DUALISM AND THE INCONGRUENCE BETWEEN OBJECTIVE INTERNATIONAL LAW AND THE PHILIPPINE PRACTICE OF INTERNATIONAL LAW*

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Introduction

Professor Merlin M. Magallona, widely regarded as one of the Philippines' foremost experts on international law, has written about the distinction between what he refers to as *objective international law* ("OIL") and the *Philippine Practice of International Law* ("PPIL"). The former is what international law actually is—based on treaties, customs, general principles of law, judicial decisions of international courts, and the teachings of publicists. The latter is the Philippine Supreme Court's interpretation of international law and the practice of the Philippine government as a whole.[1] In Magallona's words, the former is "international law as it operates in the international sphere," while the latter comprises the norms of international law "when they are incorporated into Philippine law." Magallona, in his writings, would often criticize how the latter does not correspond to the former.

While such criticisms of the Supreme Court's decisions seem called for considering the incongruity between OIL and PPIL, are they valid considering the alleged dualist approach of Philippine law?

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[1] The term "Philippine Government" should not be limited to the executive or any of the branches of government but should refer to all of its branches and agencies. However, in Prof. Magallona's writing he seems to be referring to the decisions of the Philippine Supreme Court.

I. The Dualist Debate

A. The Dualist Versus Monist Perspectives

1. The Dualist Position

According to the dualist position, international law and internal law are two separate legal orders, existing independently of one another.[2] Thus, international law and national law operate on different levels.[3] Thus, international rules cannot alter or repeal national legislation and, by the same token, national laws cannot create, modify, or repeal international rules,[4] and neither legal order has the power to create or alter rules of the other.[5] Furthermore, in order to become binding, international law must be "transformed" into national law. Thus, international law cannot directly address itself to individuals.

2. Monist Position

Under the monist position, both international law and national law are part of the same order, one or the other being supreme over the other *within that order*.[6] Thus, the national and international form one single legal order, or at least a number of interlocking orders which should be presumed to be coherent and consistent.[7] In other words, there is a single system with international law at its apex, and all national constitutional and other legal norms below it in hierarchy.[8] Because of this, there is no need for international obligations to be "transformed" into rules of national law.[9]

B. Is the Philippines Dualist or Monist?

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[2] DJ HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 66 (6th ed. 2004).
[3] EILEEN DENZA, THE RELATIONSHIP BETWEEN INTERNATIONAL AND NATIONAL LAW (Malcolm Evans ed.), *in* INTERNATIONAL LAW 428 (2nd ed. 2006).
[4] ANTONIO CASSESE, INTERNATIONAL LAW 214 (2nd ed. 2005). o
[5] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 48 (8th ed. 2012).
[6] HARRIS, *supra* note 2, at 66.
[7] CRAWFORD, *supra* note 5, at 48.
[8] DENZA, *supra* note 3, at 428.
[9] *Id.*

There are a number of arguments which may be raised to explain why the Philippines follows the dualist position.

1. The Dualist Argument

a. Magallona's argument

Magallona states: "Of a dualist character, the Philippine legal order may be interpreted to require that norms and principles of objective international law be made part of national law."[10] Furthermore: "The methods of internalization provided in the fundamental law affirm the dualist premise of the national law in relation to the international legal order. It is by reason of constitutional prescription, not of automatic incorporation or transformation, that norms of international law are internalized into Philippine law.[11]

After quoting the incorporation clause and the treaty clause of the Constitution, Magallona argues: "Thus, it is by no less than constitutional mandate that customary norms and conventional rules of objective international law be internalized into national law before they may be applied in Philippine jurisdiction."[12]

It seems that Magallona's argument is that while the Constitution seems to automatically accept custom as part of the law of the land by virtue of the incorporation clause, the internalization happens when the courts determine whether a rule is part of customary international law. He says: "Domestic courts must determine that such principles have assumed that character in the international legal order, and not by whimsical or arbitrary estimate."[13] Furthermore: "The Treaty Clause completes the process of transforming a treaty or international convention into national law."[14]

