2017
Vol. XVI

The Philippine Yearbook of International Law



THE PHILIPPINE SOCIETY OF INTERNATIONAL LAW

THE PHILIPPINE YEARBOOK OF INTERNATIONAL LAW

VOLUME XVI **2017**

Published jointly
by the
U.P. Law Complex
Diliman, Quezon City
and
Philippine Society of International Law

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UNIVERSITY OF THE PHILIPPINES LAW COMPLEX
Quezon City, Philippines

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PHILIPPINE SOCIETY OF INTERNATIONAL LAW

ISBN 971-15-0339-5
ISSN 0115-8805

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THE PHILIPPINE YEARBOOK OF INTERNATIONAL LAW

VOLUME XVI 2017

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The Philippine Yearbook of International Law is published yearly by the University of the Philippines Law Complex Institute of International Legal Studies and the Philippine Society of International Law. For inquiries on subscription, kindly contact (632) 920-5514 loc. 230, 207, 206; E-mail: iils_law.upd@up.edu.ph; FB: www.facebook.com/uplaw.iils/; Website: iils.law.upd.edu.ph

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EDITOR'S NOTE

THE PHILIPPINE YEARBOOK OF INTERNATIONAL LAW (PYIL) was first published in 1966 as a continuation to the *Philippine International Law Journal*, a quarterly publication that was unfortunately met with financial difficulties. The publication was originally headed by the late Justice Florentino P. Feliciano, a leading legal luminary of his time, known for his expertise in international trade law. Since then, it was published yearly by the Philippine Society of International Law (PSIL) until in 1975, when it became a joint undertaking between the PSIL and the University of the Philippines Law Center. This arrangement served both organizations' objective of promoting studies, research and discussions in the field of international law. The partnership proved to be fruitful as it produced several more issues of the *Yearbook* up until its 1989 publication, its 15th and last issue for a very long time.

More than 25 years passed, and the field of international law has since developed in immeasurable extents. With the emerging need for an updated publication on international law and Philippine foreign relations, the idea of reviving the PYIL materialized. Through the endorsement of Assistant Secretary J. Eduardo Malaya and Ambassador Manuel J. Antonio Teehankee of the Department of Foreign Affairs, the U.P. Law Center's Institute of International Legal Studies (UPLC-IILS) undertook to lead the relaunching of the PYIL beginning in 2017.

As the official publisher of the Yearbook, the UPLC-IILS, in cooperation with the PSIL, initiated movements to realize the project, starting with the assembly of the editorial board comprised of distinguished practitioners in the field. The proposal to relaunch the Yearbook was thereafter formally introduced to the public during the Colloquium on International Law Issues held in December 2017, the proceedings of which are also included in this issue. The editorial team has since worked tirelessly in making this publication as relevant and as comprehensive as possible.

This 2017 issue serves as the PYIL's 16th volume and marks the end of its 28-year-long hiatus. As with the past issues of the PYIL, the current issue contains articles written by international law experts, relevant jurisprudence, international treaties and agreements and proceedings of international law conventions.

It is hoped that this issue would bring new life to the publication and would restore it to its old glory as a fundamental source material for the Philippine international law community. It is further hoped that in the coming years, the Yearbook would continue to flourish just as the realm of international law continues to evolve.

MERLIN M. MAGALLONA
Editor-in-Chief

FOREWORD

INCREASING TECHNOLOGICAL ADVANCEMENTS have transformed the modern world into an interconnected community. From this new age has emerged both the threat of international conflicts, and the need for international cooperation. Now, more than ever, the study of international law has become more relevant and integral to legal practice and to legal education.

Not very many works have been written about public international law in relation to the Philippine context. The *Philippine Yearbook of International Law* is thus a remarkable publication, offering a comprehensive understanding of the current state of the country's international affairs. The *Yearbook* provides scholarly and up-to-date references which will help students and academics gain insights on Philippine state practice and other key developments in modern international law. It will further promote the study of public international law and encourage discussion on the different transnational issues facing the country today.

