customs. Because of Conclusion 1, the definition of peremptory norms found in the VCLT is now the definition of peremptory norms even if the issue does not involve treaties. Thus, the concept of peremptory norms can be applied in any legal question and is no longer limited to the law on treaties.

### *2. Criteria*

Conclusion 4 clarifies the criteria for identifying peremptory norms. The requirements for each criteria are also further elaborated on in succeeding conclusions. By clearly explaining the criteria, it is now possible for states to objectively argue for the existence of peremptory norms. In case of dispute, courts can apply the criteria to objectively determine the existence of peremptory norm. Because "it is necessary to establish" the compliance with the criteria before a peremptory norm can be said to exist, it would no longer be enough to simply point out the importance of the rule. It would also be more difficult to argue against the existence of a peremptory norm that meets the criteria. This situation may encourage the development of state practice and jurisprudence for the further development of the concept of peremptory norms.

### 3. Obligations *Erga Omnes*

Conclusion 17 clarifies that all peremptory norms are *erga omnes* obligations. This confirms what has been suggested by legal scholarship. The Commentary also clarifies that not all *erga omnes* obligations are peremptory norms.

### *C. Confusion*

But the DCILCPN also raised new issues which hopefully will be clarified in the near future.

#### *1. Fundamental Values*

The DCILCPN requires that peremptory norms reflect and protect fundamental values. But it is not clear from the Commentary what exactly are fundamental values and how they are determined. Thus, the manner by which fundamental values are identified need to be clarified. As Kolb points out, "[i]t is not sufficient for a lawyer to speak about fundamental values; he must proceed to give these values and the legal constructs that carry them a precise setting in legal technique."[194] Furthermore, as discussed earlier the existence of fundamental values require *a minimum degree of community feeling*[195] or an increasingly organized community with common interests and values.[196] Given the lack of unity among states in the international community even regarding matters of planetary survival (e.g., nuclear weapons, climate change) this international community has not been established.

#### *2. Characteristics are not criteria*

The Commentary explains that the characteristics of peremptory norms found in Conclusion 2 are not criteria for determining the existence of such norms. However, this implies that a norm which has all the characteristics listed[197] will not necessarily be a peremptory norm. If that is the case, then what type of norm is it? Perhaps it should be clarified that these

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[194] Robert Kolb*, Peremptory International Law – Jus Cogens*, (2015).
[195] Shelton, *supra* note 8 at 29.
[196] *Id.*
[197] Reflects and protects fundamental values, universally applicable and hierarchically superior.

characteristics are necessary consequences of being a peremptory norms. Thus, if all the characteristics are present then that means the norm is peremptory.

*3. The meaning of general international law*

One of the criteria for determining the existence of a peremptory norm is that it must emanant from *general international law*. The Commentary explains that "general" refers to the scope of applicability such the law must have equal force for all members of the international law community. There are two problems with this.

First, defining the first criteria in this way would make it identical with the universal applicability characteristic of the peremptory norm. Thus, because of this redundancy the insistence that the characteristics are not criteria loses some validity.

Second, Conclusion 5 provides that the "[b]ases for peremptory norms of general international law (jus cogens)" are, "(1) customary international law and (2) treaty provisions and general principles of law." The problem is that customs and treaties are necessarily universal in scope. For customs, the exception to its universal applicability are local/regional customs and persistent objectors. For treaties, only State parties are bound by treaty provisions. Furthermore, some state parties may opt out of certain treaty provisions through reservations. Thus, no treaty is binding on all states not unless all states of the world are state parties and no reservations are allowed.

Thus, the requirement that the peremptory norm must come from a law that has equal force for all members of the international law may not always be complied with.

*4. Modification of a peremptory norm*

A peremptory norm by definition can only be modified by another peremptory norm.[198] However, before a new peremptory norm can arise to "challenge" an existing peremptory the former must first be in the form of a custom, treaty provision or general principle of law.[199] But a treaty provision in conflict with a peremptory norm would make the entire treaty void.[200] Furthermore, a new custom in conflict with a peremptory norm will never arise.[201] The only option left is if a peremptory norm originates as a general principle of law. Interestingly there is no conclusion providing for the invalidity of a general principle of law in conflict with a peremptory norm.

It may also be argued that a peremptory norm cannot be changed by a rule in conflict with it but can only be modified by another peremptory norm not in conflict with it. This view is supported by the argument that the VCLT and Conclusion 2 both use the word "modified." Thus an existing peremptory norm can never be terminated or diminished. But it can be added to. In this way a new norm modifying it would not be in conflict with it but can arise initially as a custom or treaty provision. For example a peremptory norm X which requires states to perform obligation A may be modified by a new norm Y which requires states to perform obligation A and B.

*5. The Non-Compliant Annex*

The ILC attached a non-exhaustive list of peremptory norms as an Annex to the DCILCPN. However, the ILC admitted that in coming up with the list, the requirements under the DCILCPN were not complied with. This raises some issues.

First, it would seem that the list may have been derived from previous decisions of the ICJ. Thus, should the Annex be interpreted to mean that ICJ identification of peremptory norms is an alternative to the procedure discussed under the DCILCPN.

Second, the list contains fairly broad categories. For example, the list includes "the basic rules of international humanitarian law." This category is

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[198]10 United Nations, Treaty Series, Vol 1155 at 334, Art 53 (1980) and A/77, *supra* note 38 at 12 conclusion 3.
[199] A/77/10, *supra* note 38 at 12 conclusion 5.
[200] A/77/10, *supra* note 38 at 13 conclusion 10.
[201] A/77/10, *supra* note 38 at 14 conclusion 14.

both broad and vague. There are many treaties involving international humanitarian law. Are all their provisions peremptory? How does one determine what is basic? Another example is the right to self-determination. Does the category merely refer to Article 1 of the International Covenant on Civil and Political Rights or also Article 1 of the International Covenant on Economic, Social and Cultural Rights? There are also certain aspects to the right to self-determination. Are all aspects peremptory?

## VI. Conclusion

By embarking on providing rules pertinent to peremptory norms, the DCILCPN creates new rules and amends existing ones. It clarifies several issues previously hounding the concept of peremptory norms but it also adds to the confusion. Only time will tell if the DCILCPN would contribute to the development of peremptory norms in particular and international law in general.

# REPORTS

# REPORTS

## PHILIPPINE GOVERNMENT'S OBSERVATION ON THE OFFICE OF THE PROSECUTOR'S REQUEST TO RESUME THE INVESTIGATION INTO THE SITUATION IN THE PHILIPPINES, AND THE OFFICE OF THE PROSECUTOR'S RESPONSE TO THE OBSERVATION

On September 8, 2022, the Philippine Government made a submission in response to the Order of the Pre-Trial Chamber I ("the Chamber") of the International Criminal Court ("the Court") inviting the same to provide observations on the Office of the Prosecutor's (OTP) request to resume the investigation into the situation in the Philippines.

Citing Article 53(1) of the Rome Statute, which provides the considerations for the OTP to initiate an investigation, the Philippine Government submitted that the OTP failed to meet the standards therein for the following reasons: "the OTP misinterpreted available information; the situation is inadmissible under Article 17; and the situation is not of sufficient gravity to justify further action by the Court." The Philippine Government also submitted that the Court has no jurisdiction over the situation in the Philippines.

On September 22, 2022, the OTP filed its response to the Philippine Government's Observations. First, it argues that the challenges to jurisdiction and gravity are not properly before the Court, there being no provision in the State to challenge the resumption of an investigation on jurisdictional or gravity grounds at the present stage of proceedings. Second, regarding jurisdiction, it points out that the Philippine Government's contentions on the lack of a widespread or systemic attack on the civilian population and that the crimes were not in furtherance of any state policy relate to the merits of an eventual prosecution and not to the Court's jurisdiction. Third, it contends that the gravity challenge is not supported by facts or the law. Lastly, in relation to Article 18, it argues that the Philippine Government has not demonstrated that it has conducted or is conducting national investigations or prosecutions that sufficiently mirror the investigation authorized by the Chamber I.

## REGISTRY REPORT ON ARTICLE 18(2) VICTIM REPRESENTATIONS

In August 27, 2021, the Registry of the International Criminal Court (ICC) submitted 204 victim representations to the Pre-Trial Chamber I. These representations are in connection with the investigation into the Situation in the Philippines for which the Office of the Prosecutor (OTP) had previously requested for judicial authorization to commence. Said investigation is in relation to alleged crimes committed in the context of the Philippine Government's so-called War on Drugs (WoD). The victim representations were submitted pursuant to Article 15(3) of the Rome Statute.

The submission, consisting of representations from approximately 1,530 individual victims and 1,050 families, heavily supported the opening of the investigation while also bringing to light several concerns regarding the effectiveness of the Philippine judicial system and the ability and willingness to investigate the WoD-related crimes.

## IMPLEMENTATION OF THE HUMAN RIGHTS COUNCIL RESOLUTION 45/33 AND ON THE PROGRESS AND RESULTS OF TECHNICAL COOPERATION AND CAPACITY BUILDING FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS IN THE PHILIPPINES

### Report of the United Nations High Commissioner for Human Rights

"The present report examines the implementation of Human Rights Council resolution 45/33 and the progress and results of technical cooperation and capacity-building for the promotion and protection of human rights in the Philippines, including through a United Nations Joint Programme on human rights (UNJP) being implemented with the Government of the Philippines and national partners. The High Commissioner also provides recommendations aiming to promote a transformative approach to human rights-based reforms, strengthen an institutional culture of respect for human rights, ensure justice and redress for victims, and contribute towards the prevention of violations recurring."

## UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS

In 2022, the Philippines, as a member of the United Nations General Assembly, voted in favor of various resolutions tackling different international issues. From over 80 resolutions, only the vote to suspend Russia from the UN Human Rights Council[1] and vote demanding protection and aid for Ukraine[2] were publicized on the government's official news channels.

The resolutions in which the Philippines has **voted favorably** are as follows:

1. Aggression against Ukraine[3]
2. Humanitarian consequences of the aggression against Ukraine[4]
3. Suspension of the rights of membership of the Russian Federation in the Human Rights Council[5]
4. Status of internally displaced persons and refugees from Abkhazia, Georgia, and the Tskhinvali region/South Ossetia, Georgia[6]
5. Financing of the United Nations Interim Force in Lebanon[7]
6. The human right to a clean, healthy and sustainable environment[8]
7. Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations[9]
8. Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba[10]
9. Furtherance of remedy and reparation for aggression against Ukraine[11]
10. Cooperation between the United Nations and the Central European

[1] Joyce Rocamora, *PH votes to suspend Russia from UN Human Rights Council*, PHILIPPINES NEWS AGENCY, (April 8, 2022), https://www.pna.gov.ph/articles/1171776.
[2] Joyce Rocamora, *PH votes for UN reso demanding protection, aid for Ukraine*, PHILIPPINES NEWS AGENCY, (March 25, 2022), https://www.pna.gov.ph/articles/1170689.
[3] U.N. G.A. Emergency Special Session 11/5, (March 18, 2022)
[4] U.N. G.A. Emergency Special Session 11/2, (March 24, 2022)
[5] U.N. G.A. Emergency Special Session 11/3, (April 7, 2022)
[6] U.N. G.A. Res. 76/267, (June 8, 2022)
[7] U.N. G.A. Res. 76/290, (June 29, 2022)
[8] U.N. G.A. Res. 76/300, (July 28, 2022)
[9] U.N. G.A. Emergency Special Session 11/4, (October 12, 2022)
[10] U.N. G.A. Res. 77/7, (November 3, 2022)
[11] U.N. G.A. Emergency Special Session 11/5, (November 14, 2022)

Initiative[12]

11. Special information programme on the question of Palestine of the Department of Global Communications of the Secretariat[13]
12. Peaceful settlement of the question of Palestine[14]
13. The Syrian Golan[15]
14. Division for Palestinian Rights of the Secretariat[16]
15. Committee on the Exercise of the Inalienable Rights of the Palestinian People[17]
16. The risk of nuclear proliferation in the Middle East[18]
17. Strengthening of security and cooperation in the Mediterranean region[19]
18. Comprehensive Nuclear-Test-Ban Treaty[20]
19. Eleventh Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons and its Preparatory Committee[21]
20. Nuclear disarmament[22]
21. Ethical imperatives for a nuclear-weapon-free world[23]
22. Implementation of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction[24]
23. Treaty banning the production of fissile material for nuclear weapons or other nuclear explosive devices[25]
24. The Arms Trade Treaty[26]
25. Transparency in armaments[27]

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[12] U.N. G.A. Res. 77/19, (November 21, 2022)
[13] U.N. G.A. Res. 77/24, (November 30, 2022)
[14] U.N. G.A. Res. 77/25, (November 30, 2022)
[15] U.N. G.A. Res. 77/26, (November 30, 2022)
[16] U.N. G.A. Res. 77/23, (November 30, 2022)
[17] U.N. G.A. Res. 77/22, (November 30, 2022)
[18] U.N. G.A. Res. 77/91, (December 7, 2022)
[19] U.N. G.A. Res. 77/93, (December 7, 2022)
[20] U.N. G.A. Res. 77/94, (December 7, 2022)
[21] U.N. G.A. Res. 77/66, (December 7, 2022)
[22] U.N. G.A. Res. 77/65, (December 7, 2022)
[23] U.N. G.A. Res. 77/63, (December 7, 2022)
[24] U.N. G.A. Res. 77/67, (December 7, 2022)
[25] U.N. G.A. Res. 77/68, (December 7, 2022)
[26] U.N. G.A. Res. 77/62, (December 7, 2022)
[27] U.N. G.A. Res. 77/69, (December 7, 2022)

26. Conventional arms control at the regional and subregional levels[28]
27. Follow-up to the advisory opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons[29]
28. The Hague Code of Conduct against Ballistic Missile Proliferation[30]
29. Humanitarian consequences of nuclear weapons[31]
30. Implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction[32]
31. Treaty on the Prohibition of Nuclear Weapons[33]
32. Measures to uphold the authority of the 1925 Geneva Protocol[34]
33. Reducing nuclear danger[35]
34. Effects of the use of armaments and ammunitions containing depleted uranium[36]
35. Steps to building a common road map towards a world without nuclear weapons[37]
36. Follow-up to the 2013 high-level meeting of the General Assembly on nuclear disarmament[38]
37. Preventing the acquisition by terrorists of radioactive sources[39]
38. Promotion of multilateralism in the area of disarmament and non-proliferation[40]
39. No first placement of weapons in outer space[41]
40. Strengthening and developing the system of arms control, disarmament and non-proliferation treaties and agreements[42]
41. Destructive direct-ascent anti-satellite missile testing[43]

[28] U.N. G.A. Res. 77/61, (December 7, 2022)
[29] U.N. G.A. Res. 77/57, (December 7, 2022)
[30] U.N. G.A. Res. 77/58, (December 7, 2022)
[31] U.N. G.A. Res. 77/53, (December 7, 2022)
[32] U.N. G.A. Res. 77/73, (December 7, 2022)
[33] U.N. G.A. Res. 77/54, (December 7, 2022)
[34] U.N. G.A. Res. 77/50, (December 7, 2022)
[35] U.N. G.A. Res. 77/74, (December 7, 2022)
[36] U.N. G.A. Res. 77/49, (December 7, 2022)
[37] U.N. G.A. Res. 77/76, (December 7, 2022)
[38] U.N. G.A. Res. 77/47, (December 7, 2022)
[39] U.N. G.A. Res. 77/77, (December 7, 2022)
[40] U.N. G.A. Res. 77/48, (December 7, 2022)
[41] U.N. G.A. Res. 77/42, (December 7, 2022)
[42] U.N. G.A. Res. 77/78, (December 7, 2022)
[43] U.N. G.A. Res. 77/41, (December 7, 2022)

42. Conclusion of effective international arrangements to assure non-nuclear-weapon States against the use or threat of use of nuclear weapons [44]
43. Implementation of the Convention on Cluster Munitions[45]
44. Establishment of a nuclear-weapon-free zone in the region of the Middle East[46]
45. Programme of action to advance responsible State behaviour in the use of information and communications technologies in the context of international security[47]
46. Developments in the field of information and telecommunications in the context of international security[48]
47. Report of the Conference on Disarmament[49]
48. Information from Non-Self-Governing Territories transmitted under Article 73 e of the Charter of the United Nations[50]
49. Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan[51]
50. Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples by the specialized agencies and the international institutions associated with the United Nations[52]
51. Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories[53]
52. The occupied Syrian Golan[54]
53. Palestine refugees' properties and their revenues[55]
54. Assistance to Palestine Refugees[56]
55. Operations of the United Nations Relief and Works Agency for