He explains further:

> From these postulates, it is necessarily implied that compliance with these *constitutional methods of internalization* is a condition *sine qua non* to the application of norms and

[10] MERLIN M. MAGALLONA, THE SUPREME COURT AND INTERNATIONAL LAW: PROBLEMS AND APPROACHES IN PHILIPPINE PRACTICE 2 (2010).
[11] MAGALLONA, *supra* note 10, at 3.
[12] MAGALLONA, *supra* note 10, at 2-3.
[13] MAGALLONA, *supra* note 10, at 3.
[14] *Id.*

> principles of objective international law. On this account, they may be said to derive their validity as "part of the law of the land" from the Constitution, based on their substantive content determined by objective international law.[15]

b. Jurisprudence

In Justice Vitug's Separate Opinion in *Government of the United States of America v. Purganan,*[16] the Court said:

> In the Philippines, while specific rules on how to resolve conflicts between a treaty law and an act of Congress, whether made prior or subsequent to its execution, have yet to be succinctly defined, the established pattern, however, would show a leaning towards the dualist model. The Constitution, exemplified by its incorporation clause (Article II, Section 2), as well as statutes such as those found in some provisions of the Civil Code and of the Revised Penal Code, would exhibit a remarkable textual commitment towards "internalizing" international law.

The Court added:

> The principle being that treaties create rights and duties only for those who are parties thereto—*pacta tertiis nec nocre nec prodesse possunt*—it *is considered* necessary to transform a treaty into a national law in order to make it binding upon affected state organs, like the courts, and private individuals who could, otherwise, be seen as non-parties.

It concluded that: "The constitutional requirement that the treaty be concurred in by no less than two-thirds of all members of the Senate (Article , Article VII) is, for legal intent and purposes, an equivalent to the required transformation of treaty law into municipal law."

2. The Monist Argument

a. The Doctrine of Incorporation

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[15] *Id.* (Emphasis supplied).
[16] Gov't of the United States v. Purganan, G.R. No. 148571, September 24, 2002. (Resolution)

The doctrine of incorporation is stated in Article II, Section 2 of the Constitution, which states: "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."

In *Tañada v. Angara,*[17] the Court explained that by the doctrine of incorporation, the country is bound by generally accepted principles of international law, which are considered to be automatically part of our own laws.

Under the doctrine of incorporation, rules of international law form part of the law of the land and no further legislative action is needed to make such rules applicable in the domestic sphere.[18]

Thus, under the doctrine of incorporation, there is no transformation required before customs form part of the law of the land. As a response to Magallona's internalization argument, it may be argued that what actually happens is mere recognition on the part of the court that a customary norm exists. When a court invokes customary norms, they are invoked as international law concepts and not as national principles; thus, no transformation happens.

b. Direct application of Human Rights Instruments

In *Republic v. Sandiganbayan*,[19] the Court held that while the Bill of Rights under the 1973 Constitution was not operative during the period after the EDSA Revolution and before the provisional constitution, the protection accorded to individuals under the International Covenant on Civil and Political Rights ("ICCPR") and the Universal Declaration of Human Rights ("UDHR") remained in effect during the interregnum. It explained that the revolutionary government, after installing itself as the *de jure* government, assumed responsibility for the State's good faith compliance with the Covenant to which the Philippines is a signatory. As for the Declaration, it said: "the Court considers the Declaration as part of customary international law, and that Filipinos as human beings are proper subjects of the rules of international law laid down in the Covenant."

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[17] Tañada v. Angara, G.R. No. 118295, May 2, 1997.
[18] Sec. of Justice v. Lantion, G.R. No. 139465, Jan. 18, 2000.
[19] Republic v. Sandiganbayan, G.R. No. 104768, July 1, 2003.

What is most relevant here is the Court's treatment of the UDHR. The Court identified its provisions as being customary and binding even though, at the time of the incident in question, there was no incorporation clause as there was no Philippine Constitution in effect. Thus, by virtue of this ruling, it may be argued that Philippine law accepts the possibility of international law directly applying in the Philippines as a customary norm of international law, even without an incorporation clause.