This 2017 issue of the *Philippine Yearbook of International Law* is particularly momentous as it marks the revival of the *Yearbook* after almost three decades. The *Yearbook* is a showcase of legal scholarship, featuring articles written by distinguished international law experts in the country. It includes the insightful presentations and discussions among international law practitioners at the 2017 Colloquium on International Law Issues. It contains a comprehensive listing of treaties and agreements entered into by the Philippines as well as relevant judicial decisions on international law for the Year 2017, making it an essential source material that impacts Philippine foreign policy directions.

It is with pride that the University of the Philippines College of Law and the UP Law Center are instrumental to this publication. Commendations are due to the UP Law Center – Institute of International Legal Studies (UPLC-IILS) and the Department of Foreign Affairs – Office of Treaties and Legal Affairs (DFA-OTLA), without whose vision and dedication, this endeavor would not have materialized.

In today's globalized world, legal practice has likewise become globalized. I salute all the educators, lawyers and scholars who continuously strive to initiate similar projects and undertakings in order to promote discourse and development in the field of international law and foreign policy.

FIDES C. CORDERO-TAN
Dean
University of the Philippines College of Law

MESSAGE

SINCE THE ADOPTION OF THE UNITED NATIONS CHARTER IN 1945 and the development of the UN system through the years, there has been a relatively steady march towards international cooperation and peace. International law – both as the system governing relations between states and other actors, and also as a process and culture – has been essential to that endeavor. But while international law has served the global community well, it has not eliminated inter-state and inter-communal conflicts. And of late, a retreat from international institutions and a return in some countries to unilateralism have challenged and even strained the rules-based global order.

Closer to home, the Philippines sought a legal solution through arbitration of its maritime disputes in the West Philippine Sea/South China Sea. But even as China declined to honor the 2016 arbitral award that was in favor of the Philippines, the 479-page decision has become part and parcel of the corpus of international law, particularly on oceans and the law of the sea.

The above trends and countertrends underline the dynamic and ever-changing state of international law. All these require continuous monitoring and rigorous analysis, making international law an exciting and even limitless field of study.

It is in this light, and with the objective of deepening engagements with the law academia and practitioners, that the Department of Foreign Affairs, through the Office of Treaties and Legal Affairs, convened a Colloquium on International Law Issues in December 2017. The Colloquium, the proceedings of which are in the pages of this Yearbook, yielded a harvest of valuable insights and recommendations aimed at enhancing international legal cooperation and facilitating trade and investments. Many of the recommendations have been implemented, notably the accessions by the Philippines to The Hague Conference on Private International Law Apostille Convention, and soon, the Service of Process Convention and the Framework Agreement on the Facilitation of Cross-Border Paperless Trade in Asia and the Pacific, among other instruments.

The Department of Foreign Affairs is pleased to be associated with the revival of the Philippine Yearbook of International Law, which benefitted from

the expertise and immense resources among academics and practitioners that comprise the Philippine international law community. We congratulate and commend the Philippine Society of International Law and the University of the Philippines Law Center Institute of International Legal Studies for this stellar achievement.

We look to the Philippine international law community and the rest of civil society as partners in fostering a deeper understanding and appreciation of international law. Only with such a constituency can we ensure and further grow the role of international law as the true beacon in the conduct of Philippine diplomacy.

J. EDUARDO MALAYA
Assistant Secretary for Treaties and Legal Affairs / Legal Adviser
Department of Foreign Affairs
Vice President
Philippine Society of International Law

MESSAGE

IT WAS IN THE DECEMBER 2017 COLLOQUIUM on International Law Issues, convened by the Office of Treaties and Legal Affairs of the Department of Foreign Affairs, that the revival of the Philippine Yearbook of International Law (Yearbook) was announced. The Yearbook was first published by the Philippine Society of International Law (PSIL) in 1966 and served as the PSIL's pièce de résistance. The last issue was Volume XV published in 1989, and contained important dissertations on sovereign debt restructuring, exchange control regulations, and moratorium on foreign sovereign debts.