[44] U.N. G.A. Res. 77/39, (December 7, 2022)
[45] U.N. G.A. Res. 77/79, (December 7, 2022)
[46] U.N. G.A. Res. 77/38, (December 7, 2022)
[47] U.N. G.A. Res. 77/37, (December 7, 2022)
[48] U.N. G.A. Res. 77/36, (December 7, 2022)
[49] U.N. G.A. Res. 77/89, (December 7, 2022)
[50] U.N. G.A. Res. 77/129, (December 12, 2022)
[51] U.N. G.A. Res. 77/126 (December 12, 2022)
[52] U.N. G.A. Res. 77/131 (December 12, 2022)
[53] U.N. G.A. Res. 77/130 (December 12, 2022)
[54] U.N. G.A. Res. 77/125 (December 12, 2022)
[55] U.N. G.A. Res. 77/124 (December 12, 2022)
[56] U.N. G.A. Res. 77/123 (December 12, 2022)

Palestine Refugees in the Near East[57]

56. Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples[58]
57. Dissemination of information on decolonization[59]
58. Entrepreneurship for sustainable development[60]
59. Oil slick on Lebanese shores[61]
60. Role of the United Nations in promoting development in the context of globalization and interdependence[62]
61. Towards a new international economic order[63]
62. Combating sand storms[64]
63. Eradicating rural poverty to implement the 2030 Agenda for Sustainable Development[65]
64. Permanent sovereignty of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab population in the occupied Syrian Golan over their natural resources[66]
65. Addressing and countering the world drug problem through a comprehensive, integrated and balanced approach[67]
66. Moratorium on the use of the death penalty[68]
67. Extrajudicial, summary or arbitrary executions[69]
68. Promotion of peace as a vital requirement for the full enjoyment of all human rights by all[70]
69. Promotion of a democratic and equitable international order[71]
70. Human rights and unilateral coercive measures[72]

[57] U.N. G.A. Res. 77/122 (December 12, 2022)
[58] U.N. G.A. Res. 77/149 (December 12, 2022)
[59] U.N. G.A. Res. 77/148 (December 12, 2022)
[60] U.N. G.A. Res. 77/160 (December 14, 2022)
[61] U.N. G.A. Res. 77/157 (December 14, 2022)
[62] U.N. G.A. Res. 77/175 (December 14, 2022)
[63] U.N. G.A. Res. 77/174 (December 14, 2022)
[64] U.N. G.A. Res. 77/171 (December 14, 2022)
[65] U.N. G.A. Res. 77/183 (December 14, 2022)
[66] U.N. G.A. Res. 77/187 (December 14, 2022)
[67] U.N. G.A. Res. 77/238 (December 15, 2022)
[68] U.N. G.A. Res. 77/222 (December 15, 2022)
[69] U.N. G.A. Res. 77/218 (December 15, 2022)
[70] U.N. G.A. Res. 77/216 (December 15, 2022)
[71] U.N. G.A. Res. 77/215 (December 15, 2022)
[72] U.N. G.A. Res. 77/214 (December 15, 2022)

71. The right to development[73]
72. The right of the Palestinian people to self-determination[74]
73. Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination[75]
74. A global call for concrete action for the elimination of racism, racial discrimination, xenophobia and related intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action[76]
75. Combating glorification of Nazism, neo-Nazism and other practices that contribute to fuelling contemporary forms of racism, racial discrimination, xenophobia and related intolerance[77]
76. Report of the Human Rights Council[78]
77. Intensification of effort to prevent and eliminate all forms of violence against women and girls: gender stereotypes and negative social norms[79]
78. International Day for the Prevention of Violent Extremism as and when Conducive to Terrorism[80]
79. Further practical measures for the prevention of an arms race in outer space[81]
80. Oceans and Law of the Sea[82]

The resolutions in which the Philippines was considered a **"Non-Voting Party**" are as follows:

1. The situation in Afghanistan[83]
2. Situation of human rights in the Islamic Republic of Iran[84]

The resolutions in which the Philippines has **abstained** are as follows:

[73] U.N. G.A. Res. 77/212 (December 15, 2022)
[74] U.N. G.A. Res. 77/208 (December 15, 2022)
[75] U.N. G.A. Res. 77/206 (December 15, 2022)
[76] U.N. G.A. Res. 77/205, (December 15, 2022)
[77] U.N. G.A. Res. 77/204, (December 15, 2022)
[78] U.N. G.A. Res. 77/200, (December 15, 2022)
[79] U.N. G.A. Res. 77/193, (December 30, 2022)
[80] U.N. G.A. Res. 77/243, (December 20, 2022)
[81] U.N. G.A. Res. 77/250, (December 20, 2022)
[82] U.N. G.A. Res. 77/248, (December 30, 2022)
[83] U.N. G.A. Res. 77/10, (November 10, 2022)
[84] U.N. G.A. Res. 77/228, (December 15, 2022

1. Cooperation between the United Nations and the Collective Security Treaty Organization[85]
2. Promoting international cooperation on peaceful uses in the context of international security[86]
3. Convention on the Prohibition of the Use of Nuclear Weapons[87]
4. Situation of human rights in the Syrian Arab Republic[88]
5. Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol, Ukraine[89]
6. Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem[90]

[85] U.N. G.A. Res. 77/13, (November 21, 2022)
[86] U.N. G.A. Res. 77/96, (December 7, 2022)
[87] U.N. G.A. Res. 77/82, (December 7, 2022)
[88] U.N. G.A. Res. 77/230, (December 15, 2022)
[89] U.N. G.A. Res. 77/229, (December 15, 2022)
[90] U.N. G.A. Res. 77/247, (December 30, 2022)

# TREATIES AND AGREEMENTS

# TREATIES AND AGREEMENTS

## MEMORANDUM OF UNDERSTANDING ON DEFENSE COOPERATION BETWEEN THE DEPARTMENT OF NATIONAL DEFENSE OF THE REPUBLIC OF THE PHILIPPINES AND THE MINISTRY OF DEFENSE OF THE FEDERATIVE REPUBLIC OF BRAZIL

On 29 June 29 2022, the Memorandum of Understanding on Defense Cooperation between the Department of National Defense of the Republic of the Philippines and the Ministry of Defense of the Federative Republic of Brazil was signed by Secretary of National Defense Delfin N. Lorenzana and Chargé d'affaires, ad interim Minister Sérgio Taam of the Brazilian Embassy in the Philippines. The MOU is the Philippines' first bilateral defense agreement with a Latin American country.

## MEMORANDUM OF UNDERSTANDING ON DEFENSE INDUSTRY COOPERATION AND LOGISTICS BETWEEN THE DEPARTMENT OF NATIONAL DEFENSE OF THE REPUBLIC OF THE PHILIPPINES AND THE AUSTRALIAN DEPARTMENT OF DEFENCE

The Memorandum of Understanding on Defense Industry Cooperation and Logistics between the Department of National Defense of the Republic of the Philippines and the Australian Department of Defence was ratified on 4 February 2022 and entered into force on 17 February 2022.

## MEMORANDUM OF UNDERSTANDING ON DEFENCE COOPERATION BETWEEN THE DEPARTMENT OF NATIONAL DEFENSE OF THE REPUBLIC OF THE PHILIPPINES AND THE MINISTRY OF DEFENCE OF THE ISLAMIC REPUBLIC OF PAKISTAN

Secretary of National Defense Delfin N. Lorenzana and Pakistani Ambassador to the Philippines Dr. Imtiaz Ahmad Kazi signed a Memorandum of Understanding on Defense Cooperation on 5 May 2022 at Camp General Emilio Aguinaldo, Quezon City. The MOU formalizes defense ties between

the two countries and reflects a long history of exchanges in military education and training.

## AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA ON AERONAUTICAL AND MARITIME SEARCH AND RESCUE (AMSAR)

Philippine Secretary of Foreign Affairs Teodoro L. Locsin, Jr. and US Embassy Chargé d'affaires John C. Law signed the AMSAR Agreement on 30 July 2021. It was ratified on 12 May 2022 and entered into force on 13 June 2022.

The agreement provides delimitations on the search and rescue regions of both countries and enhances their effectiveness in assisting persons, vessels, aircraft or other craft in distress.

## 1961 CONVENTION ON THE REDUCTION OF STATELESSNESS

On 24 March 2022, Philippine Secretary of Foreign Affairs Teodoro L. Locsin, Jr. deposited the instrument of accession to the 1961 Convention on the Reduction of Statelessness at the United Nations in New York. The Treaty entered into force in the Philippines on 22 June 2022.

The 1961 Convention sets rules for the conferral and non-withdrawal of citizenship to prevent cases of statelessness from arising, thus giving effect to article 15 of the Universal Declaration of Human Rights which recognizes that "everyone has the right to a nationality." Accession to the 1961 Convention fulfills one of the seven action points under the National Action Plan (NAP) to End Statelessness that the Philippines committed to implement until 2024.

## ARMS TRADE TREATY (ATT)

On 24 March 2022, Philippine Secretary of Foreign Affairs Teodoro L. Locsin, Jr. deposited the instrument of ratification for the ATT at the United Nations in New York. The ATT entered into force in the Philippines on 22 June 2022. The Philippines is the first country in Southeast Asia to become a state party to the ATT.

The ATT aims to establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms and to prevent and eradicate the illicit trade in conventional arms and prevent their diversion.

## ARRANGEMENT BETWEEN THE DEPARTMENT OF NATIONAL DEFENSE OF THE REPUBLIC OF THE PHILIPPINES AND THE AUSTRALIAN DEPARTMENT OF DEFENCE CONCERNING THE PROVISION OF MUTUAL LOGISTIC SUPPORT

The Mutual Logistic Support Arrangement (MLSA) between the Philippines and Australia was ratified on 25 April 2022 and entered into force on 13 May 2022. The MLSA allows the provision of logistics support during exercises, training, deployments, and other exigencies as determined by both countries.

## MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENT OF NATIONAL DEFENSE OF THE REPUBLIC OF THE PHILIPPINES AND THE MINISTRY OF DEFENCE OF THE CZECH REPUBLIC CONCERNING COOPERATION IN THE AREA OF DEFENSE INDUSTRY AND LOGISTICS

The Memorandum of Understanding Between the Department of National Defense of the Republic of the Philippines and the Ministry of Defence of the Czech Republic Concerning Cooperation in the Area of Defense Industry and Logistics was signed by Czech Ambassador Jana Šedivá and Philippine Undersecretary for National Defense Cardozo Luna on 12 October 2021. The MOU was ratified on 4 February 2022 and entered into force on 14 February 2022.

The MOU establishes cooperation between the two countries in several areas such as the exchange of technical knowledge in defense and logistics and assistance with the procurement and export of defense materials and equipment.

## AMENDMENT TO ARTICLE 1 OF THE CONVENTION ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCRIMINATE EFFECT (AMENDMENT TO ARTICLE 1 OF CCW)

The Philippines ratified the Amendment to Article 1 of the CCW on 12 April 2022, becoming the first ASEAN country to do so. It entered into force on 10 November 2022.

The CCW bans or restricts the use of specific types of weapons that cause unnecessary or unjustifiable suffering to combatants or to affect civilians indiscriminately. The Amendment to Article 1 expands the applicability of the CCW to non-international armed conflict without changing the legal status of rebel groups to that of privileged belligerents.

## PROTOCOL ON EXPLOSIVE REMNANTS OF WAR TO THE CONVENTION ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCRIMINATE EFFECT (PROTOCOL V)

The Philippines ratified Protocol V on 12 April 2022. It entered into force on 10 November 2022. Protocol V addresses the humanitarian problems caused by unexploded and abandoned ordnances.

## ARRANGEMENT BETWEEN THE ARMED FORCES OF THE PHILIPPINES AND SINGAPORE ARMED FORCES CONCERNING THE ASSIGNMENT OF A TEAM TO THE REGIONAL COUNTER-TERRORISM INFORMATION FACILITY IN SINGAPORE

The Arrangement between the Armed Forces of the Philippines and the Singapore Armed Forces Concerning the Assignment of a Team to the Regional Counter-Terrorism Information Facility (CTIF) in Singapore was signed on 5 September 2022 and entered into force on 21 November 2022.

The CTIF is a multilateral platform which allows countries to share intelligence and provide early warnings and analysis of terrorist activities.

## MEMORANDUM OF IMPLEMENTATION FOR THE TRANSFER OF THE TECHNICAL INFORMATION CONCERNING AIR SURVEILLANCE RADAR SYSTEMS AND THE ASSOCIATED TECHNICAL INFORMATION TO THE REPUBLIC OF THE PHILIPPINES FOR THE COOPERATION TO ENHANCE THE PHILIPPINES' CAPACITY IN VIGILANCE AND SURVEILLANCE UNDER THE AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES AND THE GOVERNMENT OF JAPAN CONCERNING THE TRANSFER OF DEFENSE EQUIPMENT AND TECHNOLOGY

The Memorandum of Implementation for the Transfer of the Technical Information Concerning Air Surveillance Radar Systems and the Associated Technical Information to the Republic of the Philippines for the Cooperation to Enhance the Philippines' Capacity in Vigilance and Surveillance under the Agreement between the Philippines and Japan Concerning the Transfer of Defense Equipment and Technology were signed on 28 September 2022 and 14 September 2022, respectively.

## PHILIPPINE DRUG ENFORCEMENT AGENCY AND AUSTRALIAN FEDERAL POLICE MEMORANDUM OF UNDERSTANDING ON COMBATING TRANSNATIONAL ORGANIZED CRIME, INCLUDING COMBATING ILLICIT TRAFFICKING IN NARCOTIC DRUGS, PSYCHOTROPIC SUBSTANCES AND THEIR PRECURSORS

The Philippine Drug Enforcement Agency and Australian Federal Police Memorandum of Understanding on Combating Transnational Organized Crime, including Combating Illicit Trafficking in Narcotic Drugs, Psychotropic Substances and Their Precursors was signed on 5 August 2022.

## AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES AND THE GOVERNMENT OF THE UNITED ARAB EMIRATES FOR THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS (PH-UAE IPPA)

PH Department of Trade and Industry Secretary Ramon M. Lopez and UAE Minister of State for Financial Affairs Mohamed Bin Hadi Al Hussaini signed the PH-UAE IPPA on 9 June 2022.

The IPPA aims to promote greater economic cooperation between the two countries by encouraging and creating favorable conditions for investors. The IPPA covers the protection of investments, national treatment, most favoured nation treatment, and investor-state dispute settlement procedures, among others.

## CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE

On 22 June 2022, the Philippines deposited its instrument of ratification of the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance at the Ministry of Foreign Affairs of the Netherlands. The Philippines was represented by H.E. Mr. J. Eduardo Malaya, Ambassador of the Republic of the Philippines to the Netherlands, Mr. Jarie R. Osias, First Secretary and Consul, Ms. Marianne I. Bringas, Third Secretary and Vice Consul, and Ms. Kieren Roevi A. Batiles, Information Officer. The Convention entered into force in the Philippines on 1 October 2022.

The Convention aims to ensure the effective international recovery of child support and other forms of family maintenance by establishing a comprehensive system of co-operation between the authorities of Contracting States and requiring effective measures for the prompt enforcement of maintenance decisions.

## KIGALI AMENDMENT TO THE MONTREAL PROTOCOL (AMENDMENT TO THE MONTREAL PROTOCOL ON SUBSTANCES THAT DEPLETE THE OZONE LAYER)

The Philippines ratified the Kigali Amendment to the Montreal Protocol on 23 June 2022. Ambassador Antonio Lagdameo, Permanent Representative

to the United Nations, deposited the instrument of ratification at the United Nations on 3 November 2022.

The Kigali Amendment to the Montreal Protocol is an international agreement to gradually reduce the consumption and production of hydrofluorocarbons.

## 1986 INSTRUMENT FOR THE AMENDMENT OF THE CONSTITUTION OF THE INTERNATIONAL LABOR ORGANIZATION

The Philippines ratified the 1986 Instrument for the Amendment of the Constitution of the International Labor Organization on 12 May 2022. The 1986 Amendment addresses three main areas: the composition and governance of the Governing Body of the Office; the procedure for appointment of the Director-General; and the rules governing how the Constitution may be amended.

## CONVENTION ON TEMPORARY ADMISSION (ISTANBUL CONVENTION)

Philippine Ambassador to Belgium, Luxembourg, and the European Union Eduardo José A. de Vega deposited the Instrument of Accession to the Istanbul Convention at the World Customs Organization in Brussels, Belgium on 17 January 2022. The Convention entered into force in the Philippines on 17 April 2022.