C. International Versus National Law

1. Supremacy of International Law Over National Law

a. State Responsibility

Under the Articles on State Responsibility, the characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.[20] This means that a State cannot avoid international responsibility simply because its national law allowed it to commit an otherwise internationally wrongful act. The articles also provide that the responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations of cessation and reparation.[21] These rules reinforce the primacy of international law when it comes to issues of state responsibility.

b. Law on Treaties

Under the Vienna Convention on the Law of Treaties ("VCLT"), a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.[22] The only exception is in the case of Article 46 of the VCLT, which provides that a State may invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties, and that its consent is invalidated only when the violation was

[20] G.A. Res. 56/83, annex, Articles on Responsibility of States for Internationally Wrongful Acts art. 3, UN Doc. A/56/10 (Dec. 12, 2001).
[21] *Id.*, art. 3.
[22] Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331.

manifest[23] and concerned a rule of its internal law of fundamental importance.

Thus, the general rule with respect to treaties is that a State may not invoke its national law, even its constitution, to justify non-compliance with its treaty obligations. This demonstrates the primacy of international law when it comes to the law on treaties.

c. Philippine Jurisprudence

In *Tañada v. Angara*,[24] the Court seemed to be in support of the primacy of international law over national law. While in the process of determining the constitutionality of the WTO Agreement, it stated: "However, while sovereignty has traditionally been deemed absolute and all-encompassing on the domestic level, it is however subject to restrictions and limitations voluntarily agreed to by the Philippines, expressly or impliedly, as a member of the family of nations."

It explained further by stating that:

> By their inherent nature, *treaties really limit or restrict the absoluteness of sovereignty*. By their voluntary act, nations may surrender some aspects of their state power in exchange for greater benefits granted by or derived from a convention or pact. After all, states, like individuals, live with coequals, and in pursuit of mutually covenanted objectives and benefits, they also commonly agree to limit
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> the exercise of their otherwise absolute rights. Thus, treaties have been used to record agreements between States concerning such widely diverse matters as, for example, the lease of naval bases, the sale or cession of territory, the termination of war, the regulation of conduct of hostilities, the formation of alliances, *the regulation of commercial relations*, the settling of claims, the laying down of rules governing conduct in peace and the establishment of international organizations. *The sovereignty of a state therefore cannot in fact and in reality be considered absolute.*[25]

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[23] Vienna Convention on the Law of Treaties art. 46.2, May 23, 1969, 1155 U.N.T.S. 331. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.
[24] Tañada v. Angara, G.R. No. 118295, May 2, 1997.
[25] *Id.* (Emphasis supplied).

The implication of the ruling is that even the sovereignty of the State can be subject to the State's treaty obligations. While seemingly logical, the problem with this ruling is that what it considers a rule is actually the very issue that the Court had to address. In Magallona's words:

> One absurd feature of this theorizing is that if the status of a treaty as an inherent limitation to sovereignty is to be attributed to the WTO Agreement in a case where its very constitutionality is in question, then what is to be resolved as an issue in *Tañada* is already determine *a priori* as a premise, namely, a treaty is a restriction on state sovereignty.

Thus, if the Court begins with the premise that a treaty is a limitation on sovereignty, then how can a treaty ever be unconstitutional?

In *Bayan v. Zamora,*[26] the Court said:

> As a member of the family of nations, the Philippines agrees to be bound by generally accepted rules for the conduct of its international relations. While the international obligation devolves upon the state and not upon any particular branch, institution, or individual member of its government, the Philippines is nonetheless responsible for violations committed by any branch or subdivision of its government or any official thereof. As an integral part of the community of nations, *we are responsible to ensure that our government, Constitution, and laws will carry out our international obligation.*

Notice that the Court said that the Philippine Constitution has a duty to carry out the State's international obligations. This clearly implies that international law has primacy over the Philippine Constitution.