PSIL's revival in 2014 saw as well the rebirth of the Yearbook. It was opportune and significant given the contemporary challenges we face as a nation marked by the exciting and swiftly changing area of international law. Among the latest international law issues that have come to fore are the unanimous award of the Permanent Court of Arbitration in favor of the Philippines on the South China Sea Arbitration, the ratification and subsequent withdrawal by the Philippines from the Rome Statute creating the International Criminal Court, resort by Filipinos to communications and inquiry procedures before the Human Rights Council and the Committee on the Elimination of Discrimination Against Women for violations of the ICCPR and CEDAW, respectively, the creation of the ASEAN Inter-Governmental Commission on Human Rights, and the recent Philippine accession to two Hague Conventions on Private International Law. In sum, international law has ceased to be a matter relevant only to academics. It is a living field of study which lawyers and laymen alike must be familiar with, if not knowledgeable of.

With the revitalization of both PSIL and the Yearbook, we encounter the same questions that other professional societies and journals around the world have had to wrestle with. Given the fast improving technology and the rise of new media, are professional societies and professional journals obsolete? This issue was discussed by Kristen Hahn in her article published in the American Journal of Epidemiology (Volume 183, Issue 5, 1 March 2016). And while it was examined in the context of a specific specialization in medicine, I find it applicable in the legal profession.

Hahn points out that advancement in technology, particularly the frequent resort to the online medium by students, professionals and academicians, poses challenges to both professional societies and journals. Ideas are now introduced through the cyberspace with ease, which makes it accessible to a wider audience with just a few clicks on a keyboard from anywhere in the world as compared to the conventional print medium. Review and discourse can be done online as well, without the necessity of braving through Manila traffic in order to convene. Given the convenience brought by this new medium, it would seem that there is less incentive in participating in professional conventions to engage with peers. Hence, the argument that journals are rendered obsolete.

While the internet has made ideas and subsequent discourse more accessible to the public, its being too accessible may also be a disadvantage. Ideas and theories are formed, composed and published online, most of the time with minimal vetting process. This is exactly the matter that PSIL and the Yearbook can address.

Professional societies such as PSIL, and the Yearbook can complement each other in the process of further developing our knowledge and understanding of the ever-changing arena of international law. They can act as curators in selecting the best research papers on emerging issues in the field that is worth primary attention and act as catalysts as ideas are clarified, deliberated on and enhanced in Society meetings, which in turn may be published in journals such as the Yearbook. At the end of the process, the journals guarantee experts' subscription on the output by the fact that it is deemed worthy of publishing.

Holmes once said that "every idea is an incitement. It offers itself for belief...eloquence may set fire to reason." It is my hope that the collection of essays and papers in our Yearbook will be the spark that opens our readers' minds and sets fire to reason and finding solutions to the various international law dilemmas raised.

I congratulate the Yearbook editorial staff led by its Editor-in-chief, Dean Merlin Magallona and Associate Editor, Prof. Rommel Casis, for this feat.

ELIZABETH H. AGUILING-PANGALANGAN
President
Philippine Society of International Law

ARTICLES

DYNAMICS BETWEEN DIPLOMACY AND INTERNATIONAL LAW: REFLECTIONS ON THE PHILIPPINE EXPERIENCE

J. EDUARDO MALAYA[*] and
JOHAIRA WAHAB-MANANTAN[**]

The interplay between international law and diplomacy is a recurrent and dynamic one in the conduct of foreign relations. That international law has primacy in inter-state engagements is almost axiomatic, but this proposition can be challenging, if not problematic, when one deals with specific cases. How does a lawyer-diplomat, for instance, render legal advice when his government wishes to withdraw from an international arrangement or institution, say a regional free trade agreement, a global pact for the environment or the International Criminal Court? An evaluation and balancing has certainly to be made between the need of one's State for autonomy of action to address pressing domestic concerns and the interest of the larger community of nations.