Under the Convention, each Party undertakes to provide temporary admission of goods covered by the ATA Carnet with total conditional relief from import duties and taxes. It also requires simplified processes for temporary admission of goods into a customs territory.

## UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS

On 7 July 2022, Ambassador and Chargé d'affaires, ad interim Ariel Rodelas Peñaranda of the Philippine Mission to the United Nations deposited the instrument of ratification of the Convention on the Use of Electronic Communications in International Contracts at the UN Headquarters in New York. The Convention aims to enhance legal certainty and commercial predictability for international contracts and help States gain access to modern trade routes.

## AIR TRANSPORT AGREEMENT BETWEEN THE REPUBLIC OF THE PHILIPPINES AND THE KINGDOM OF SPAIN

The Air Transport Agreement was signed on 12 June 2018 and entered into force on 22 March 2022. The agreement aims to promote an international aviation system which offers fair and equal opportunities to the airlines of both countries.

## MEMORANDUM OF UNDERSTANDING BETWEEN THE BANGKO SENTRAL NG PILIPINAS AND THE STATE BANK OF PAKISTAN

The Memorandum of Understanding between the Bangko Sentral ng Pilipinas and the State Bank of Pakistan entered into force on 28 January 2022. The MOU provides for cooperation between the two authorities in the development and performance of the banking system, payments and settlements, and other areas of mutual interest.

## PROTOCOL TO IMPLEMENT THE TENTH PACKAGE OF COMMITMENTS ON AIR TRANSPORT SERVICES UNDER THE ASEAN FRAMEWORK AGREEMENT ON SERVICES AND PROTOCOL TO IMPLEMENT THE ELEVENTH PACKAGE OF COMMITMENTS ON AIR TRANSPORT SERVICES UNDER THE ASEAN FRAMEWORK AGREEMENT ON SERVICES (AFAS)

The Protocols to Implement the Tenth and Eleventh Package of Commitments on Air Transport Services under the ASEAN Framework Agreement on Services were ratified on 10 June 2022. These packages

provide for details of commitments of each ASEAN Member State in various services sectors and subsectors.

## AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES AND THE EUROPEAN UNION (EU) ON CERTAIN ASPECTS OF AIR SERVICES

The Agreement between the Government of the Republic of the Philippines and the European Union on Certain Aspects of Air Services was ratified on 25 April 2022 and entered into force on 24 May 2022. The Agreement recognizes that certain provisions of the bilateral air service agreements between Member States of the EU and the Philippines, which are contrary to the law of the EU, must be brought into conformity with it in order to establish a sound legal basis for air services and to preserve the continuity of such air services.

## MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENT OF AGRICULTURE OF THE REPUBLIC OF THE PHILIPPINES AND THE GENERAL ADMINISTRATION OF QUALITY SUPERVISION, INSPECTION AND QUARANTINE OF THE PEOPLE'S REPUBLIC OF CHINA ON COOPERATION OF ANIMAL AND PLANT INSPECTION AND QUARANTINE

The Memorandum of Understanding between the Department of Agriculture of the Republic of the Philippines and the General Administration of Quality Supervision, Inspection and Quarantine of the People's Republic of China on Cooperation of Animal and Plant Inspection and Quarantine was ratified on 5 May 2022.

In a joint statement issued in 2016, the Philippines welcomed China's announcement to restore permits of relevant Philippine enterprises that export bananas and pineapples to China, and continue to import vapor heat treated mangoes which were packed in facilities that comply with standards set by China.

## MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENT OF TOURISM OF THE REPUBLIC OF THE PHILIPPINES AND THE MINISTRY OF TOURISM DEVELOPMENT, WILDLIFE AND CHRISTIAN RELIGIOUS AFFAIRS OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

The Memorandum of Understanding between the Department of Tourism of the Republic of the Philippines and the Ministry of Tourism Development, Wildlife and Christian Religious Affairs of the Democratic Socialist Republic of Sri Lanka was ratified on 5 May 2022. President Rodrigo Duterte and Sri Lanka President Maithripala Sirisena witnessed the exchange of agreements held in Malacañang on 16 January 2019.

## MEMORANDUM OF UNDERSTANDING ON COOPERATION IN AGRICULTURE, FISHERIES AND RELATED FIELDS BETWEEN THE REPUBLIC OF THE PHILIPPINES AND THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

The Memorandum of Understanding on Cooperation in Agriculture, Fisheries and Related Fields between the Republic of the Philippines and the Democratic Socialist Republic of Sri Lanka was ratified on 12 May 2022. President Rodrigo Duterte and Sri Lanka President Maithripala Sirisena witnessed the exchange of agreements held in Malacañang on 16 January 2019.

## MEMORANDUM OF UNDERSTANDING BETWEEN THE REPUBLIC OF THE PHILIPPINES AND THE GOVERNMENT OF YUKON ON THE EMPLOYMENT AND PROTECTION OF FILIPINOS UNDER THE YUKON NOMINEE PROGRAM (YNP)

Philippine Labor and Employment Secretary Silvestre Bello III and Yukon Minister for Economic Development Ranj Pillai signed the Memorandum of Understanding on the Employment and Protection of Filipinos under the YNP

on 18 March 2022. The MOU aims to ensure the protection of the rights and welfare of Filipino workers deployed to Yukon under the YNP.

## COOPERATION FRAMEWORK ON EMPLOYMENT OF DOMESTIC WORKERS BETWEEN THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES AND THE GOVERNMENT OF THE HASHEMITE KINGDOM OF JORDAN

The Cooperation Framework on Employment of Domestic Workers between the Government of the Republic of the Philippines and the Government of the Hashemite Kingdom of Jordan was signed on 6 September 2018 and ratified on 2 June 2022.

## AIR SERVICES AGREEMENT (ASA) BETWEEN THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES AND THE GOVERNMENT OF THE ITALIAN REPUBLIC

The ASA between the Philippines and Italy was ratified on 13 June 2022 and entered into force on 22 June 2022. The ASA aims to facilitate, contribute and promote the expansion of regional and international air service opportunities in both countries.

## AGREEMENT BETWEEN THE PHILIPPINES AND SPAIN REGARDING THE INTERNATIONAL CONVENTION ON STANDARDS OF TRAINING, CERTIFICATION AND WATCHKEEPING FOR SEAFARERS, 1978, AS AMENDED

The Agreement between the Philippines and Spain regarding the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended was signed on 30 May 2022.

## MEMORANDUM OF UNDERSTANDING BETWEEN THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES AND THE GOVERNMENT OF MALAYSIA ON COOPERATION IN THE FIELD OF HEALTH

The Memorandum of Understanding between the Government of the Republic of the Philippines and the Government of Malaysia on Cooperation in the Field of Health was ratified on 23 June 2022. Under the MOU, both governments agree to cooperate in the areas of primary healthcare, reproductive health, health education, human resources for health development, and nutrition, among others.

## MEMORANDUM OF UNDERSTANDING ON COOPERATION IN THE FIELD OF AGRICULTURE BETWEEN THE DEPARTMENT OF AGRICULTURE OF THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES AND THE MINISTRY OF NATIONAL FOOD SECURITY AND RESEARCH OF THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF PAKISTAN

Philippine Department of Agriculture Secretary Manny Piñol and Pakistan Ambassador to the Philippines Dr. Aman Rashid signed the Memorandum of Understanding on Cooperation in the Field of Agriculture on 17 October 2018 in Quezon City. The MOU was ratified on 23 June 2022.

## MEMORANDUM OF UNDERSTANDING BETWEEN THE COMMISSION ON HIGHER EDUCATION OF THE REPUBLIC OF THE PHILIPPINES AND THE MINISTRY OF EDUCATION OF THE PEOPLE'S REPUBLIC OF CHINA ON COOPERATION IN THE FIELD OF HIGHER EDUCATION

Philippine Commission on Higher Education Chairman J. Prospero E. De Vera III and China’s State Councilor and Foreign Minister Wang Yi signed the Memorandum of Understanding on Cooperation in the Field of Higher Education on 29 Aug 2019. The MOU was ratified on 27 October 2022.

The MOU aims to promote collaboration between higher education institutions in both countries through mutual recognition of degrees and faculty and student exchanges through scholarships, training programs and country visits, among others.

## AGREEMENT CONCERNING THE ADOPTION OF HARMONIZED TECHNICAL UNITED NATIONS REGULATIONS FOR WHEELED VEHICLES, EQUIPMENT AND PARTS WHICH CAN BE FITTED AND/OR BE USED ON WHEELED VEHICLES AND THE CONDITIONS FOR RECIPROCAL RECOGNITION OF APPROVALS GRANTED ON THE BASIS OF THESE UNITED NATIONS REGULATIONS (WORKING PLAN-29 AGREEMENT)

The Philippines signed the instrument of accession to the Working Plan-29 Agreement on 23 June 2022. Ambassador Antonio Lagdameo, Permanent Representative to the United Nations, deposited the instrument of accession to the United Nations on 3 November 2022.

The Agreement aims to reduce technical barriers to international trade by defining harmonized technical UN Regulations that will suffice for certain wheeled vehicles, equipment and parts to fulfil in order to be used in their countries or regions.

## AIR SERVICES AGREEMENT (ASA) BETWEEN THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES AND THE GOVERNMENT OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA AND THE MEMORANDUM OF UNDERSTANDING (MOU) BETWEEN THE REPUBLIC OF THE PHILIPPINES AND THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA

The ASA between the Government of the Republic of the Philippines and the Government of the Federal Democratic Republic of Ethiopia was ratified on 23 June 2022 and entered into force on 26 August 2022. The ASA defines the aviation relationship and the exchange of traffic rights between the two countries.

## REGIONAL COMPREHENSIVE ECONOMIC PARTNERSHIP (RCEP) AGREEMENT

The Philippines ratified the RCEP Agreement on 28 November 2022. The RCEP Agreement aims to broaden and deepen economic integration in the region, strengthen economic growth and equitable economic development, and advance economic cooperation which will build upon existing economic linkages among the parties.

## AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES AND THE GOVERNMENT OF THE REPUBLIC OF INDIA ON CO-OPERATION AND MUTUAL ASSISTANCE IN CUSTOMS MATTERS

The Agreement between the Government of the Republic of the Philippines and the Government of the Republic of India on Co-operation and Mutual Assistance in Customs Matters was signed on 24 April 2022 and ratified on 23 December 2022.

## MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENT OF AGRICULTURE OF THE REPUBLIC OF THE PHILIPPINES AND THE MINISTRY OF CLIMATE CHANGE AND ENVIRONMENT OF THE UNITED ARAB EMIRATES ON AGRICULTURE

The Memorandum of Understanding between the Department of Agriculture of the Republic of the Philippines and the Ministry of Climate Change and Environment of the United Arab Emirates on Agriculture was signed on 27 June 2022. The MOU covers various areas such as soil science and management, biotechnology, post-harvest transactions, agricultural

research and development, agricultural innovation, protected agriculture technology, and irrigation and water resources.

## AGREEMENT BETWEEN THE THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES AND THE GOVERNMENT OF THE STATE OF ISRAEL FOR THE PROMOTION AND PROTECTION OF INVESTMENTS (IPPA)

Philippine Secretary of Trade and Industry Ramon M. Lopez and Israel Finance Minister Avigdor Lieberman signed the IPPA on 7 June 2022. The IPPA covers areas such as national treatment, most favored nation treatment, free transfers, rules-based expropriation and compensation, and investor-state dispute settlement.

# JUDICIAL DECISIONS

# JUDICIAL DECISIONS (PIL CASES)

**In partially granting this petition involving filiation and succession of nonmarital children, the Supreme Court relied, in part, in the United Nations Convention on the Rights of the Child and ruled that "should children's successional rights be at stake, then the best interest of the child should be of paramount consideration.**

AMADEA ANGELA K. AQUINO vs. RODOLFO C. AQUINO and ABDULAH C. AQUINO
[G.R. No. 208912. December 7, 2021.]

RODOLFO C. AQUINO vs. AMADEA ANGELA K. AQUINO
[G.R. No. 209018. December 7, 2021.]

*J. LEONEN:*

FACTS:

Petitioner Angela Aquino (Angela) moved that she be included in the distribution and partition of her grandfather Miguel's estate, alleging that she is the only child of Arturo Aquino (Arturo) – one of Miguel's sons with his first wife. While her mother and father were not married, Angela claimed that they did not suffer from any impediment to marry and were planning to get married before her father died.

Before Miguel died, he provided instructions on how his properties were to be distributed through a document, of which stated that Angela was among the heirs who would receive portions of Miguel's estate. Miguel gave her a commercial lot, which allowed rental payments to be made to her. Petitioner Rodolfo Aquino (Rodolfo), Angela's paternal uncle, opposed this.

While the RTC ruled in Angela's favor, the CA later reversed this and held that there was insufficient proof of filiation. The Supreme Court's Third Division denied her Petition, causing Angela to have the case referred to the Supreme Court*, En Banc*.

RULING (Excerpts):

> ARTICLE 992. An illegitimate child has no right to inherit *ab intestato* from the legitimate children and relatives of his father or mother; nor shall children or relatives inherit in the same manner from the illegitimate child.

The Civil Code now allows all nonmarital children as defined in the Civil Code to inherit in intestate succession. But because of Article 992, all nonmarital children are barred from reciprocal intestate succession. . . .

. . . .

Article 992 carves out an exception to the general rule that persons, by operation of law, inherit intestate from their blood relatives up to a certain degree. It does so through a classification of persons based on their birth status. The classification created in Article 992 is made upon persons at their conception and birth — when they are children. Children bear the burden of this classification, despite having no hand in it and its creation dependent on matters beyond their control, and without any power to change it or even mitigate some of its most pernicious effects. . .

. . . .

In line with these, the Philippines has bound itself to abide by universal standards on children's rights embodied in the United Nations Convention on the Rights of the Child. The Convention, a human rights treaty signed by the Philippines on January 26, 1990 and ratified on August 21, 1990, contains several State obligations, including a commitment to nondiscrimination of children and the enforcement of their best interests as a primary consideration in actions concerning children. . . .

. . . .

The United Nations Convention on the Rights of the Child is operative in Philippine law. Its principles and policies have been embraced in many laws on children and social welfare. Notably, Section 2 of Republic Act No. 7610, 187 or the Special Protection of Children Against Child Abuse, Exploitation, and Discrimination Act, provides:

> SECTION 2. Declaration of State Policy and Principles. — It is hereby declared to be the policy of the State *to provide special protection to children from all forms* of abuse, neglect, cruelty, exploitation *and discrimination, and other conditions, prejudicial to their development* including child labor and its

> worst forms; provide sanctions for their commission and carry out a program for prevention and deterrence of and crisis intervention in situations of child abuse, exploitation and discrimination. The State shall intervene on behalf of the child when the parent, guardian, teacher or person having care or custody of the child fails or is unable to protect the child against abuse, exploitation and discrimination or when such acts against the child are committed by the said parent, guardian, teacher or person having care and custody of the same.
>
> It shall be the policy of the State to protect and rehabilitate children gravely threatened or endangered by circumstances which affect or will affect their survival and normal development and over which they have no control.
>
> *The best interests of children shall be the paramount consideration in all actions concerning them, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, and legislative bodies, consistent with the principle of First Call for Children as enunciated in the United Nations Convention on the Rights of the Child. Every effort shall be exerted to promote the welfare of children and enhance their opportunities for a useful and happy life.* (Emphasis supplied)

This Court has repeatedly invoked the Convention to protect the rights and promote the welfare of children in matters of custody; filiation and paternity; adoption; crimes committed against them; and their status and nationality. As amicus curiae Professor Aguiling-Pangalangan pointed out:

> The Court has anchored several decisions on the Convention on the Rights of the Child in a long line of cases, to wit:
>
> 1. *Perez v. CA* [G.R. No. 118870, March 29, 1996] where the Court awarded the custody to the mother petitioner Nerissa Pere[z] as this was for the best interest of the child and held that: "It has long been settled that in custody cases, the foremost consideration is always the welfare and best interest of the child. In fact, no less than an

international instrument, the Convention on the Rights of the Child provides: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” "

2. *In the Matter of the Adoption of Stephanie Astorga Garcia* [G.R. No. 148311, March 31, 2005] in deciding the issue of the name of an adopted child, the Court held that: "The modern trend is to consider adoption not merely as an act to establish a relationship of paternity and filiation, but also as an act which endows the child with a legitimate status. This was, indeed, confirmed in 1989, when the Philippines, as a State Party to the Convention of the Rights of the Child initiated by the United Nations, accepted the principle that adoption is impressed with social and moral responsibility, and that its underlying intent is geared to favor the adopted child. Republic Act No. 8552, otherwise known as the 'Domestic Adoption Act of 1998,' secures these rights and privileges for the adopted."