2. Supremacy of National Law Over International Law

a. Treaties

[26] Bayan v. Zamora, G.R. Nos. 138570, 138572, 138587, 138680 & 138698, Oct. 10, 2000.

The supremacy of Philippine law over international law can be demonstrated by the Court's power to invalidate treaties by subjecting them to constitutional requirements. Section 2 of Article VIII of the Constitution provides that the Supreme Court may not be deprived "of its jurisdiction to review, revise, reverse, modify, or affirm on appeal, certiorari, or writ of error, as the law or the rules of court may provide, final judgments and decrees of inferior courts in — (1) All cases in which the *constitutionality or validity* of any *treaty,* law, ordinance, or executive order or regulation is in question."

The Court has interpreted this provision to mean that our Constitution authorizes the nullification of a treaty, not only when it conflicts with the fundamental law, *but also when it runs counter to an act of Congress*.[27]

The Court has explained that a treaty is always subject to qualification or amendment by a subsequent law [...] and the same may never curtail or restrict the scope of the police power of the State.[28] Thus, police power may not be curtailed or surrendered by any treaty or any other conventional agreement.[29]

Magallona states: "The core of dualist jurisdiction is composed of the power of judicial review by which the courts may determine the constitutionality or validity of a treaty or executive agreement."[30]

Because a treaty is only the equal of legislation, "the *principle lex posterior derogat priori* takes effect—a treaty may repeal a statute and a statute may repeal a treaty."[31]

Neither can treaties affect rules established by the Philippine Supreme Court. The Court has ruled that a treaty could not:

> [M]odify the laws and regulations governing admission to the practice of law in the Philippines, for the reason that the Executive Department may not encroach upon the constitutional prerogative of the Supreme Court to promulgate rules for admission to the practice of law in the Philippines, the

[27] Gonzales v. Hechanova, G.R. No. 21897, Oct. 22, 1963.
[28] Ichong v. Hernandez, G.R. No. 7995, May 31, 1957.
[29] *Id.*
[30] MAGALLONA, *supra* note 10, at 3.
[31] Sec. of Justice v. Lantion, G.R. No. 139465, Oct.17, 2000.

> power to repeal, alter or supplement such rules being reserved only to the Congress of the Philippines.[32]

Thus, based on these rulings, a treaty, at best, is only equal to a statute and may in fact be overridden by another statute.

b. Customs

The Court has stated that:

> Withal, the fact that international law has been made part of the law of the land does not by any means imply the primacy of international law over national law in the municipal sphere. Under the doctrine of incorporation as applied in most countries, rules of international law are given a standing equal, not superior, to national legislative enactments.[33]

Thus, the process of incorporation of customary international law only makes the custom in question equal to an act of legislation.

Magallona explains that the Incorporation Clause[34] is the "formal acceptance and recognition of principles of general international law as part of Philippine law; by this constitutional process they are transmuted into national law."[35]

As a consequence of this:

> In the Philippine jurisdiction, these principles are subordinated to the Constitution; their operation is subject to constitutional standards [...] Indeed, they derive their validity from the Constitution under the Incorporation Clause.[36]

If Magallona is correct, then the application of international custom under Philippine law is not automatic. This means that the Court can

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[32] *In re* Garcia, 2 SCRA 984, Aug. 15, 1961.
[33] Philip Morris, Inc. v. Court of Appeals, G.R. No. 91332, July 16, 1993; Sec. of Justice v. Lantion, G.R. No. 139465, Oct. 17, 2000.
[34] CONST. art. II, § 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.
[35] MAGALLONA, *supra* note 10, at 39.
[36] *Id.*

make a determination as to whether the international custom is consistent with the Constitution, in the same way that it evaluates treaty provisions. If so, this is further proof that national law is supreme over international law.