[*] Malaya is Assistant Secretary for Treaties and Legal Affairs (Legal Adviser) at the Philippine Department of Foreign Affairs (DFA). A career member of the Philippine foreign service since 1986, he served as Philippine Ambassador to Malaysia from September 2011 to March 2017. He was also Assistant Secretary for Legal Affairs and concurrently Foreign Affairs Spokesman from February 2009 to September 2011. He is the author of six books on Philippine diplomacy, the Philippine presidency and law, notably Forging Partnerships: Philippine Defense Cooperation in Constitutional and International Laws (University of the Philippines Law Center/Foreign Service Institute, 2017) and Philippine Treaties Index, 1946 to 2010 (Foreign Service Institute/Central Law Books, 2010). He has BA Economics (*cum laude*) and Law degrees, both from the University of the Philippines. He is currently Vice President of the Philippine Society of International Law.

[**] Wahab-Manantan is Third Secretary and Vice Consul at the Philippine Embassy in Kuala Lumpur. She was formerly assigned at the DFA Office of Treaties and Legal Affairs. She received her degrees in BA Philosophy (*magna cum laude)* and Juris Doctor from the University of the Philippines. She finished her LLM in National Security Law (Honors & with Distinction) from the Georgetown University in Washington D.C., where she was also awarded the Dorothy Mayer Prize for outstanding academic achievement.

The authors wish to acknowledge the research assistance extended by lawyer Crystal Gale Dampil and Kieren Roevi Batiles, both of the DFA Office of Treaties and Legal Affairs, in the drafting of this paper.

In 1990, Jorge Coquia – a well-regarded jurist, former justice of the Court of Appeals and at that time a Legal Adviser at the Department of Foreign Affairs (DFA), described international law as "the law that is intertwined with international politics, reflecting political interests, registering political adjustments and expressing in its stability and instability the political demands for order and for change."[1] Appreciating the delicate balancing of interests that shapes international law, he further wrote:

> *Here is the law that neither promises to transform the political system nor serves simply to disguise that system, but provides an instrument whereby states may achieve tentative reconciliation between their simultaneous urges for freedom of action and for predictable patterns of behavior, for the individualistic pursuit of national interest and for collective enjoyment of settled relationships... Law, understood in this sense, is not antithetical politics, dominant over politics, or subservient to politics but is integral to the political process.*[2]

Thus, it was perhaps inevitable – when the DFA, through its Office of Treaties and Legal Affairs (DFA-OTLA), convened and hosted a Colloquium on International Law Issues on December 4, 2017 – that the question of the role of State representatives, particularly diplomats, in shaping international law was thrust prominently in the minds of the diplomats, lawyers and other attendees at the event.

The goal of the Colloquium, the proceedings of which are published in this Yearbook, was to gather international law experts and specialists – both academe and practitioners, whether in the public or private sectors – and to bring their collective expertise to bear on pressing and current issues in international law that have concrete and realizable impact on Philippine foreign policy. Granted that this overarching goal moves from a certain assumption about the objectives of Philippine foreign policy, the participants at the Colloquium were well aware (or kept aware) that the topic of the day presented not merely substantive questions of international law, or what international law is, but also confronted them with the reality and constraints of diplomacy, or what States, such as the Philippines, can and cannot do, or must and must not do, as they take part in discussions that have a direct bearing on the development of international law.

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[1] Jorge Coquia, *The Role of the Office of the Legal Adviser (Department of Foreign Affairs),* 2 THE DIPLOMATS REV. 9-10 (1990).

[2] *Id.*

This article is an attempt to address some aspects of these questions and explore the answers in writing. In Part I, we discuss the conceptual linkages between diplomacy and international law, in general, and how these interlinkages can also be seen in the legal framework that guides the conduct of Philippine foreign policy. In Part II, we revisit key contributions of the Philippines to the development of certain norms in international law. In Part III, we explore the role of the Philippine foreign service and the DFA, through the DFA-OTLA, in shaping, as well as in fulfilling, the promise of international law by ensuring the Philippines' compliance with its obligations under international law and promoting international law in various domestic audiences and in its dealings with other States.