3. *Gamboa-Hirsch v. CA* [G.R. No. 174485, July 11, 2007] where the Court stated: "The Convention on the Rights of the Child provides that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” The Child and Youth Welfare Code, in the same way, unequivocally provides that in all questions regarding the care and custody, among others, of the child, his/her welfare shall be the paramount consideration." The Court held that "the mother was not shown to be unsuitable or grossly incapable of caring for her minor child. All told, no compelling reason has been adduced to wrench the child from the mother's custody."

4. *Thornton v. Thornton* [G.R. No. 154598, August 16, 2004] where the Court cited the UN CRC as basis for its ruling that RA 8369 did not divest the Court of Appeals of jurisdiction despite RA 8369 explicitly stating that family courts have exclusive original jurisdiction over petitions for

> *habeas corpus*. The Court stated that ". . . a literal interpretation of the word "exclusive" will result in grave injustice and negate the policy "to protect the rights and promote the welfare of children" under the Constitution and the United Nations Convention on the Rights of the Child [. . .]."
>
> *These decisions, having referred to the CRC, are part of the legal system in accordance with Article 8 of the Civil Code [R.A. 386, Civil Code of the Philippines, 1949] that states that: "Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines*." (Emphasis supplied)

Clearly, our Constitution, our laws, and our voluntary commitment to our treaty obligations, when taken together, extend special protection to children, in equal measure and without any qualifications. When we affirm our international commitments that are in harmony with our constitutional provisions and have already been codified in our domestic legislation, we do nothing more than to recognize and effect what has already formed part of our legal system.

In this instance, should children's successional rights be at stake, then the best interest of the child should be of paramount consideration.

. . . .

We adopt a construction of Article 992 that makes children, regardless of the circumstances of their births, qualified to inherit from their direct ascendants — such as their grandparent — by their right of representation. Both marital and nonmarital children, whether born from a marital or nonmarital child, are blood relatives of their parents and other ascendants. Nonmarital children are removed from their parents and ascendants in the same degree as marital children. Nonmarital children of marital children are also removed from their parents and ascendants in the same degree as nonmarital children of nonmarital children.

. . . .

While not binding upon our jurisdiction, the changes in legitimacy statutes and successional rights in other countries may offer alternative

perspectives that can help foster an overdue conversation about our civil laws.

As early as 1967, the United Nations Commission on Human Rights and the United Nations Economic and Social Council appointed a special rapporteur to study discrimination against nonmarital children, then called as "persons born out of wedlock," across different member-nations, including the Philippines. One outcome of this study was a set of draft general principles submitted by the Sub-Committee on Prevention of Discrimination and Protection of Minorities "to enable all members of society, including persons born out of wedlock, to enjoy the equal and inalienable rights to which they are entitled," including inheritance rights. . . .

. . . .

More generally, the 1975 European Convention on the Legal Status of Children Born Out of Wedlock, ratified by 23 Council of Europe states, includes a provision on nondiscrimination of children in succession. . . .

. . . .

In 2013, the European Court of Human Rights observed that among its member-states, 21 countries gave children inheritance rights independent of their parents' marital status; 19 countries still retained a distinction according to the parents' marital status but the distinction did not extend to inheritance; 1 country — Malta — still made some distinctions in inheritance; and only Andorra treated nonmarital children less favorably than their marital counterparts in inheritance matters.

. . . .

All children are deserving of support, care, and attention. They are entitled to an unprejudiced and nurturing environment free from neglect, abuse, and cruelty. Regardless of the circumstances of their birth, they are all without distinction entitled to all rights and privileges due them. The principle of protecting and promoting the best interest of the child applies equally, and without distinction, to all children. . . .

. . . .

WHEREFORE, Amadea Angela K. Aquino's Motion for Reconsideration in G.R. No. 208912 is PARTIALLY GRANTED. The January 21, 2013 Decision of the Court of Appeals in CA-G.R. CV No. 01633 is REVERSED and SET ASIDE.

The cases are REMANDED to the Regional Trial Court of origin for resolution, within 90 days of receipt of this Decision, of the issues of Amadea Angela K. Aquino's filiation — including the reception of DNA evidence upon consultation and coordination with experts in the field of DNA analysis — and entitlement to a share in the estate of Miguel T. Aquino, in accordance with this Decision and the re-interpretation of Article 992 of the Civil Code.

SO ORDERED.

**The Court held that Section 69 of the Omnibus Election Code does not infringe the right of suffrage by citing Article 25 of the International Covenant on Civil and Political Rights.**

ANGELO CASTRO DE ALBAN vs. COMMISSION ON ELECTIONS (COMELEC), COMELEC LAW DEPARTMENT AND COMELEC EDUCATION AND INFORMATION DEPARTMENT
[G.R. No. 243968. March 22, 2022]

*J. M.V. LOPEZ:*

FACTS:

Angelo Castro De Alban filed his Certificate of Candidacy (CoC) for senator in the May 13, 2019 elections as an independent candidate, indicating that he is a lawyer and a teacher. The Comelec Law Department *motu proprio* filed a petition to declare De Alban a nuisance candidate alleging that he had no *bona fide* intent to run for public office. De Alban countered that he has a *bona fide* intention to run for public office given his government platforms covering education, agriculture, health, and housing programs.

The COMELEC First Division declared De Alban a nuisance candidate and ruled that De Alban failed to establish the financial capacity to wage a nationwide campaign. The COMELEC En Banc denied De Alban's motion for reconsideration.

RULING (Excerpts):

Suffice it to say that the right to seek public office is not a constitutional right but merely a privilege that may be subject to the limitations imposed by law. In one case, the Court rejected the claim that the right to run for public office is inextricably linked with the fundamental freedom of speech and expression which deserves constitutional protection. More telling is the Philippines' commitment to Article 25 of the International Covenant on Civil and Political Rights (ICCPR) which provides that *"[e]very citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: x x x (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; x x x."*

As aptly worded, the ICCPR abhors "unreasonable restrictions" but did not contemplate that the right to vote and be elected should be absolute. Indeed, *"[a]ny conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria."* The freedom of the voters to exercise the elective franchise at a general election implies the right to freely choose from all qualified candidates for public office. The imposition of unwarranted restrictions and hindrances precluding qualified candidates from running, is, therefore, violative of the constitutional guaranty of freedom in the exercise of elective franchise. It seriously interferes with the right of the electorate to choose freely from among those eligible to office whomever they may desire. As discussed earlier, Section 69 of the OEC serves as a reasonable restriction for persons to pursue their candidacies. The barring of candidates without *bona fide* intention serves to keep the purity of elections and addresses the malpractice of scrupulous candidates to the detriment of the voters.

…

FOR THESE REASONS, the petition is partly GRANTED. The provisions of Section 69 of the Omnibus Election Code are declared NOT UNCONSTITUTIONAL on the grounds raised by the petitioner. The Commission on Elections En Banc's Resolution dated January 28, 2019 in SPA No. 18-045 (DC) (MP) which declared Angelo Castro De Alban a nuisance candidate is SET ASIDE.

**The Supreme Court ruled that mothers who commit violent and abusive acts against her own child can be held criminally liable under Republic**

**Act (RA) No. 9262 or the Anti-Violence Against Women and Their Children Act of 2004 based on the principle that the State must "exert efforts to address violence committed against children in keeping with the fundamental freedoms guaranteed under the Constitution, the Universal Declaration of Human Rights, the Convention on the Rights of the Child, and other international human rights instruments of which the Philippines is a party."**

RANDY MICHAEL KNUTSON, acting on behalf of minor RHUBY SIBAL KNUTSON vs. HON. ELISA R. SARMIENTO-FLORES, in her capacity as Acting Presiding Judge of Branch 69, Regional Trial Court, Taguig City, and ROSALINA SIBAL KNUTSON

[G.R. No. 239215, July 12, 2022]

*J. M. V. LOPEZ:*

FACTS:

This case stemmed from a petition under RA No. 9262 for the issuance of Temporary and Permanent Protection Orders (Orders) filed by Randy Knutson (Randy) on behalf of his daughter with Rosalina Knutson (Rosalina), Rhuby, who is a minor. Randy alleged that after he and Rosalina separated and became estranged, he found out that Rosalina has been hurting their daughter, Rhuby, by pulling her hair, slapping her face, and knocking her head. One time, Rosalina pointed a knife at Rhuby and threatened to kill her. Rosalina also texted Randy about her plan to kill Rhuby and commit suicide.

The Regional Trial Court (RTC) dismissed the Petition and held that the remedies are not available to Randy because he is not a "woman victim of violence." The Supreme Court reversed the ruling of the RTC. It held that RA No. 9262 covers a situation where the mother committed violent and abusive acts against her own child.

RULING (Excerpts):

Section 3 (a) of RA 9262 defines violence against women and their children as "*any act or a series of acts committed by any person against a woman who is his wife, former wife, or against a woman with whom the person has or had a sexual or dating relationship, or with whom he has a common child, or against her child whether legitimate or illegitimate, within or without the family abode, which result in or is likely to result in physical, sexual, psychological harm or suffering, or economic abuse including threats of such acts, battery, assault, coercion, harassment or arbitrary deprivation of liberty*." The law criminalizes acts of violence against women and their children perpetrated by women's intimate partners, i.e., husband; former husband; or any person who has or had sexual or dating relationship with the woman, or with whom the woman has a common child. However, the Court in *Garcia* [*v. Drilon*[1]] emphasized that the law does not single out the husband or father as the culprit. The statute used the gender-neutral word "*person*" as the offender which embraces any person of either sex. The offender may also include other persons who conspired to commit the violence . . .

Logically, a mother who maltreated her child resulting in physical, sexual, or psychological violence defined and penalized under RA No. 9262 is not absolved from criminal liability notwithstanding that the measure is intended to protect both women and their children. In this case, however, the RTC dismissed Randy's petition for protection orders on behalf of his minor daughter on the ground that the mother cannot be considered as an offender under the law. To restate, the policy of RA No. 9262 is to guarantee full respect for human rights. Towards this end, the State shall exert efforts to address violence committed against children in keeping with the fundamental freedoms guaranteed under the Constitution, the Universal Declaration of Human Rights, the Convention on the Rights of the Child, and other international human rights instruments of which the Philippines is a party.

Specifically, Section 3 (2), Article XV of the 1987 Constitution espoused the State to defend "*[t]he right of children to assistance, including proper care and nutrition, and special protection from all forms of neglect, abuse, cruelty, exploitation, and other conditions prejudicial to their development; x x x*." Also, Article 25 (2) of the Universal Declaration of Human Rights advocated that "*[m]otherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social*

*protection*." Further, the Philippines as a state party to the Convention on the Rights of the Child has the following international commitments, to wit:

> *Preamble*
> The States Parties to the present Convention,
>
> xxx xxx xxx
>
> Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding
>
> xxx xxx xxx
>
> *Article 2*
>
> xxx xxx xxx
>
> 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.
>
> *Article 3*
>
> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
>
> xxx xxx xxx
>
> *Article 9*

> 1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
>
> xxx xxx xxx
>
> *Article 19*
>
> 1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
>
> xxx xxx xxx
>
> *Article 39*
>
> States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child. (Emphases supplied)

Notably, the Committee on the Rights of the Child commented that "*all forms of violence against children, however light, are unacceptable. x x x Frequency, severity of harm and intent to harm are not prerequisites for the definitions of violence*." The United Nations Children's Fund recognized "*violence against children x x x as global human rights and public health problems of critical importance.*" Also, violence against children "*takes many forms, including physical, sexual, and emotional abuse, and may involve*

*neglect or deprivation. Violence occurs in many settings, including the home, school, community and over the Internet. Similarly, a wide range of perpetrators commit violence against children, such as family members, intimate partners, teachers, neighbors, strangers and other children*." The World Health Organization said that *"[v]iolence against children includes all forms of violence against people under 18 years old, whether perpetrated by parents or other caregivers, peers, romantic partners, or strangers.*" Verily, mothers may be offenders in the context of RA No. 9262. The Court finds no substantial distinction between fathers and mothers who abused their children that warrants a different treatment or exemption from the law. Any violence is reprehensible and harmful to the child's dignity and development.

. . . .

FOR THESE REASONS, the Petition for *Certiorari* is GRANTED. The Orders dated January 10, 2018 and March 14, 2018 of the Regional Trial Court of Taguig City, Branch 69 in JDRC Case No. 313 are SET ASIDE. Let a PERMANENT PROTECTION ORDER be issued immediately.

SO ORDERED.

**This case involves the necessary parameters and quantum of proof in the refugee status determination process in the Philippines based on the definition of the term refugee, as well as the humanitarian nature of the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol.**

REHMAN SABIR vs. DEPARTMENT OF JUSTICE-REFUGEES and STATELESS PERSONS PROTECTION UNIT (DOJ-RSPPU)
[G.R. No. 249387. August 2, 2022]

*J. ZALAMEDA:*

FACTS:

The Applicant Rehman Sabir is a Pakistani national seeking protection as a refugee under the 1951 Convention Relating to the Status of Refugees ("1951 Refugee Convention") on account of alleged religious persecution. Sometime after Christmas in 2016, his father and stepmother (both Muslim) forced him to read the Quran. Applicant states that he refused to accept it

and, in the process, the Quran accidentally dropped. Raja said that the Applicant insulted the Quran and is (sic) that he is now dead. Raja then grabbed a knife from the kitchen, prompting the Applicant to run away. According to the Applicant, anyone who is accused of insulting the Quran in Pakistan can be criminally charged with Section 295-C of their criminal laws, a Blasphemy law, the penalty of which is death. He was later referred to a Non-Governmental Organization ("NGO") in Pakistan named "Save and Serve Christ", which helped the Applicant to get to the
Philippines for the purpose of seeking asylum. He later applied for refugee status upon arrival.

The Secretary of Justice, through the Department of Justice-Refugees and Stateless Persons Protection Unit (DOJ- RSPPU), issued a Decision denying petitioner's application, concluding that the petitioner is not a refugee within the meaning of the 1951 Refugee Convention. They state that risk of blasphemy allegations is generally not enough to make out a claim under the Refugee Convention, unless there is evidence that the charge is pursued. The Court of Appeals affirmed the decision of the DOJ-RSPPU.

RULING (Excerpts):

The 1951 Refugee Convention and the 1967 Protocol did not specify any threshold of evidence to warrant a finding that an applicant is a refugee. There is likewise no specific mention of a quantum of proof in DOJ Circular No. 058-12. In relation to Section 9, Article II, however, it is provided that a finding of refugee status is warranted where the applicant has met the definition of a refugee. The definition referred to is a substantial reproduction of the definition of a refugee under the 1951 Refugee Convention and the 1967 Protocol, thus:

> SECTION 1. Definition of Terms. — x x x
>
> d. *"Refugee" is a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence."*

On the basis of the definition of the term refugee, as well as the humanitarian nature of the Refugee Convention and the Protocol, we determine the necessary parameters and quantum of proof in the refugee status determination process in the Philippines.

The most important element of the definition is the existence of a "well-founded fear" of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. While the definition uses the phrase "well-founded fear," this cannot be taken to mean proof beyond reasonable doubt as required in criminal cases. To require such a high threshold will be contrary to the humanitarian purpose of the convention, and the acknowledgment that there may be no other evidence available to the applicant, especially if he or she had to immediately leave the country of origin.

As such, we hold that there is a "well-founded fear of being persecuted" if the applicant can establish, to a reasonable degree, that he or she would have been persecuted had the applicant not left his or her country of origin, or would be persecuted if the applicant returns thereto. So, decision-makers would have to answer the question: "Is there a reasonable chance that the applicant would have been persecuted had he or she not departed from his or her country of origin, or wouldbe persecuted upon return to his or her country?"

…

Considering the factual issues that still need to be threshed out in light of the clarifications on the refugee status determination process, we find it prudent to remand the case back to the DOJ-RSPPU.

The DOJ-RSPPU is urged to actively discharge its burden in assisting petitioner to elucidate his claim. Reception of further evidence, conduct of additional interviews, in-depth study of country-of-origin information, and assessment of petitioner's averments to a greater extent are thus encouraged. Thereafter, the evidence should be assessed based on the reasonable degree threshold We laid down in this case.