The Court would seem to agree with Magallona. It has said that:

> [I]f there is a conflict between a rule of international law and the provisions of the constitution or statute of the local state [...] [e]fforts should first be exerted to harmonize them, so as to give effect to both since it is to be presumed that municipal law was enacted with proper regard for the generally accepted principles of international law in observance of the Incorporation Clause [...] [But] where the conflict is irreconcilable and a choice has to be made between a rule of international law and municipal law, jurisprudence dictates that municipal law should be upheld by the municipal courts.[37]

3. Supreme in Separate Fields

As can be seen in the previous two sections, there is authority for saying that "international law has primacy over national law" and for arguing that "national law has supremacy over international law." Perhaps the only way to reconcile these seemingly contradictory statements is to recognize the dualist perspective and allow each to have primacy or supremacy over the other in their respective fields.

In practical terms, national courts are justified in holding international law principles subject to national law rules and limitations. International courts, on the other hand, need not consider national law justifications for international law breaches.

But, as will be discussed later, this does not resolve the problem as far as teaching law is concerned, or in its application by the Philippine government.

II. Objective International Law v. Philippine Practice

The following discussion illustrates the differences and conflicts between OIL and PPIL by providing a comparison between the rules

[37] Sec. of Justice v. Lantion, G.R. No. 139465, Oct. 17, 2000.

of international law on the one hand, and Philippine jurisprudence and executive issuances on the other.

A. The Problem

Magallona defines *objective international law* as the "norms of international law," while "their status when they are incorporated into Philippine law" is referred to as the *Philippine practice in international law*.

The problem, as Magallona puts it, is:

> Where a resolution of a controversy by a domestic court requires the application of a norm or principle of international law, this may be done without a clear understanding as to whether it is to be applied as objective international law or as national law. Confusion of one with the other may produce bizarre consequences or absurd implications, even as the controversy is formally resolved.[38]

B. The Practice

1. The Sources of Law

Article 38 of the ICJ Statute provides the authoritative listing of the sources of international law. It lists three formal law-creating processes:

- international conventions;
- international custom; and
- the general principles of law recognized by civilized nations.

Article 38 also lists two material sources (law-determining agencies) which serve as a "subsidiary means for determination of rules of law":

- judicial decisions; and
- the teachings of the most highly qualified publicists.

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[38] MAGALLONA, *supra* note 10, at 5.

Unfortunately, the three formal sources and the two material sources do not track with Constitutional provisions on how international law may be applied in the Philippine jurisdiction. In summary, the Constitution appears to allow for international conventions or treaties and international custom, but not general principles of law of civilized nations.

International custom becomes part of the law of the land under the Incorporation Clause.Article II, Section 2 of the Constitution provides:

> SECTION 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.

On the other hand, international conventions are recognized under the Treaty Clause. Article VII, Section 21 of the Constitution provides: "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."

a. Custom

i. Coverage of Incorporation Clause

The incorporation clause is intended to be the portal through which international custom makes its way into the Philippine jurisdiction. However, as Magallona notes:

> Jurisprudence does not seem to observe a consistently reasoned standard based on the nature of the sources of international law, in the determination of what are the "generally accepted principles of international law" to be subsumed under the Incorporation Clause.

In *Kuroda v. Jalandoni*,[39] the Court considered "the Hague Convention, the Geneva Convention and significant precedents of international jurisprudence established by the United Nations" as generally accepted principles of international law. The Court added:

[39] Kuroda v. Jalandoni, G.R. No. 2662, Mar. 26, 1949.

> *the rules and regulations of the Hague and Geneva conventions* form part of and *are wholly based on the generally accepted principles of international law* [...] *Such rules and principles, therefore, form part of the law of our nation even if the Philippines was not a signatory to the conventions embodying them*, for our Constitution has been deliberately general and extensive in its scope and is not confined to the recognition of rules and principles of international law as contained in treaties to which our government may have been or shall be a signatory.

There are other cases such as *Agustin v. Edu*,[40] *Reyes v. Bagatsing*, and *Marcos v. Manglapus*,[41] where, after the Court identifies a treaty to which the Philippines is a party, it goes on to say that it is part of "generally accepted principles of law."