Finally, in Part IV, we conclude by exploring some challenges to diplomacy and international law, as distinct yet deeply interconnected fields of study and practice, given current realities in how States *choose* to relate to each other and the constantly shifting landscape of international relations. As States continue to draw and re-draw the lines that define their domestic interests and their objectives in dealing with other States and the international community, where will diplomats locate themselves in the process of shaping international law? Will international law continue to be a constructive medium of communication for international relations or will some of its fundamental principles be ultimately set aside as States pit their interests against each other in policy arenas that are governed less and less by fixed rules but by *ad hoc* understandings and flexible arrangements? What is the role of today's Filipino diplomats in the continual push and pull between the dictates of national interests, on one hand, and the demands of law for predictability, stability and fairness in norms and their implementation, on the other?

I. Links Between Diplomacy and International Law

"Diplomacy" and "international law" are both concepts that have the idea of foreign interactions at their core. Yet there seems to be a tension that forces itself between the nature of diplomacy – which relies heavily on compromise and flexibility, on one hand, and the perceived rigidity of law – which is premised on hierarchy and rules, on the other. Despite this apparent tension, the link between diplomacy and law can be said to be both conceptual and real, and the same is particularly manifest in the case of international law.

Diplomacy is traditionally[3] understood as "a set of institutions and processes by which *states* represent themselves and their interests to one another in a states system or society.[4]" Realists would posit that the relations of states in this system are generally "tense" and "violent."[5] Thus, it falls upon designated representatives of states – their diplomats and other officials – to manage these relations[6] and maintain them at a level or condition most ideal to maximizing the attainment of their respective interests. It is also generally assumed that the *primary* currency or, perhaps, manner of representation and interaction among States and diplomats in this system is mainly characterized by "power."[7] However, it is also acknowledged even by those who take the traditional view, that as chaotic and power-driven as these relations may be, there are norms or rules which govern these relations, and many of these norms are defined in international law.

International law refers to a body of laws generally derived from the following sources enumerated in the Statute of the International Court of Justice (ICJ):[8]

(a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
(b) International custom, as evidence of a general practice accepted as law;
(c) The general principles of law recognized by civilized nations; and
(d) Judicial decisions and the teachings of the most highly qualified publicists, as a subsidiary means for the determination of rules of law.

Among these sources, the first two most illustrate the role of States in shaping the norms and rules in international law, and are most relevant to the present discussion: *international conventions* refer to the body of bilateral and multilateral treaties negotiated by and entered into between and among States, under which they agree on certain norms to govern their behavior, in areas or situations where they may exercise control or influence. In the process of negotiating and concluding treaties – even as they approach the exercise and articulate their positions based on their respective interests – States take a direct

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[3] The authors acknowledge that there are views, which hold that diplomacy is not, or no longer, the exclusive realm of States and their diplomats. These views adopt a more plural, inclusivist and less "stateized" approach to understanding diplomacy.

[4] Stuart Murray et al., *The Present and Future of Diplomacy and Diplomatic Studies*, 13 INT'L STUD. REV. 708-728 (2011), www.jstor.org/stable/41428877.

[5] *Id.*

[6] *Id.*

[7] Dino Kritsiotis, *The Power of International Law as Language*, 34 CAL. WESTERN L. REV. 400 (1998), Available at: http://scholarlycommons.law.cwsl.edu/cwlr/ vol34/iss2 /9.

[8] Statute of the International Court of Justice, art. 38.

and active role in shaping norms which are intended to bind not only themselves, but oftentimes also others who are equal with themselves and sovereign in their own right.

In treaty negotiations, States actively utilize this opportunity not only to shape norms on how they should relate with each other, but to actively influence how other State *should* behave. Thus, the States who prevail with their views in this domain do significantly shape the yardstick for what is acceptable State behavior in the community of nations, determine what is deemed in conformity to the rule of law in the international order, and indeed, define how that international order looks like. From the viewpoint of State responsibility, the ability to shape international law also entails the ability to assign wrongdoing or responsibility to a State which may carry actionable consequences under international law.