In this regard, we provide the following guidelines for refugee status determination proceedings:

> 1. To discharge the shared and collaborative burden between the applicant and the protection officer: (a) the applicant must provide accurate, full, and credible account or proof in support of his or her claim, and submit all relevant evidence reasonably available; and (b) the protection officer must assist and aid the applicant in explaining, clarifying, and elucidating his or her claim.
>
> 2. Notwithstanding the protection officer's shared burden, it is also the duty of the protection officer to assess the credibility of the statements of the applicant and the evidence on record.
>
> 3. The facts, as ascertained, should be applied to the definition of a refugee under the 1951 Refugee Convention and the 1967 Protocol, considering the subjective and objective elements of the phrase "well-founded fear." The protection officer should determine if the applicant has established, to a reasonable degree, that he or she would have been persecuted had the applicant not left his or her country of origin or would be persecuted if the applicant returns thereto.
>
> …

WHEREFORE, the petition is hereby PARTLY GRANTED. Accordingly, the Decision dated 31 January 2019 and Resolution dated 10 September 2019 of the Court of Appeals in CA-G.R. SP No. 153799 are REVERSED and SET ASIDE. The case is remanded to the Department of Justice-Refugees and Stateless Persons Protection Unit for further proceedings in accordance with the guidelines stated in this Decision.

SO ORDERED.

**The Supreme Court - by citing the influence of the World Intellectual Property Organization (WIPO), the Berne Convention, and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) ruled that the act of playing radio containing sound recordings using loudspeakers amounts to an unauthorized communication of such copyrighted music to the**

**public, and thus, violates various subsets of intellectual property rights of the owner of the copyright.**

FILIPINO SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (FILSCAP), INC.,
vs. ANREY, INC.
[G.R. No. 233918, August 9, 2022]

*J. ZALAMEDA:*

FACTS:

This case stemmed from a complaint for copyright infringement filed by FILSCAP – a non-profit society of composers, authors, and publishers that owns public performance rights over the copyrighted musical works of its members – against Anrey, Inc., a chain of restaurants in Baguio City for the unauthorized public performance of music. Anrey, Inc. contended that their establishments merely played whatever is being broadcasted on the radio they are tuned in and even if the broadcast plays copyrighted music, the radio stations have already paid the corresponding royalties. The RTC and CA found no merit in FILSCAP's complaint.

RULING (Excerpts):

The Supreme Court found merit in FILSCAP's petition stating that the act of playing radio broadcasts containing sound recordings through loudspeakers amounts to an unauthorized communication of such copyrighted music to the public, thus, violates the public performance rights of FILSCAP. This decision is in harmony with the guidance released by the World Intellectual Property Organization (WIPO) to the Berne Convention for the Protection of Literary and Artistic Works, to which the Philippines is a signatory since 1951. The Philippines is also a signatory to the Convention establishing the WIPO as well as the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement which incorporated by reference the provisions on copyright from the Berne Convention.

In their decision, the court cited the influence of international treaties to define what is a public performance and what constitutes communication to

the public which were essential to determine whether there was copyright infringement was committed by Anrey Inc.

The WIPO gave the following remarks on the situation when a broadcast is publicly communicated by loudspeaker to the public:

> When the work which has been broadcast is publicly communicated, e.g., by loudspeaker or otherwise, to the public such as in cafe's, restaurants etc., the Convention states that the relay of a broadcast by wire, creates an additional audience (paragraph (l) (ii)), so, in this case too, the work is made perceptible to listeners (and perhaps viewers) other than those contemplated by the author when his permission was given. Although, by definition, the number of people receiving a broadcast cannot be ascertained with any certainty, the author thinks of his license to broadcast as covering only the direct audience receiving the signal within the family circle. Once this reception is done in order to entertain a wider circle, often for profit, an additional section of the public is enabled to enjoy the work and it ceases merely a matter of broadcasting. The author is given control over this new public performance of his work.

The remarks discussed introduces the concept of a "new public." Typically, radio stations already secured from the copyright owner (or his/her assignee) the license to broadcast the sound recording and by the nature of broadcasting, it is necessarily implied that its reception by the public has been consented to by the copyright owners. But the author normally thinks of the license to broadcast as to "cover only the direct audience receiving the signal within the family circle." Any further communication of the reception creates, by legal fiction, a "new public" which the author never contemplated when they authorized its use in the initial communication to the public.

. . . . .

The disquisitions above show that Anrey infringed on the public performance right of FILSCAP when it played music by means of radio-over loudspeakers. It is suggested that Anrey equally violated FILSCAP's right to communicate to the public the songs from its repertoire.

The Berne Convention provides that authors of musical works shall enjoy the exclusive right of authorizing the public performance of their works including the "public performance by any means or process" and "any communication to the public of the performance of the works," under Art. 11 (1) of the Convention.

The scope of these rights was explained in the 1978 WIPO Guide to the Berne Convention stating that:

1. This covers performance by means of recordings; there is no difference for this purpose between a dance hall with an orchestra playing the latest tune and the next-door discotheque where the customers use coins to choose their own music. In both, public performance takes place. The inclusion is general and covers all recordings (discs, cassettes, tapes, videograms, etc.) though public performance by means of cinematographic works is separately covered — see Article 14 (1) (ii).”
2. The second leg of this right is the communication to the public of a performance of the work. It covers all public communication except broadcasting which is dealt with in Article 116.

Article 11 of the Berne Convention further provides for the exclusive right, among others, of authorizing the "the public communication by loudspeaker or any other analogous instrument transmitting by sign, sound or images, the broadcast of the work."

In sum, public performance right includes broadcasting of the work [music] and specifically covers the use of loudspeakers. This is the very act Anrey is complained of infringing. As to whether Anrey also infringed on FILSCAP's right to communicate to the public, given the factual scenario of the case, this should be answered in the negative.

Communication to the public is defined under Art. 8 of the WIPO Copyright Treaty which reads:

> Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall

> enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them. (Underscoring supplied)

Apparently, the phrase "the public may access these works from a place and time individually chosen by them" refers to interactive on-demand systems like the Internet. It does not refer to other traditional forms like broadcasting and transmitting of signals where a transmitter and a receiver are required as discussed in the WIPO Guide to the Berne Convention.

> "The right of communication to the public is the right to authorize any communication to the public, by wire or wireless means, including "the making available to the public of works in a way that the members of the public may access the work from a place and at a time individually chosen by them." The quoted expression covers, in particular, on-demand, interactive communication through the Internet. (Underscoring supplied)

Prior to amendment of the IPC by RA 10372, communication to the public is defined as the making of a work available to the public by wire or wireless means in such a way that members of the public may access these works from a place and time individually chosen by them. The WIPO, on the other hand, limited this to interactive on-demand systems like the internet.

The phrase, "other communication to the public," however, still pertains to the advanced methods of communication such as the internet. The use of the word "other" is simply to segregate its application from the traditional methods of communication such as performing the radio out loud to the public or by means of loudspeakers. The IPC under RA 8293 made use of the word "other" only to distinguish it from what has been traditionally considered part of the public performance rights of the copyright owner under the Act 3134.

. . . .

Neither the Berne Convention nor the TRIPS Agreement prohibit States from the introduction of limitations or exceptions on copyright. However, such limitations or exceptions cannot exceed a *de minimis* threshold or limitations that are of minimal significance to copyright owners.

At present, the WTO employs three-step test in determining whether the limitation or exception on the rights of an owner exceed the threshold: they (1) must be confined to certain special cases, (2) cannot conflict with a normal exploitation of the work, and (3) cannot unreasonably prejudice the legitimate interests of the right holder. These conditions are to be applied on a cumulative basis; if any one step is not met, the exemption in question will fail the test and be found to violate the TRIPS Agreement.

. . . .

WHEREFORE, premises considered, the instant petition is GRANTED. The assailed Decision dated April 19, 2017 and Resolution dated August 3, 2017 promulgated by the Court of Appeals (CA) in CA-G.R. CV No. 105430, affirming the Decision dated April 15, 2015 and Order dated June 30, 2015 rendered by Branch 6, Regional Trial Court (RTC) of Baguio City, are hereby REVERSED and SET ASIDE.

SO ORDERED.

## JUDICIAL DECISIONS (PRIL CASES)

**In this case, the Court reiterates the rules for proving the fact of a foreign judgment, as well as the policy of limited review wherein Philippine courts cannot delve into the merits of the foreign judgment.**

BANKRUPTCY ESTATE OF CHARLES B. MITICH a.k.a. CHARLIE MITICH and JAMES L. KENNEDY, TRUSTEE OF THE BANKRUPTCY ESTATE OF CHARLES B. MITICH a.k.a. CHARLIE MITICH vs. MERCANTILE INSURANCE COMPANY, INC.

[G.R. No. 238502. February 15, 2022]

LAZARO-JAVIER, J:

FACTS:

Petitioners filed before the RTC of Manila a civil case for recognition and enforcement of foreign judgment rendered by the Superior Court of the State of California awarding them damages against Mercantile, an insurance company in the Philippines. Mercantile moved to dismiss the case, alleging that the Default Judgment of the California Court was void due to invalid extraterritorial service of summons on Mercantile. They argue that this made it unenforceable in the Philippines. It argued that extraterritorial service of summons is governed by *lex fori* or the internal law of the forum, and the summons from the California Court was served on a Claims Clerk of Mercantile who was neither authorized to receive summons on its behalf nor among those authorized to receive summons for a corporation under the California Code of Civil Procedure.

The trial court ruled in favor of the petitioners. The Court of Appeals, however, affirmed the main decision but deleted the award of interest and attorney's fees, noting that the Default Judgment itself did not allegedly award these, nor did it contain the computation and legal basis for the interest imposed.

RULING (Excerpts):

Under Section 48 (b), Rule 39 of the 1997 Rules of Civil Procedure, a foreign judgment or final order against a person creates presumptive evidence of a right as between the parties involved...

….

But before the presumption may be invoked, the party seeking the enforcement of the foreign judgment must first prove it as a fact. This, in turn, demands compliance with Sections 24 and 25, Rule 132 of the Rules of Evidence prior to its amendment...

….

Verily, the fact of foreign judgment may be proved through: (1) an official publication or (2) a certification or copy attested by the officer who has custody of the judgment. If the office which has custody is in a foreign country, the certification may be made by the proper diplomatic or consular officer of the Philippine foreign service in that country and authenticated by the seal of office.

Here, Mitich, et al., presented the Default Judgment dated July 21, 1994 before the trial court, together with a Certification dated August 3, 1994 of Kenneth E. Martone, Clerk of the San Diego Superior Court who has custody of the seal and all records pertaining to cases of that court, to the effect that the Default Judgment had been entered in his record last July 22, 1994, as attested to by James R. Milliken, Judge of the San Diego Superior Court. These documents were authenticated by Consul Antonio S. Curameng of our Philippine Consulate in Los Angeles, State of California, USA through Authentication dated August 9, 1994. Certainly, Mitich, et al., complied with Sections 24 and 25, Rule 132 of the Rules of Evidence.

…

Since Mitich, et al., have proven the existence and authenticity of the Default Judgment in accordance with Sections 24 and 25, Rule 132 of the Rules of Evidence, the Default Judgment already enjoys presumptive validity. The burden has therefore shifted to Mercantile to prove otherwise. But instead of presenting preponderant evidence against the authenticity of the Default Judgment, Mercantile simply indulged in conjectures.

At any rate, the trial court and Court of Appeals uniformly ruled that the handwritten year "1992" was a mere clerical error. Indeed, it is settled that when the factual findings of the trial court are confirmed by the Court of Appeals, said facts are final and conclusive on the Court unless the same are not supported by the evidence on record. The Court will not assess all over again the evidence adduced by the parties, particularly whereas in this case the findings of both the trial court and the Court of Appeals completely coincide.

As consistently found by the courts below, the handwritten date July 21, "1992" was a mere typographical error. Circumstances showed that the actual date of the Default Judgment was July 21, 1994: the complaint before the California Court was dated February 18, 1994 summonses on Mercantile were issued on February 18, 1994; Mitich requested for default judgment on May 24, 1994, May 27, 1994 and July 6, 1994; and the application for default judgment was heard by the California Court on July 18, 1994. The Default Judgment showed that the year "1992" was erroneously written thereon; the rest of the Default Judgment specifically pointed to 1994 as the year when it was promulgated.

…

Verily, Philippine courts cannot delve into the merits of the foreign judgment under a policy of limited review. In the recognition of foreign judgments, Philippine courts are incompetent to substitute their judgment on how a case was decided under foreign law. Thus, we cannot simply impose post judgment interest here unless it was specifically and categorically awarded by the California Court. In other words, the foreign court itself should have fixed the amount of legal interest taking all necessary factors into account, but did not. For sure, the Court cannot now assume this task. We cannot substitute the discretion which should have been exercised by the California Court with our own.

In any case, it is a conflict of law policy that foreign law ordinarily applicable will not be applied if to do so would violate domestic public policy. In other words, the normal operation of foreign law is subject to a public policy limitation. When a judge rejects the application of foreign law on public policy grounds, it is not that the foreign law does not seem so reasonable to the judge as his or her own good homemade precedent, only that it violates some fundamental principle of justice, good morals, or some deep-rooted tradition of society. Relief may be refused at the forum state because of disapproval of a particular cause of action on grounds of policy.

…

ACCORDINGLY, the Decision dated November 27, 2017 and Resolution dated March 12, 2018 of the Court of Appeals in CA-G.R. CV No. 104238 are AFFIRMED with MODIFICATION.

MERCANTILE INSURANCE COMPANY, INC. is also REQUIRED to pay the ESTATE OF CHARLES B. MITICH a.k.a. CHARLIE MITICH and JAMES L. KENNEDY, TRUSTEE OF THE BANKRUPTCY ESTATE OF CHARLES B. MITICH a.k.a. CHARLIE MITICH P500,000.00 as temperate damages and P200,000.00 as attorney's fees. This amount shall earn six percent (6%) legal interest per annum from finality of this Decision until fully paid.

SO ORDERED.

**Despite the documentary evidence submitted, without an official translation of the divorce laws of the country where it was obtained, it may be considered to be insufficient to prove the fact of the foreign divorce.**

REPUBLIC OF THE PHILIPPINES vs. JOCELYN ASUSANO KIKUCHI
[G.R. No. 243646, June 22, 2022]

HERNANDO, J:

FACTS:

Jocelyn filed before the trial court a Petition for judicial recognition of foreign divorce which she and her former husband (a Japanese national) jointly filed in 2007 before the City Hall of Sakado City, Saitama Prefecture. She presented the following before the Regional Trial Court: (1) the Acceptance Certificate issued by the Mayor of Sakado City; (2) an Authentication from the Vice Consul of Philippine Embassy in Tokyo, Japan; and (3) a photocopy of the Civil Code of Japan in English text. Both the trial court and the Court of Appeals ruled in Jocelyn's favor. The Republic, through the Office of the Solicitor General, filed a Petition for Review on Certiorari before the Supreme Court, arguing that arguing that Jocelyn failed to comply with the requirements of authentication and proof of documents concerning the Acceptance Certificate, and the Authentication by the Philippine Embassy in Tokyo, Japan; that the testimony of her attorney-in-fact as to the fact of divorce should have been excluded for being hearsay; and that the foreign law had not been proven.

RULING (Excerpts):

Before a foreign divorce decree can be recognized by the court, the party pleading it must first prove the fact of divorce and its conformity to the foreign law allowing it. As both of these purport to be official acts of a sovereign authority, the required proof are their official publications or copies attested by the officers having legal custody thereof, pursuant to Section 24, Rule 132 of the Rules of Court.

. . .

The Republic nevertheless argues that the Acceptance Certificate is insufficient because the accompanying Authentication issued by the Embassy

of the Philippines in Tokyo, Japan does not comply with the rules on authentication.

We disagree.

In *Racho v. Seiichi Tanaka*, which involves a similarly-worded Authentication from the Embassy of the Philippines in Japan, the Court held that the document was sufficient, viz.:

> The Certificate of Acceptance of the Report of Divorce was accompanied by an Authentication issued by Consul Bryan Dexter B. Lao of the Embassy of the Philippines in Tokyo, Japan, certifying that Kazutoyo Oyabe, Consular Service Division, Ministry of Foreign Affairs, Japan was an official in and for Japan. The Authentication further certified that he was authorized to sign the Certificate of Acceptance of the Report of Divorce and that his signature in it was genuine. Applying Rule 132, Section 24, the Certificate of Acceptance of the Report of Divorce is admissible as evidence of the fact of divorce between petitioner and respondent.

As in *Racho*, We rule that the Authentication submitted by Jocelyn is also sufficient.

. . .

To prove that the divorce was valid under Japanese laws, Jocelyn submitted a photocopy of the English translation of the Civil Code of Japan, published by Eibun-Horei-Sha, Inc. and stamped with "LIBRARY, Japan Information and Culture Center, Embassy of Japan, 2627 Roxas Boulevard, Pasay City." The Republic assails the document for being insufficient to prove the law of Japan on divorce.

We agree with the Republic. Following jurisprudence, the document is devoid of any probative value.