It is possible that what the Court meant was that these treaties embodied customary norms and such norms, therefore, form part of the law of the land under the Incorporation Clause. A customary norm has an independent existence from the conventional norm identical to it. However, there is no mention of that in any of the aforementioned decisions. These decisions are written in such a way that a casual reader will identify treaties as being covered by the Incorporation Clause. This is not what the Incorporation Clause is supposed to do.

ii. Confusion with General Principles of Law of Civilized Nations

As explained earlier, treaties and customs become applicable in the Philippines by virtue of the Treaty Clause and the Incorporation Clause. Thus, there appears to be no explicit rule for the application of general principles of law of civilized nations ("GPL"). GPL is the third category of formal sources of international law found in Article 38 of the ICJ Statute. GPL are principles found in municipal law which international courts can apply when there is no custom or treaty applicable.

The Court seems to have recognized GPL, although it wrongly characterized it. After citing Article 38 of the ICJ Statute, it said that international law "springs from general principles of law." It seemed to be confusing GPL with custom.

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[40] Agustin v. Edu, G.R. No. 49112, Feb. 2, 1979.
[41] Marcos v. Manglapus, G.R. No. 88211, Sept. 15, 1989.

But the Court also said that, "[t]he Philippines, through its Constitution, has incorporated this principle as part of its national laws."[42] The Court seems to be referring to the Incorporation Clause. This means that the Court has identified the Incorporation Clause as the portal through which GPL can be applied under Philippine law. But is this a valid authority considering that the Court may have confused GPL with custom?

b. Treaties

i. Definition of Treaty

Under the Vienna Convention on the Law of Treaties ("VCLT"), a "treaty" 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." This is found in paragraph 1 (a) of Article 2 of the VCLT. However, paragraph 2 of the same article of the VCLT states, "[t]he provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State."

Therefore, the VCLT, while it provides a definition for a treaty, allows the national law to define it. Thus, a treaty complies with the definition as provided by national law.

The Philippine definition of a treaty does seem to deviate from the VCLT definition. Under Executive Order No. 459 ("EO 459") issued by then President Ramos, the VCLT definition for a treaty was instead assigned to the term "international agreement." Section 2(a) of EO 459 states that an *international agreement* "shall refer to a contract or understanding regardless of nomenclature, entered into between the Philippines and another government in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments."

But EO 459 also defines the term "treaties" and states that these are "international agreements entered into by the Philippines which require legislative concurrence after executive ratification. This term may include compacts like conventions, declarations, covenants and

[42] Int'l School Alliance of Educators v. Quisumbing, G.R. No. 128845, June 1, 2000.

acts." EO 459 also defines the term "executive agreements," which are described as "similar to treaties except that they do not require legislative concurrence." Therefore, what is defined as a "treaty" under OIL is designated as an "international agreement" under PPIL. The term "treaty" under PPIL is relegated to only one type of international agreement.

ii. Effect of Signature

Under Article 11 of the VCLT,[43] signature is one of the means by which a State may express its consent to be bound by a treaty. More specifically, Article 12 of the VCLT provides:

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

   a) the treaty provides that signature shall have that effect;
   b) it is otherwise established that the negotiating States were agreed that signature should have that effect; or
   c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

Thus, under international law, signature may be sufficient to bind states in certain cases.

However, in *Pimentel v. Executive Secretary,*[44] the Court downplays the importance of signature:

> It should be underscored that the signing of the treaty and the ratification are two separate and distinct steps in the treaty-making process. As earlier discussed, the signature is primarily intended as a means of authenticating the instrument and as a symbol of the good faith of the parties. It is usually performed by the state's authorized representative in the diplomatic mission.

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[43] Article 11. The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.
[44] Pimentel, Jr. v. Office of the Executive Secretary, G.R. No. 158088, July 6, 2005.

Perhaps the statement in *Pimentel* should only be limited to treaties which require ratification under international law.