Another source of international law whose formation and content are also heavily and directly influenced by States is *customary international law*, or custom. Custom is derived from State practice coupled with *opinio juris*, or that "general recognition by States that the practice is settled enough to amount to an obligation binding on States in international law."[9] Being based on State practice, this is another opportunity for States to define international law through their behavior or official pronouncements. State practice can be gleaned from various sources, such as "governmental actions in relation to other States, legislations, diplomatic notes, ministerial and other official statements, government manuals, unanimous or consensus resolutions of the United Nations (U.N.) and soft-law instruments."[10]

Yet of course, treaty norms and customary norms of international law are not necessarily distinct or remote from each other. As a matter of State practice or *opinio juris*, for example, consistent resort or use by States of a certain language or formulation in treaties are often cited as evidence of both State practice and *opinio juris*. Similarly, treaty norms, which may have started out as a product of negotiated compromise, may eventually be so widely accepted and followed in practice by States, even those not parties to the original treaty, that these norms may be deemed to have crystallized as customary international law.

Many of these norms in treaties and customary international law directly regulate how States relate to one another. Some are found in the U.N. Charter, such as the principle of sovereign equality, peaceful settlement of disputes and the prohibition on the use of force. Others are also found in the Vienna Conventions

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[9] ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 6 (2nd ed. 2010).
[10] *Id.*

on diplomatic and consular relations, such as the principle of *pacta sunt servanda* and the legal regime for diplomatic immunities. Aside from being embodied in treaties, many of these norms are also acknowledged to have attained the status of customary law.

In the Philippines, this link between diplomacy and international law can be seen in the legal framework which guides the conduct of Philippine foreign relations. The 1987 Constitution provides principles governing how the Philippines should relate with other States. These include principles that are aligned with norms in international law, such as the renunciation of war as an instrument of national policy (Art. II, Sec. 2); the paramount consideration for national sovereignty, territorial integrity, national interest and the right of self-determination (Art. II, Sec. 7); and the policy of freedom from nuclear weapons (Art. II, Sec. 8). As for international law norms, the Philippines follows a dualist legal order with respect to their adoption into the domestic legal system: that is, international law norms, in order have domestic law status, must undergo a method of internalization.[11]

The Constitution provides for two ways by which international law norms may be deemed part of the law of the land: one is by incorporation, which can only apply upon a determination (generally, by domestic courts) that a norm of international law is a generally accepted principle, or one that has attained the status of custom.[12] The point on judicial determination at the domestic level is crucial because it signals that the incorporation of these norms into domestic law is not by virtue of their nature as customary international law *per se*, but by virtue of a constitutional pronouncement requiring their incorporation given their nature as such.[13]

The other way by which an international law norm, particularly those found in international conventions and treaties, can form part of the Philippine domestic legal system is by way of Senate concurrence under the Treaty Clause in Article VII, Section 21 of the Constitution. With respect to treaties, the Constitution requires the concurrence of at least 2/3 of all the Members of the Senate for a treaty to be valid and effective.

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[11] Merlin M. Magallona, *The Supreme Court and International Law: Problems and Approaches in Philippine Practice*, PHIL. L. J., 2-3 (2010).

[12] *Id.*

[13] *Id.*

With these two methods for the internalization of international law norms, it is clear that under the Philippine legal framework, no assumption can be made regarding the primacy of international law norms over domestic law norms. This is also consistent with the language in Article VIII, Section 5 of the Constitution, which confers jurisdiction upon the Supreme Court to, among others, review the validity of any treaty, and international or executive agreement on the basis of their compliance with the Constitution or other national laws.[14] In the domestic sphere, the Constitution trumps international law norms in the same way that it prevails over other domestic laws and issuances, and the validity of a treaty or international agreement is evaluated on the basis of the same principles which apply for statutes.