. . .

Not being an official translation, the document submitted by Jocelyn does not prove the existing law on divorce in Japan. Unfortunately, without such evidence, there is nothing on record to establish that the divorce

between Jocelyn and Fumio was validly obtained and is consistent with the Japanese law on divorce.

Given that Jocelyn was able to prove the fact of divorce but not the Japanese law on divorce, a remand of the case rather than its outright dismissal is proper. This is consistent with the policy of liberality that the Court has adopted in cases involving the recognition of foreign decrees to Filipinos in mixed marriages.

. . .

WHEREFORE, the Petition is GRANTED. The November 15, 2018 Decision of the Court of Appeals in CA-G.R. CV No. 110750 is REVERSED and SET ASIDE. The case is REMANDED to the court of origin for further proceedings and reception of evidence on the Japanese law on divorce.

SO ORDERED.

**This case reiterates the Special ADR Rules, providing that the Philippine court may refuse the recognition and enforcement of a foreign arbitral award when it finds that its recognition and enforcement would be contrary to public policy.**

PIONEER INSURANCE & SURETY CORPORATION vs. TIG INSURANCE COMPANY, successor by merger to CLEARWATER INSURANCE COMPANY
[G.R. No. 256177, June 27, 2022]

M.V. LOPEZ, J:

FACTS:

Clearwater, a foreign company organized under the laws of the State of Delaware, USA, filed a Petition for confirmation, recognition, and enforcement of a foreign arbitral award before the RTC. Clearwater initiated the arbitration proceedings in New York. The panel of arbitrators ordered Pioneer, a domestic corporation engaged in the business of selling non-life insurance, to pay Clearwater, which Pioneer failed to pay. In opposing Clearwater's Petition, Pioneer invoked Rule 13.4 of the Special Rules of Court on Alternative Dispute Resolution, A.M. No. 07-11-08- SC dated September 1, 2009 (Special ADR Rules), and Article V of the 1958 New York Convention, and argued that the arbitral award is contrary to public policy or the

Philippine Constitution because Clearwater's claim was not supported by sufficient evidence. Pioneer also maintains that public policy against non-assertion of stale claims was violated when the arbitral award was confirmed, recognized, and enforced. Since Clearwater only enforced its claims against Pioneer 16 years after Pioneer rejected Clearwater's demand, the 6-year prescription period under the New York Civil Practice Law and Rules had already set in.

RULING (Excerpts):

Rule 13.4 (b) (ii) 40 of the Special ADR Rules provides that the Philippine court may refuse the recognition and enforcement of a foreign arbitral award when it finds that its recognition and enforcement would be contrary to public policy. In *Mabuhay Holdings Corporation v. Sembcorp Logistics Limited*, the Court adopted the narrow approach in determining whether the enforcement of an arbitral award is contrary to public policy. The Court emphasized that not all violations of law may be deemed contrary to public policy. The Philippine court may only refuse to recognize or enforce a foreign arbitral award when its enforcement would be against the fundamental tenets of justice and morality, or would blatantly be injurious to the public, or the interests of the society. . .

. . .

Based on the foregoing, the party raising the ground of violation of public policy in opposing the recognition and enforcement of a foreign arbitral award must: (a) identify the State's fundamental tenets of justice and morality; (b) prove the illegality or immorality of the award; and (c) show the possible injury to the public or the interests of the society.

Pioneer's prescription and violation of public policy arguments rest on shaky ground. Pioneer identifies the State's policy against stale claims, but its evidence falls short in proving the illegality or immorality of the award. It fails to establish that Clearwater's claims have already prescribed.

Pioneer narrates that it repeatedly requested supporting documents from Clearwater after the latter's initial demand in 1995, and it was only in 2012 when Clearwater provided them with various documents. Surely, Pioneer did not reject Clearwater's demand for payment in 1995. Following Pioneer's argument, the prescriptive period should not start from

Clearwater's initial demand in 1995 because it did not reject Clearwater's claims outright. Instead, it requested a breakdown and supporting documents from Clearwater. The running of the prescriptive period is undeterminable absent any evidence showing the specific date when Pioneer rejected Clearwater's claim.

All told, the final award will significantly affect Pioneer, but it will not injure the public or compromise the society's interest. The final award's alleged violation of our policy against stale claims was not established with certainty. Thus, confirming and enforcing the final award is not contrary to public policy.

. . .

ACCORDINGLY, the Petition is DENIED. The Court of Appeals' Decision dated June 19, 2020 and Resolution dated February 24, 2021 in CAG.R. SP No. 149206 upholding the Decision dated September 21, 2016 and the Order dated December 16, 2016 of Branch 141, Regional Trial Court of Makati City are AFFIRMED. The United States Board of Arbitrator's Final Award dated April 25, 2013 is CONFIRMED, RECOGNIZED, and ENFORCED, without pronouncement as to attorney's fees and costs of suit.

SO ORDERED.

**Any declaration as to the validity of the divorce can only be made upon petitioner's complete submission of evidence proving the divorce decree and the national law of her alien spouse.**

MARIA TERESA DINO BASA-EGAMI vs. DR. LISA GRACE BERSALES, in her capacity as the Administrator and Civil Registrar General, et al
[G.R. No. 249410, July 6, 2022]

ZALAMEDA, J:

FACTS:

Petitioner, a Filipina previously married to a Japanese national, filed before the RTC a Petition for Recognition of Foreign Judgment/Final Order to be able to remarry. The Republic of the Philippines, through the Office of the Solicitor General (OSG), sought the dismissal of the petition, arguing in the main that a consensual or mutual divorce, such as the divorce obtained by

petitioner, is not contemplated by Article 26 (2) of the Family Code; hence, it cannot be recognized by Philippine courts. It argues that only a divorce obtained through a court judgment or adversarial proceeding can be recognized by Philippine courts, insisting that the only divorce contemplated under Article 26 (2) is the one validly obtained by the alien spouse, without the consent or acquiescence of the Filipino spouse.

RULING (Excerpts):

If we are to follow the OSG's interpretation of the law, petitioner would sadly remain in limbo — a divorcee who cannot legally remarry — as a result of the ambiguity in the law, particularly the phrase "divorce is thereafter validly obtained abroad by the alien spouse." This perfectly manifests the dire situation of most of our *kababayans* in unsuccessful mixed marriages since, more often than not, their divorces abroad are obtained through mutual agreements. Thus, some of them are even constrained to think of creative and convincing plots to make it appear that they were against the divorce or that they were just prevailed upon by their foreigner spouse to legally end their relationship. What is more appalling here is that those whose divorce end up getting rejected by Philippine courts for such a flimsy reason would still be considered as engaging in illicit extra-marital affairs in the eyes of Philippine laws if ever they choose to move on with their lives and enter into another relationship like their foreigner spouse. Worse, their children in the subsequent relationship would be legally considered as illegitimate.

The myopic understanding of Article 26 (2), as incessantly advocated by the OSG, would have been sound and successful in the past, since the Court repeatedly upheld this ultra-conservative view by relying on the letter of the law that killeth, instead of choosing that spirit of the law which giveth life. Fortunately, *Republic v. Manalo (Manalo)*, a landmark ruling by the Court *En Banc*, finally put an end to this iniquitous interpretation of the law as it gave due regard to the sad consequences a strict and literal construction of the law brings . . .

. . .

The OSG should now take note that *Manalo* is the prevailing jurisprudence on the matter. As it was clearly spelled out in *Manalo*, Article 26 (2) only requires that there be a divorce validly obtained abroad, without regard as to who initiated it. This felicitous ruling was echoed in yet another

seminal case of recognition of a divorce of mixed marriage. In *Racho v. Tanaka (Racho)*, rendered only a few months after *Manalo*, the Court squarely dealt with the divorce by mutual consent of a marriage involving a Filipina and a Japanese national, the same situation in the petition at bar. Therein, the Court unambiguously declared that pursuant to *Manalo*, a foreign divorce may be recognized in this jurisdiction as long as it is validly obtained, regardless of who between the spouses initiated the divorce proceedings. Since then, there have been many other iterations of *Manalo* in jurisprudence.

. . .

Even as the Court declares the evidence of petitioner to be sufficient in proving the fact of divorce, the OSG is correct in pointing out that as a settled rule, mere presentation of the divorce decree is insufficient. A divorce obtained abroad may be recognized in our jurisdiction only if the decree is valid according to the national law of the foreigner. Accordingly, both the divorce decree and the governing personal law of the alien spouse must be proven.

The CA found that the Civil Code of Japan submitted by petitioner does not comply with the attestation requirements under Sections 24 and 25 of the Revised Rules of Court. Also, the OSG argued that the Civil Code submitted by petitioner is a mere photocopy of a book published by a private company, Elbun-Horei-Sha, Inc. It is not even authenticated, and neither is a statement or proof that the library of the Japanese Embassy is an official repository or custodian of Japanese public laws and records. Petitioner, on the other hand, counters that her evidence should be considered as sufficient evidence of the national law of Japan as the Court did in *Racho*. She posits that like in *Racho*, the trial court herein duly admitted the evidence of the national law of Japan which, as stated in the RTC Decision, were excerpts from the book The Civil Code of Japan, certified as true copy and notarized by Kenji Sugimori, notary of the Osaka Legal Affairs Bureau and duly authenticated by Consul Castro of the Philippine Consulate General, Osaka, Japan.

In the face of these conflicting assertions, the Court's appropriate recourse is to peruse the subject document in order to arrive at the correct conclusion. However, petitioner shot herself in the foot by failing to attach any evidence to her petition. Accordingly, the Court is constrained to sustain

the CA's ruling on this issue. To stress anew, our courts do not take judicial notice of foreign laws and judgment; our law on evidence requires that both the divorce decree and the national law of the alien must be alleged and proven and like any other fact. Hence, any declaration as to the validity of the divorce can only be made upon petitioner's complete submission of evidence proving the divorce decree and the national law of her alien spouse.

. . .

WHEREFORE, the Petition for Certiorari under Rule 65 is GRANTED. The Decision dated 25 March 2019 and Resolution dated 22 July 2019 of the Court of Appeals in CA-G.R. CV No. 109890 are REVERSED AND SET ASIDE. The case is REMANDED to Branch 86, Regional Trial Court of Quezon City, for further proceedings and reception of evidence on the pertinent Japanese law on divorce and the document proving Hiroshi Egami is now recapacitated to marry.

**This case reiterates the recognition of foreign decrees of divorce irrespective of who obtained the decree abroad. Divorces obtained abroad by a foreign spouse may be recognized in Philippine jurisdiction as long as the decree is valid based on the national law of the foreigner.**

REPUBLIC OF THE PHILIPPINES V. HELEN BAYOG-SAITO, THE LOCAL CIVIL REGISTRY OF PASAY CITY AND THE NATIONAL STATISTICS OFFICE
[G.R. No. 247297. August 17, 2022]

INTING, J:

FACTS:

Helen (a Filipino citizen) and Toru (a Japanese national) were married on August 30, 1999 in Pasay City. They had no children or conjugal property, and eventually separated due to differences in culture. Their divorce notification papers were accepted by Mayor Takashi, the mayor of Minami-ku, Yokohama City and the divorce was subsequently recorded in Toru's family registry. Vice Consul Kengo of the Japanese Embassy in the Philippines issued a Divorce Certificate which was then authenticated by the DFA. She filed a Petition for Judicial Recognition of foreign divorce decrees with the RTC, seeking to sever her marriage bond and give her legal capacity to remarry. The RTC found the

petition sufficient in form and substance, granting recognition and legal capacity to remarry based on Article 26 of the Family Code.

The Office of the Solicitor General filed a Motion for Reconsideration, stating that the respondent was unable to satisfy the requirements of Article 26. The RTC denied this motion. The OSG once again filed an appeal to the CA stating that absolute divorce is against public policy and is not able to be recognized in the Philippines. The CA denied the appeal, on the basis that Helen merely accepted the divorce notification and did not initiative such. The OSG disagrees with this contention, stating that it was jointly obtained by the both of them.

RULING (Excerpts):

Article 26 of the Family Code states that where a marriage between a Filipino citizen and a foreigner is validly celebrated and a divorce is thereafter validly obtained by the alien spouse capacitating him or her to remarry, the Filipino spouse shall likewise have capacity to remarry under Philippine law.

Fujuki v. Marinay explains the nature of the second paragraph of Article 26 as a corrective measure to address the anomaly that results from a marriage between a Filipino, whose laws do not allow divorce, and a foreign citizen, whose laws allow divorce. The anomaly consists in the Filipino spouse being tied to the marriage while the foreign spouse is free to marry under the laws of his or her country. The correction is made by extending in the Philippines the effect of the foreign divorce decree, which is already effective in the country where it was rendered.

In the landmark case of the Republic of the Philippines v. Manalo, the court states that the letter of the law does not demand that the alien spouse should be the one who initiated the proceeding wherein the divorce decree was granted. It does not distinguish whether the Filipino spouse is the petitioner or the respondent in the foreign divorce proceeding. The Court is bound by the words of the statute; neither can We put words in the mouths of the lawmakers. The purpose of Paragraph 2 of Article 26 is to avoid the absurd situation where the Filipino spouse remains married to the alien spouse who, after a foreign divorce decree that is effective in the country where it was rendered, is no longer married to the Filipino spouse.

Here, the divorce was initiated by Toru who asked Helen to sign the divorce notification papers; she agreed by affixing her signature on the documents. In effect, the parties are considered to have obtained divorce by agreement when they mutually agreed to the divorce, which is allowed in Japan. After the acceptance of the divorce notification, the marriage of respondent and Toru has been dissolved as far as the Japanese laws are concerned and Toru is then capacitated to remarry.

Verily, the fact of the divorce of Helen and Toru, as well as the Japanese law on divorce, had been sufficiently and satisfactorily proven by Helen. Hence, the Court finds that the CA was correct in affirming the RTC's grant of the petition for judicial recognition of foreign divorce decree of respondent and her Japanese husband. More importantly, the dissolution of their marriage under the laws of Japan, has capacitated her former husband, Toru, to remarry, and in fact, he has already remarried. Hence, the Court finds no reason to deprive Helen of her legal capacity to remarry under our national laws.

...

WHEREFORE, the instant petition is DENIED. The Decision dated February 28, 2018 and Resolution dated April 30, 2019 of the Court of Appeals in CA-G.R. CV No. 108057 are hereby AFFIRMED. The foreign divorce decree between Helen Bayog and Toru Saito is hereby judicially recognized pursuant to paragraph 2, Article 26 of the Family Code, and Helen Bayog is hereby declared capacitated to remarry. The Office of the Civil Registrar of Pasay City is hereby ordered to annotate the Divorce Certificate dated October 16, 2012 on the record of marriage of Toru Saito and Helen Bayog.

**This land case establishes the doctrine that naturalized Filipino citizens who have owned local land previous to their acquisition of new citizenship continue to have ownership over such.**

MARIA LUISA MORALES v. ABNER DE GUIA
[G.R. No. 247367. December 5, 2022]

INTING, J:

FACTS:

Abner bought an unregistered parcel of land with an area of 18,000 sqm from the Spouses Sabanan on Abra Street Extension, Barangay Barretto, Olongapo City. The mayor of that area asked Abner to allow the Morales family to stay on the property, and the latter executed an agreement where they acknowledged Abner's superior right and interest as owner of the property, as well as agreed to vacate the property upon reasonable notice.

Abner and his family migrated to the USA where the former became a naturalized American citizen. Unbeknownst to them, Dominador declared portions of the property under his and his children's names for taxes, in addition to constructing a bungalow on the property. This led Abner to file for an Action for Recovery of Possession and Ownership of Real Property, and Annulment of Documents and Damages against the Morales Family stating that they took advantage of his absence and fraudulently declared the land as theirs.

Dominador argues that since Abner is a naturalized American citizen and has lost his Philippine citizenship, he is disqualified from acquiring and owning lands of Philippine domain. The Regional Trial Court and the Court of Appeals ruled in favor of Abner, ordering the vacation of the property.

RULING (Excerpts):

In the case of Rep. of the Philippines v. Court of Appeals and Lapiña, the Court held that the private respondents therein were natural-born Filipino citizens at the time of the acquisition of the properties; and by virtue thereof, they acquired vested rights thereon tacking in the process, the possession in the concept of an owner and the period of time held by their predecessors-in-interest.

Similarly, in this case, Abner was a natural-born Filipino citizen when he acquired the property from its previous owners, the Spouses Sabangan. As a result, he is deemed to have acquired a vested right over the property which cannot be defeated by the mere possession and occupation of the Morales Family as caretakers thereof…

...