However, under Philippine law, is it not the case that all treaties are required to undergo ratification as described in the Treaty Clause? When will *signature* ever be sufficient to render a treaty effective under Philippine law? Under OIL, a state can be bound by mere signature. But under PPIL, due to the Treaty Clause, this does not seem to be possible.

iii. The Meaning of Ratification

The VCLT identifies ratification as one of the acts whereby a State establishes on the international plane its consent to be bound by a treaty.[45]

Under Philippine jurisprudence, ratification is "the formal act by which a state confirms and accepts the provisions of a treaty concluded by its representative. It is generally held to be an executive act, undertaken by the head of the state or of the government."[46] The Court has reiterated that "[i]n our jurisdiction, the power to ratify is vested in the President and not, as commonly believed, in the legislature. The role of the Senate is limited only to giving or withholding its consent, or concurrence, to the ratification."[47]

Clearly there is a divergence here between OIL and PPIL. Under OIL, ratification, when required, is the final act to demonstrate the State's consent to be bound to a treaty. But according to PPIL, ratification is not the final act but concurrence by the Senate.

III. Challenges Caused by the Incongruence

There are other areas of incongruence between OIL and PPIL (e.g., executive agreements, state immunity, international organizations, etc.) that could have been added to this discussion. But this paper is not intended to be a treatise or detailed discussion on all the discrepancies and conflicts between OIL and PPIL. The topics discussed in the previous section should be sufficient to demonstrate that there is an incongruence between OIL and PPIL.

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[45] Vienna Convention on the Law of Treaties art. 2(b), May 23, 1969, 1155 U.N.T.S. 331.
[46] Pimentel, Jr. v. Office of the Executive Secretary, G.R. No. 158088, July 6, 2005.
[47] Bayan v. Zamora, G.R. No. 138570, Oct. 10, 2000.

This section will highlight the challenges created by this incongruence.

A. Teaching of international law in Philippine law schools

The first area affected by the incongruence is in the teaching of international law in Philippine law schools. Teaching Public International Law would require teaching both OIL and PPIL. Teaching one without the other would render law students' education incomplete.

But what should law professors do about examinations? Should a professor avoid questions that would have a different answer depending on whether they answer on the basis of OIL or PPIL?

For example, how will a Philippine law student respond to these questions:

- Is the Philippines monist or dualist?
- What are the sources of international law?
- What is supreme: Philippine law or international law?
- Can the Philippines be bound by a treaty which has been signed but not ratified?
- Is the Philippines bound by a treaty which has been ratified?
- Can general principles of law of civilized nations be applied in the Philippines?

In law schools, perhaps students and professors could come to an agreement and resolve most of the conflicts. But what about the Bar Examinations? How will the bar examinee know whether the examiner is seeking an answer from OIL or PPIL?

B. Application of International Law by the Philippine Government

Some agencies of government are engaged in treaty negotiations and/or treaty drafting. So, the other area directly affected by the incongruence is how these agencies are supposed to understand international law. When there is a conflict, should these agencies apply OIL or PPIL? Considering the incongruence between VCLT provisions and Philippine law, what should be their guide in negotiating and drafting treaties? Certainly, while they can inform their foreign

counterparts about the idiosyncrasies of PPIL, they cannot impose this on them.

Then there are the courts. Should the courts continue to apply executive interpretation of international law concepts even though they can determine that OIL provides otherwise?

IV. Conclusion

There are no easy answers for the issues raised in the previous section. There is one obvious answer: fix the incongruence between OIL and PPIL— but this cannot easily be achieved.

Fixing the incongruence would require correcting mistakes in jurisprudence and aligning them with OIL. It will also require amending executive issuances with provisions that are inconsistent with OIL. Furthermore, decades of preconceived notions and traditions emanating from these notions would have to be discarded in order to be compliant with OIL. This would take vast amounts of energy and humility for the people involved.

The easier way out may simply be the dualist solution. Let OIL be applied in the international sphere, but in the domestic sphere, PPIL reigns. After all, why bother with fixing PPIL if the Philippines is supposed to be dualist anyway?