II. Philippine Contributions to International Law

The presence and participation of Asian States in institutions and processes setting and defining the rules of international law has not always been as robust as it is today. The participation of Asia in international tribunals and multilateral bodies, noted Judge Owada Hisashi of the International Court of Justice (ICJ), was relatively low compared to other regions, especially during the pre-World War II era.[15] For instance, Japan was the only Asian country that participated in the Committee of Jurists, which undertook the preparatory works for the creation of the Permanent Court of International Justice (PCIJ), the predecessor of the ICJ.[16] When the PCIJ was eventually created, only five Asian States were members of the League of Nations, namely Afghanistan, China, India, Japan and Siam (Thailand).[17]

After World War II, more Asian States gained independence from colonizers, enabling them to take a more active and direct part in international relations. Nonetheless, as Simon Chesterman noted, despite the passage of over seven decades, many Asian States remain ambivalent about international law and institutions, and they are the least likely of any regional groupings to be party to most international obligations or to have representation reflecting their number and size in international organizations.[18]

The Philippines, having attained briefly its independence from Spain in 1898 and permanently from the U.S. in 1946, was one of the States that embarked on an

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[14] *Id.*

[15] Hisashi Owada, *Experience of Asia with the International Court* 2-3 (Yuchengco Center De La Salle University, Occasional Paper No. 2, Jul. 15, 2004)

[16] *Id.*

[17] *Id.*

[18] Simon Chesterman, *Asia's Ambivalence about International Law and Institutions: Past, Present and Futures*, 27 EUR. J. OF INT'L. L., no. 4.

active engagement with the community of nations. Since that time, Philippine diplomatic traditions and approaches have evolved and continue to so evolve, adapting to the objectives and priorities defined by its national interests. Not all of these interests are as fluid as might be commonly assumed; many are more enduring and inherent in the historical experiences, material realities and physical characteristics of the Philippines and its peoples. As can be seen in the following key contributions of the Philippines to international law, these national interests serve as guidepost for Filipino diplomats and officials as they advocate Philippine positions in the international arena.

Drafting of the Charter of the United Nations and the Trusteeship Issue

The Philippines was one of the early signatories to the formation of the United Nations when it adhered to the January 1, 1942 Declaration, which subscribed to the principles of the Atlantic Charter between the U.S. and the United Kingdom.[19] The Declaration represented a pact of alliance between signatory States not only to stand in mutual defense against the then members of the Tripartite Pact, but also not to enter into separate peace treaties with said adversaries.[20]

The Philippines, as a Commonwealth under the U.S., acceded to the Declaration on June 10, 1942, more than four years *before* it attained independence in 1946. The Philippines was one of the only three Asian countries to have subscribed to the declaration at the time – next to India and China.[21] The Philippines thereafter participated in the U.N. Conference on International Organization in San Francisco that drafted the Charter of the United Nations. In a sense, the country received some form of international diplomatic recognition even as a Commonwealth, although its participation was initially opposed by the Soviet Union.[22]

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[19] *A Decade of American Foreign Policy 1941-1949 Declaration by the United Nations*, The Avalon Project Documents in Law History and Diplomacy by Yale Law School Lillian Goldman Law Library (January 1, 1942), http://avalon.law.yale.edu/20th_century/decade03.asp.

[20] *Id.*

[21] *Id.*

[22] The Soviet Union acceded to the inclusion of the Philippine Commonwealth and India (a colony of the United Kingdom) in exchange for bringing in Byelorussia and Ukraine. See Natalia Ma. Lourdes M. Morales, *Philippine Participation in the United Nations: A Fifty-Year Perspective*, *in* Philippine External Relations: A Centennial Vista 545 (Aileen San Pablo-Baviera & Lydia N. Yu-Jose eds., 1998).