WHEREFORE, the Petition is DENIED. The assailed Decision dated June 18, 2018 and the Resolution dated February 13, 2019 of the Court of Appeals in CA-G.R. CV No. 103406 are AFFIRMED.

SO ORDERED.

**This case clarifies the requirements of filing for a Certificate of Candidacy for Dual Citizens by Birth. The court differentiates dual citizens from birth versus those from naturalization.**

MARIZ LINDSEY TAN GANA-CARAIT Y VILLEGAS, PETITIONER, VS. COMMISSION ON ELECTIONS, ROMMEL MITRA LIM, AND DOMINIC P. NUÑEZ, RESPONDENTS. [G.R. No. 256453. August 9, 2022]

INTING, J:

FACTS:

Gana-Carait filed her Certificate of Candidacy as a Member of Sangguniang Panlunsod of Binan Laguna for the 2019 National and Local Elections. Respondent Lim filed a petition for disqualification against her before the COMELEC, stating she did not renounce her foreign citizenship before applying to a local government post. She also alleges that her use of a US passport negated her claim that she was a Filipino citizen at the time she filed her COC. Nunez filed a similar petition against the petitioner stating that Gana was a dual citizen.

The COMELEC First Division found that she was a dual citizen as she was born to a Filipino father, and based on her Consular Report of Birth Abroad, she was likewise a US citizen. As she was unable to prove she renounced her foreign citizenship, she committed material misrepresentation in her CoC when she stated she was eligible to run for public office. The COMELEC En Banc affirmed the ruling.

RULING (Excerpts):

The coverage of R.A. 9225 includes only those natural-born Filipinos who acquired foreign citizenship through the process of naturalization. Similarly, the provisions of R.A. 9225 on the required oath of allegiance under Section 3, and the personal and sworn renunciation of any and all foreign citizenship

under its Section 5(2) apply only to dual citizens by naturalization and not to dual citizens by birth.

A full and plain reading, however, of Maquiling readily refutes the OSG's proposition. Maquiling pertinently held:

> Arnado's category of dual citizenship is that by which foreign citizenship is acquired through a positive act of applying for naturalization. This is distinct from those considered dual citizens by virtue of birth, who are not required by law to take the oath of renunciation as the mere filing of the certificate of candidacy already carries with it an implied renunciation of foreign citizenship. Dual citizens by naturalization, on the other hand, are required to take not only the Oath of Allegiance to the Republic of the Philippines but also to personally renounce foreign citizenship in order to qualify as a candidate for public office

Black's Law Dictionary defines naturalization as "the act of adopting a foreigner and clothing him [or her] the privileges of a native citizen." In Garcia v. Recio, the Court defined naturalization as a legal act of adopting an alien and clothing him [or her] with the political and civil rights belonging to a citizen. It implies the renunciation of a former nationality and the fact of entrance into a similar relation towards a new body politic. Therefore, naturalization is a process through which a State confers an outsider, i.e., a non-citizen/alien/foreigner, with rights enjoyed by its citizens. Based on the definition of naturalization, an insider, i.e., a citizen, is disqualified from undergoing naturalization proceedings. In this regard, the Court recognizes that naturalization is superfluous for persons who are already citizens of a particular State and that it is absurd for a State to issue a certificate of naturalization to its own citizens.

Thus, the Court finds that petitioner, as shown by evidence, never underwent such process. The CRBA document itself, which was used by the COMELEC En Banc as basis to declare that petitioner was a naturalized dual citizen, actually proves the opposite.

. . .

WHEREFORE, the Petition for Certiorari is GRANTED. The Resolution dated 23 September 2021 of the Commission on Elections En Banc and the

Resolution dated 27 February 2019 of the Commission on Elections First Division are ANNULLED and SET ASIDE.

The Certificate of Finality dated 13 December 2021, the Entry of Judgment dated 13 December 2021, and the Writ of Execution dated 31 January 2022 issued by the COMELEC En Banc, in relation to the Resolution dated 23 September 2021, are likewise CANCELLED and SET ASIDE.

Accordingly, the Petition to Deny Due Course to or Cancel Certificate of Candidacy dated 6 November 2018, filed by private respondent Dominic P. Nuñez against petitioner Mariz Lindsey Tan Villegas Gana-Carait, docketed as SPA Case No. 18-126 (DC), is DISMISSED.

SO ORDERED.

# SUPREME COURT ISSUANCES

## SC ISSUANCES

A.M. No. 02-6-02-SC

## GUIDELINES ON THE IMPLICATIONS OF RA. 11642 ON THE RULE ON ADOPTION (June 20, 2022)

This particular issuance of the Supreme Court transfers the jurisdiction of courts on the issue of petitions for domestic adoption to the National Authority for Child Care (NACC). These in turn are judicial proceedings turned administrative.

Ultimately, the Rule on Adoption covering the domestic adoption of Filipino children is rendered ineffective by the Supreme Court, except insofar as petitions for adoption which have not been withdrawn from the courts pursuant to Sec. 56 of R.A. No.11642.

Another such effect of this issuance is that all pending inter-country adoption petitions filed in court pursuant to the Rule on Adoption shall be dismissed.

## A.M. No 22-09-15-SC

## RULE ON INTERNATIONAL CHILD ABDUCTION CASES (approved on February 16, 2022)

. . .

### I. GENERAL PROVISIONS

This particular Supreme Court Issuance provides specific rules tackling international child abduction and retention cases. The Philippines adopts the procedures laid down in the Hague Convention of International Child Abduction of 1980 (HCAC), supplementing these with the Rules of Court if certain matters are not covered by the previous instrument. This shall be applied as long as the convention has entered into force between the Philippines and the other Contracting State.

**SECTION 2. OBJECTIVE.** The objective of this Rule is to protect children from the harmful effects of wrongful removal or retention across international boundaries by providing an expeditious procedure designed to bring about the prompt return, of such children to the state or country of their habitual residence, based on the presumption that, save in exceptional circumstances, such wrongful removal or retention is not in the best interests of the child. The prompt return of the child is designed to restore the status of the parties which existed before such wrongful removal or retention. This Rule also aims to ensure that 'rights of custody and of access under the laws of the state or country of the child's habitual residence are effectively respected.

…

II. PROCEDURE

The following pertinent procedural rules on international child abduction cases are laid down by the Supreme Court.

This issuance specifies the venue of where the petition for return of, or access to a child wrongfully removed or retained shall be filed. This is generally seen to be in the Family Court where the child is found.

It is the “left behind parent”, or petitioner who claims that a child has been removed or retained who may file this petition. The mandatory requirements and specific content of the petition are also included in the issuance. Included as well are the required annexes to the petition— some of which are proof of habitual residence prior to removal or detention, and proof that HCAC is in force between the Philippines and the country of the child’s habitual residence (such as Certifications from DFA, or the official list of contracting state parties in the Child Abduction Section of the Hague Conference on Private International Law official website). If there are public documents originating from foreign countries, these should be duly authenticated pursuant to the pertinent provisions of the Rules of Court.

Central Authorities of the alleged country of habitual residence may be coordinated with to obtain information on the child’s social background.

Home studies and social background reports may also be conducted to ascertain pertinent facts to the case.

…

If the Family Court finds merit in the petition, a judgment will be rendered ordering the child to be returned to the country of habitual residence. The court may allow the taking parent to have access to the child under reasonable terms and conditions for the best interests of the child.

If prayed for and the Family Court finds sufficient basis therefor, the respondent who wrongfully removed or retained the child, or who prevented the exercise of petitioner's rights of access, may be ordered to pay the petitioner reasonable and necessary damages.

…

## III. PROVISIONAL REMEDIES

Orders for Temporary Right of Access and Supervised Visitation or Contact Arrangements may be granted by the Family Courts to allow the petitioner visitation of the child. But, this does not allow a change or transfer of the child's residence without the court's permission.

Another unique remedy available here are Hold Departure Orders, which are issued by courts and enforceable by the Bureau of Immigration. This prevents a child's departure from the Philippines without the Family Court's authorization. The required information is laid down by Section 36 of the issuance. This does not preclude a recall of the order if necessary for the best interests of the child.

# DOJ ISSUANCES

# DOJ ISSUANCES

## Department Circular No. 010

## ESTABLISHING THE PROCEDURE FOR PROCESSING APPLICATIONS UNDER THE 1980 CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, AND FOR OTHER PURPOSES

(approved on February 22, 2022)

. . . .

**WHEREAS,** the Philippines, as a State Party to the Convention on the Rights of the Child, is obliged to ensure, among others, that a Child shall not be separated from his or her parents against his or her will, except when competent authorities, subject to judicial review, determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the Child;

**WHEREAS,** in Resolution No. 116, dated 01 February 2016, the Senate concurred in the accession of the Philippines to the 1980 Convention on the Civil Aspects of International Child Abduction or the Hague Child Abduction Convention (HCAC), which obliges State Parties to: (a) secure the prompt return of children wrongfully removed from or retained in any Contracting State; and (b) ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States;

**WHEREAS,** as a State Party to the HCAC, the Philippines is obliged to take all appropriate measures to secure within its territory the implementation of the objectives of the HCAC using the most expeditious procedure available

### I. PRELIMINARY PROVISIONS

**SECTION 2.** *Coverage.* - The procedure under this Circular shall apply to both incoming and outgoing HCAC applications received by the HCAC Unit for the

return of, or access to, a Child who was wrongfully removed from his or her country of habitual residence, or who was wrongfully retained in a country other than his or her country of habitual residence.

. . . .

**II. HCAC PRINCIPLES**

**SECTION 4**. *Basic Principles.* — This procedure shall be governed by the following basic principles:

a. The HCAC is based on the principle that, save in exceptional circumstances, the wrongful removal or retention of a Child across international borders is not in the best interests of the Child.
b. A decision under the HCAC concerning the return of the Child shall not be taken to be a determination on the merits of any custody issue.
c. The return of the Child to his or her country of habitual residence is to restore the *status quo* that existed prior to the wrongful removal or wrongful retention.

. . .

**III. PHILIPPINE HCAC CENTRAL AUTHORITY**

**SECTION 5.** *Philippine HCAC Central Authority.* - The Department of Justice, through the Legal Staff (Office of the Chief State Counsel), is the designated Philippine HCAC Central Authority.

It shall cooperate with the Central Authorities of other HCAC Contracting States to secure the prompt return of children covered by the HCAC and to achieve the other objects of the HCAC.

. . . .

**IV. PROCESSING OF HCAC APPLICATIONS**

Under this section, applications shall be filed with the Legal Staff of the DOJ, but may also be filed by the "Left Behind Parent" directly before the Philippine courts. Section 10 and 11 respectively specify the contents of the HCAC Application and mandatory requirements, as well as the supplementary requirements required.

Upon receipt of the application, the Bureau of Immigration shall be tapped by the HCAC Unit to verify the entry and exit of the Taking Parent and the Child. If not in the country, the application shall be transmitted to the Contracting State in which the Child is believed to be.

The HCAC Unit has discretionary power to determine whether to accept or refuse the application. Section 14 specifies the grounds for refusal, some of which are the following— the child having reached 16 at the time of filing or pendency, lack of sufficient proof showing a relationship between a Left Behind Parent and Child, no proof of evidence or wrongful removal or retention, etc.

The Taking Parent may discuss the situation on return of the child with the Left Behind Parent, and may be given a duly accredited mediator if necessary. If they fail to agree, a case may be filed before the appropriate court.

From Section 20, a Left Behind Parent whose child is habitually residing in the Philippines (and has been wrongfully removed or retained) may file an HCAC application with the PH HCAC Central authority as well. The same procedure shall follow.

## Department Circular No. 024

## STRENGTHENING THE REFUGEES AND STATELESS PERSONS PROTECTION UNIT, ENHANCING THE RULES FOR REFUGEE AND STATELESS STATUS DETERMINATION, AND FOR OTHER PURPOSES

(approved on June 22, 2022)

. . . .

**WHEREAS**, the Republic of the Philippines is a State Party to the 1951 United Nations Convention Relating to the Status of Refugees, its 1967 Protocol Relating to the Status of Refugees (1967 Protocol), 1954 United Nations Convention Relating to the Status of Stateless Persons, and the 1961

Convention on the Reduction of Statelessness (1961 U.N. Convention). As such, the Philippines is under a legal obligation to comply in good faith with all the provisions of the Conventions and other relevant international instruments to which the Philippines is a State Party to;

**WHEREAS**, Section 2, Article II of the 1987 Constitution provides, in part, that the Philippines adopts the generally accepted principles of international law as part of the law of the land;

**WHEREAS**, Section 47(b) of Commonwealth Act (C.A.) No. 613, as amended, otherwise known as "The Philippine Immigration Act of 1940", provides that the President is authorized, "for humanitarian reasons, and when not opposed to the public interest, to admit aliens who are refugees for religious, political, or racial reasons" in such classes of cases and under such conditions as he or she may prescribe;

**WHEREAS**, Section 13 of C.A. No. 613 allows the admission of persons "without nationality" as immigrants;

**WHEREAS**, it is essential to strengthen the procedure to determine the eligibility and protection of refugees and stateless persons consistent with the aforementioned laws, rules, regulations and Conventions, as well as other relevant international instruments, to ensure that POC are provided protection and assistance in the Philippines;

…

**RULE 1. PRELIMINARY PROVISIONS**

SECTION 1. *Definition of Terms.* — As used in this Circular, the following terms are hereby defined:

p. "Refugee" refers to a person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence, is unable or, owing to such fear, is unwilling to return to it;
q. "Stateless Person" refers to a person who is not considered a national

by any State under the operation of its law.

SECTION 3. *Basic Principles.* — This refugee and stateless status determination procedure shall be governed by the following basic principles:

a. Non-refoulement is a core principle of the 1951 U.N. Convention, that prohibits States from returning refugees and asylum seekers in any manner whatsoever to countries or territories in which their lives or freedom may be threatened. The principle of non-refoulement, pursuant to customary international law, may also apply to other individuals whose lives or freedom may be threatened;
b. Non-detention on account of being an Applicant, a refugee, or a stateless person;
c. Non-deprivation of refugee or stateless status, and nondiscrimination in the application of the Conventions, including on account of race, religion, political opinion, or Country of Origin or habitual residence;
d. An Applicant for refugee and/or stateless status shall not be penalized on account of illegal entry or presence in the country, provided he or she presents himself or herself without delay to the authorities and/or shows good cause for his or her illegal entry or presence; and
e. Preservation and promotion of family unity

…

**RULE II. PRELIMINARY PROVISIONS**

An application may be filed with the Refugees & Stateless Persons Person Unit (a unit from the DOJ). Some documents to be submitted with this are travel documents, IDs, and other documents to support the claim of refugee or stateless status. If they are unable to do so physically, this may also be done through electronic means.

Section 4 states that upon submission of the application, deportation proceedings of the applicant and their family members shall be suspended until a final determination of their status has been reached.

In cases wherein there are large groups arriving across international borders, wherein individual determination of claims are impracticable, group-based applications are possible.

Refugee claims, as per Section 8, shall be given priority if such a claim

exists while recognition as a stateless person is processing. The determination of this stateless status shall be suspended first pending the refugee claim.

Decisions shall be rendered by the RSPPU within 90 days from their last interview, and if denied, a request of reconsideration may be filed.

**RULE III. ACCELERATED REFUGEE STATUS DETERMINATION**

**SECTION 1.** ***Coverage***. — The Accelerated RSD shall apply to situations wherein the Applicant is: (i) at the airport or seaport and is the subject of an exclusion proceedings by the Bureau; (ii) detained at a government detention facility and is subject of deportation proceedings by the Bureau; or (iii) other analogous circumstances as may be determined by the RSPPU wherein the threat of refoulement is imminent.

The proceedings under this Rule shall be summary in nature.

…

Once an arriving alien arrives at the port of entry (airport or seaport), and declares that they seek asylum in the Philippines, an application is initiated. An application may be filed by the applicant or their counsel, personally or through electronic means. The same procedure follows if they are detained in any government detention facility.

Soon after the receipt of their Application, a protection officer shall interview the applicant. Within 5 working days from the interview, a written decision shall be rendered. If this is denied with finality, an Exclusion Order shall be issued and the parties shall be turned over to the airline or vessel.

…

**RULE IV. PROVISIONS COMMON TO REGULAR AND ACCELERATED STATUS DETERMINATION**

Applicants are granted certain rights from the time they file the Application until the finality of the decision on the Application. This includes the rights to counsel, to be informed and have access to the procedure, and to have his or her interview conducted in a private, secure, and appropriate location, and in a confidential manner. In addition, they have the right

participate in the procedure in a language and manner they understand and to have access to the services of an interpreter, if necessary, access to the UNCHR and most importantly, to have protection from any forcible return in any manner whatsoever, to a country where he or she may face persecution on account of his or her race, religion, nationality, membership of a particular social group or political opinion

If they are recognized as a refugee or stateless person, this recognition may inure to their other family members in the Philippines. They shall have the right to residence, gain visas, freedom from registration fees, and gain pertinent immigration documents. They shall also be entitled to rights and privileges accorded by the Convention subject to national laws, rules, and regulations.

…

**RULE V. APPEAL**

An administrative appeal may be appealed to the Office of the President under the principle of exhaustion of administrative remedies, as long as in accordance with the rules and regulations governing appeals to their office.

…

**RULE VI. EXCLUSION**

**SECTION 1.** ***Persons Excluded from the 1951 U.N. Convention and the 1954 U.N. Convention (Excluded Application). —****The* 1951 U.N. Convention and the 1954 U.N. Convention do not apply to persons:

a. Who are at present receiving from organs or agencies of the United Nations other than the UNHCR protection or assistance so long as they are receiving such protection or assistance;
b. Who are recognized by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of that country; or
c. If there are serious reasons for considering that the person:
    a. Has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;
    b. Has committed a serious non-political crime outside of the

Philippines prior to his or her admission to the Philippines; or

c. Has been found guilty of acts contrary to the purposes and principles of the United Nations.

…

**RULE VII. CANCELLATION, REVOCATION, AND CESSATION OF REFUGEE AND STATELESS STATUS**

**SECTION 1.** ***Cancellation of Refugee or Stateless Status****.* — The refugee or stateless status shall be cancelled if the recognition was granted erroneously as a result of:

a. Intentional misrepresentation or concealment by the Applicant or a third party of facts that were material to the determination of the claim;
b. New evidence shows that the Applicant ought not to have been recognized in the first place;
c. Recognition was granted on the basis of a material mistake of fact or law; or
d. Misconduct of the Applicant (such as threats or bribery) being the motivating reason for the recognition of refugee or stateless status.

**SECTION 2.** ***Revocation of Refugee Status****.* — The refugee status shall be revoked where, following recognition, the refugee engages in conduct coming within the scope of Section 1(c)(1), Rule VI or Section 1(c)(3), Rule VI, in that there are serious reasons for considering that he or she has:

a. Committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes; or,
b. Been found guilty of acts contrary to the purposes and principles of the United Nations.

**SECTION 3.** ***Revocation of Stateless Status****.* — The stateless status shall be revoked if there are serious reasons to believe that, after recognition, the stateless person engages in conduct that would bring him or her within the exclusion grounds under Rule VI of this Circular.

**SECTION 4.** ***Cessation of Refugee Status.*** — Refugee status shall cease if a refugee:

a. Voluntarily re-availed himself or herself of the protection of the

country of his or her nationality;

b. Voluntarily re-acquired his or her lost nationality;
c. Acquired a new nationality and enjoys the protection of the country of his or her new nationality;
d. Voluntarily re-established himself or herself in the country he or she left, or outside which he or she remained owing to fear of persecution;
e. Enjoys protection from the country of his or her nationality, because the circumstances in connection with which he or she was recognised as a refugee have ceased to exist; Provided, that this paragraph shall not apply to a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection of the country of his or her nationality; or,
f. Not having a nationality, is able to return to his or her country of former habitual residence because the circumstances in connection with which he or she was recognised as a refugee have ceased to exist; Provided, that this paragraph shall not apply to a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection of the country of his or her former habitual residence.

…

Stateless status may cease if the concerned stateless person has obtained a nationality, or reacquired their former nationality. If their refugee status was cancelled, revoked or ceased under the aforementioned grounds (with some exceptions), if their application also includes a claim to stateless status which has been suspended, the procedure to determine stateless status shall proceed.

…

**RULE VIII. REMOVAL**

**SECTION 1.** ***Removal of a Refugee or a Stateless Person.*** — A refugee or a stateless person may be removed from Philippine territory:

a. Where he or she has been convicted with finality of a particularly serious offense and is considered a danger to the community after having served his or her sentence; or
b. In respect of whom there are reasonable grounds for regarding him or her as a danger to the security of the country

…

For one to be removed, the decision must be reached in accordance with due process of the law. Generally, the applicant may submit further evidence, file one (1) motion for reconsideration or letter-request, or appeal the decision to the Office of the president. The refugee or stateless person subject of removal shall be

# EVENTS

# EVENTS

## PHILIPPINE PARTICIPATION IN VARIOUS MOOT COURT COMPETITIONS IN 2022

The University of the Philippines-Institute of International Legal Studies hosted the 26th Stetson Annual International Environmental Moot Court competition last January 2022. The online moot court competition was participated by teams from Southeast Asian region with the University of the Philippines-College of Law bagging the Championship round. Mr. Raymond Nhil Shappit was named the best oralist of the final round. They, together with Ateneo de Manila University School of Law and University of Cebu School of Law comprise the Philippine delegation who competed in the international rounds at Gulfport, Florida.

The 2022 National Rounds of the Jessup Moot Court Competition was held on March 2022 with the UP-Law Jessup Team clinched its 5-peat championship and bagged all the competition's special awards for their written submissions[1]. Team members Aloysius Francis Bresnan, Czar Matthew Dayday, Berenice Dela Cruz and Adrian Padilla also won best speaker awards in the preliminary rounds. Mr. Bresnan won the championship's best oralist award. Three Philippine teams made it to the international round with University of the Philippines and University of San Carlos competing until the Octafinal round.

The 20th Red Cross International Moot Court held in Hong Kong was also participated by the University of San Agustin (USA) who placed in the Top Eight of the rounds. Prior, the national competition was held in October 2022 with the USA and the UP Law Team competing in the final rounds.

In September 2022, the UP Law Team was proclaimed champions in the 39th Jean-Pictet International Moot Court Competition among 21 competing teams from all over the world.

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[1] Gamba, Bino, *UP Law tops national rounds of Jessup*, (2022), https://upd.edu.ph/up-law-tops-national-rounds-of-jessup/#:~:text=The%20UP%20College%20of%20Law,in%20the%20competition's%20global%20rounds.

Lastly, the UP Law Price Team were crowned world champions in the International rounds of the Price Media Moot Court Competition with the Asia-Pacific Regional rounds commencing in 2022 where the team reached the semi-final round. Mr. Bryan Thomas Santamaria was awarded as the best oralist in the Final rounds.

## APPOINTMENT OF JUDGE RAUL C. PANGALANGAN AS THE HEAD OF THE COMMISSION OF INQUIRY AT THE INTERNATIONAL LABOR ORGANIZATION (ILO)

PYIL Editor-in-Chief and retired International Criminal Court Judge Raul C. Pangalangan was appointed to head a Commission of Inquiry at the International Labor Organization(ILO).

In June 2022, the Director-General of the ILO released in its 344th session report the appointment of Judge Pangalangan together with Judge Dhaya Pillay of South Africa and Dr Faustina Pereira of Bangladesh to serve the Commission of Inquiry arising from a complaint of concerning the non-observance of Myanmar of the Forced Labour Convention, 1930 (No. 29) and the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

The ILO is the only tripartite agency of the United Nations that sets labour standards, develops policies and devises programmes promoting decent work for women and men. It was created through the Treaty of Versailles. The organization roots its existence on the foundation of social justice.

## PHILIPPINES HOSTS HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (HCCH)

From 18-20 October 2022, the Philippines hosted the Hague Conference on Private International Law (HCCH) Asia Pacific Week with the theme " "Enabling Cross-border Cooperation in the Region and Beyond" in partnership with the Department of Foreign Affairs, Supreme Court of the Philippines and the Supreme Court of the Philippines-Philippine Judicial Academy.

The program was officially opened by Hon. Enrique A. Manalo, Secretary of the Department of Foreign Affairs, Hon. Alexander G. Gesmundo, Chief Justice of the Supreme Court of the Philippines, and Dr. Cristophe Bernasconi, Secretary General of the HCCH.

Members of the PYIL Editorial Board served as speakers during the numeros sessions that focused on three main areas of International Family and Child Protection Law, Transnational Litigation and Cooperation, as well as International Commercial, Digital and Financial Law.

Prof. Elizabeth Aguiling-Pangalangan chaired the introductory lecture on The HCCH: Benefits of Memberships of Key Convention with Amb. J. Eduardo Malaya speaking on its Regional perspective. Prof. Aguiling-Pangalangan also provided her insights on the 2007 Child Support Convention. Managing Editor Assistant Professor Michael T. Tiu Jr. chaired the third day of the events on International, Commercial, Digital, and Financial Law & Normative Projects and Future Work. To cap off the three-day event, Dean Sedfrey Candelaria gave a closing plenary and concluding statement to end the three-day conference[2].

## LAUNCH OF THE PHILIPPINE MATERIALS IN INTERNATIONAL LAW PUBLICATION BY JUDGE RAUL C. PANGALANGAN

PYIL Editor-in-Chief, Raul C. Pangalangan launched his publication titled Philippine Materials In International Law Publication. The book is a collection of international law materials relating to the Philippines: excerpts of treaties and declarations; international judicial and arbitral decisions; and Philippine constitutional clauses, statutes and Supreme Court decisions[3]. It is published in-print and online by Brill-Nijhoff – an esteemed international book publishing company known for producing scholarly publications.

The Philippine Materials in International Law also contains a collection of documents that are rarely seen in the original and are put together as one resource. During the launch, Professor Elizabeth Aguiling-Pangalangan,

[2]Schedule of Activities, HCCH Asia Pacific Week Manila 2022, https://apwmanila2022.law.upd.edu.ph (last visited January 15, 2024).
[3] PHILIPPINE MATERIALS IN INTERNATIONAL LAW: A COLLOQUIUM, https://brill.com/display/title/60849?language=en (last visited January 16, 2024).

president of the Philippine Society of International Law, highlighted that the publication will be instrumental in providing perspectives that resonate with shared national experiences and in ensuring the development of international law that fits the context and reflects the vantage point of the Philippines[4].

Several members of the Editorial Board and Professors of the UP College of Law participated in the panel discussion and offered perceptive insights into crucial details and principles discussed in the publication.

Professor Rommel J. Casis, emphasized the necessary distinction between the concept of domestication and the binding effect of international law as well as the overuse of the term "Incorporation Clause" leads to an erroneous application of law where "unratified treaties are made binding domestically qua international custom[5]. Professor Andre Palacios emphasized the book's exploration of the convergence between two legal systems – domestic law and international law – crucial for pinpointing gaps in the domestication of international law. Dr. Jay Batongbacal emphasized the *"battle of note verbales"* in relation to the claim on the Philippine territory. A collection of the said *note verbales* can be found in the report section of this issue. Prof.. Dante Gatmaytan gave his insights on the chapter of the book "Human Rights Cases under the Marcos Dictatorship". Lastly, Asst. Prof. Michael Tiu, Jr. focused on the book's discussion relating to International Criminal Law and its development through doctrine and practice. He also pinpointed misreadings in judicial decisions particularly the incorrectness of the *Pimentel* ruling as to the distinction between signing and ratification as well as *Pangilinan* ruling on mootness and actual case or controversy to which Prof. Casis extensively gave a discussion in the third article of this yearbook.

## INTRODUCTION OF THE INTERNATIONAL CRIMINAL LAW BLOG IN PARTNERSHIP WITH ASIAN SOCIETY OF INTERNATIONAL LAW-INTERNATIONAL LAW INTEREST GROUP

[4] PHILIPPINE MATERIALS IN INTERNATIONAL LAW: A COLLOQUIUM, https://law.upd.edu.ph/philippine-materials-in-international-law-a-colloquium/ (last visited January 16, 2024).
[5] *Id.*

In 2022, the Institute of International Legal Studies, International Criminal Law (ICL) launched the International Criminal Law Blog which is a platform for Filipino legal scholars and lawyers to comment on or discuss developments in international law, particularly those relating to international criminal law matters of relevance to the Philippines. It is also a venue for commentaries and the expression of diverse views of and approaches by ICL scholars all over the world.

The blog comprises four topics, primarily authored by Asst. Prof. Michael T. Tiu Jr., discussing the Philippine situation in the International Criminal Court, the Proposed International Crime of Ecocide, an understanding of *Pangilinan v Cayetano* on the President's Concurrence, Treaty Powers and vested rights and the launch of the Philippine Materials in International Law, A Colloquium.

Points of relevance in the blog include the Philippine situation in the ICC and how it delved how the case initiated by ICC Prosecutor Fatou Bensouda against the Philippines is a test case in many respects. It was outrightly challenged by state agents on the ground of jurisdiction and admissibility considering that the Philippines withdrew from the Rome Statute which took effect on 17 March 2019.

There is also a discussion on the proposed broader definition of the crime "Ecocide" which sought to afford protection in a wider scope and prosecute acts relating to environmental damage despite the absence of an international armed conflict.

The ICL website can be accessed through the Institute of International Studies website at https://law.upd.edu.ph/IILS/pages/home/.

## ELECTION OF AMBASSADOR J. EDUARDO MALAYA AS HEAD OF PERMANENT COURT OF ARBITRATION GOVERNING COUNCIL

Philippine Ambassador to the Netherlands and PYIL Editorial Board member, Ambassador J. Eduardo Malaya assumed office as the Head of the Permanent Court of Arbitration (PCA) after being elected by 122 PCA member states during its 208th session held in the Peace Palace at the Hague. Upon his election, he became the first Filipino and only the second non-Dutch national to head the Administrative Council.

University of the Philippines President Angelo Jimenez, describes Amb.Malaya's election as an honor for the country to have a Filipino leading the council. Jimenez praised Malaya's wealth of experience as a diplomat, lawyer, and accomplished writer, recognizing the significant contribution he can make to the PCA and international law.

The Philippines became a member of the PCA in 2010, after the leadership of Amb. Malaya on the Philippines' accession to the Convention for the Pacific Settlement of International Disputes, which paved the way for the country's membership[6]. The PCA, with 122 member states, plays a crucial role as a permanent institution for the resolution of international disputes through arbitration. The Administrative Council, comprising representatives from member states, serves as the governing body, providing guidance on the PCA's work, administration, budget, and shaping its policy in consultation with the Secretary-General.

Amb. Malaya shall serve for the term 2023-2024. As the PCA reaches its 125th milestone in 2024, Ambassador Malaya highlighted the auspicious timing for a comprehensive review and assessment of the organization. In a world grappling with conflicts and global challenges, he stressed the importance of ensuring that the PCA remains dynamic, relevant, and faithful to its original vision.

## RECOGNITION OF PROFESSOR ELIZABETH AGUILING-PANGALANGAN BY THE CHILD IDENTITY PROTECTION

The Child Identity Protection (CHIP) is a Geneva-based only international non- profit organization solely advocating for the protection of children's identity rights in family relations. In 2022, CHIP recognized the contribution of UP College of Law Professor and PYIL Editorial Board member, Prof. Elizabeth Aguiling-Pangalangan by citing it in its 2022 signature publication entitled "Preserving 'family relations': an essential feature of the child's right to identity.[7]" that was released in full last 29 June 2022.

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[6] Rocamora, Joyce, PH envoy elected head of PCA governing council, https://www.pna.gov.ph/articles/1190840

[7]GENEVA-BASED NGO TAPS UP IHR DIRECTOR PROF AGUILING-PANGALANGAN, https://law.upd.edu.ph/geneva-based-ngo-taps-up-ihr-director-professor-elizabeth-aguiling-pangalangan-as-expert/ (last visited Jan 22, 2024).

In the publication, Prof. Aguiling-Pangalangan provided her expertise on the assertion that the right to have one's family relations must be legally established or recognised, as a stand-alone right. This is in support of SDG 16.3 and 16.9 enshrined in the Conventions of the Rights of the Child. In the same year, Prof. Aguiling-Pangalangan appeared as *amicus curae* in the landmark case of *Aquino v Aquino* where the court used the Convention as one of the basis for the re-interpretation of the iron-curtain rule on the rights of an illegitimate child to inherit from the legitimate relatives of his or her parents.

Prof. Aguiling-Pangalangan represented the Philippines as the sole Filipina to be reocgnized by CHIP[8]. She is recognized alongside other world-renowned child's rights experts such as former UN Special Rapporteur Maud de Boer-Buquicchio, Rio de Janeiro Court of Justice Judge Raquel Santos Pereira Chrispino, international child's rights consultant, Nigel Cantwell, who contributed to the drafting of the CRC and former Hague Conference on Private International Law Secretary-General Hans Van Loon[9].

The full-publication may be accessed through https://child-identity.org/images/files/CHIP-Preserving-Family-Relations-EN.pdf

[8] *Id.*
[9] *Id.*