At the fourth plenary session of the San Francisco Conference, Brigadier General Carlos P. Romulo, head of the Philippine delegation, urged his fellow delegates to "make this floor the last battleground." He said:

> *Words are more powerful than guns in the defense of human dignity. Treaties are stronger than armamented boundaries. The only impregnable line is that of human understanding...*
>
> *... our words and actions here can outline a future pattern that can serve all the small nations of the world – a pattern that can be the working basis for world communal living – a pattern which will set peace. In this plan, the terms under which the individual nations have set their manner of living must adjust themselves to the needs of peace. Power must become pliable. Each nation must be prepared to contribute its share of effort and its share of yielding. In this civilized family first one member and then another gives in or yields a little and by these small submissions they gain everything in pride and protection.*[23]

The Philippine delegation took an active role in the deliberations, and authored ideas on "trusteeship" in the drafting of the Charter[24] and the proper disposition of former colonial territories. It was a difficult task considering that the Philippines was formally a Commonwealth under the U.S. and a third of the world was still under Western colonialism. Right after World War II, the greatest single political issue was colonialism, and most colonial powers had wanted to cling on to their imperial possessions. The proposed Charter provision on non-self governing territories had placed a limit to the aspirations of people under trusteeship at "self-determination" and "self-government," as discussed in the Trusteeship Committee.

As the first country in Asia to have declared independence and deeply keen on the issue of self-governance, the Philippine delegation urged the assembly to add the term "independence." Juxtaposing the terms "self-government" and "independence," Romulo emphasized that the latter is the paramount goal of all peoples, including the 600 million of them not yet represented at the conference. Said Romulo:

> *People can evolve into self-government and yet be part and parcel of a pattern imposed upon them against their will. Therefore, Mr. President, I insist that*

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[23] Address by Brigadier General Carlos P. Romulo, Chairman of the Philippine Delegation to the United Nations Conference on International Organizations, Fourth Plenary Session of the Conference, April 28, 1945.

[24] Morales, *supra* note 22, at 545-550.

> *"independence" should be mentioned because I feel that people should be given the freedom of choice. While some people may be happy and find the ultimate happiness in self-government, other people may find their ultimate happiness in independence...* [25]

Despite being opposed at the committee level by major colonial powers – U.K., France, Netherlands and Belgium – and then again at the general assembly, the vote was won. As adopted by the assembly, Article 76 in the chapter on International Trusteeship System fell into place, thus:

> *Article 76. The basic objective of the trusteeship system ... shall be:*
>
> *xxx*
>
> *b. to promote the political, economic, social and educational advancement of the inhabitants of the trust territories and their progressive development towards self-government or <u>independence</u> as may be appropriate to the particular circumstances of each territory and its people and the freely expressed wishes of the people concerned ... "* (underscoring supplied)

The active role of the Philippines on this issue was a major factor in its election as one of the additional members of the Trusteeship Council in its 95th plenary meeting on October 1, 1947.[26]

When the text was finalized, the Philippines took pride of place as among the 50 original signatories of the U.N. Charter on June 25, 1945 at the Veterans Memorial Hall in San Francisco. The Philippines was among the few Asian countries present, alongside China and India, as well as Iran, Iraq, Lebanon, Saudi Arabia, Syria and Turkey.

The issue of trusteeship remained contentious. Under a claim of right to annex the Namibian territory, South Africa occupied Southwest Africa (now Namibia). The League of Nations after the First World War had placed the territory under the mandate of South Africa. The U.N. General Assembly declared the continuous presence of South Africa in Namibia as illegal and called upon other Member States to act accordingly. An advisory opinion was also sought from the ICJ for a determination of the legal status of the territory.

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[25] *Id.,* at 550.
[26] *Id.*

To press its advocacy on the issue, the Philippines opted not merely to submit written statements on the question, but designated one of its officials to orally argue before the ICJ. On May 19-20, 1950, Jose D. Ingles, Legal Adviser of the Philippine Mission in New York, appeared before the Court,[27] together with the representative of the U.N. Secretary-General for the enforcement of the obligation of South Africa. The Philippines was the only State to have an official argue its case, other than for respondent South Africa.

According to Ingles, Chapter XI of the U.N. Charter was intended to apply to all non-self-governing territories. The administering authorities undertook certain obligations in recognition of the principle that the interests of the inhabitants of the dependent territories are paramount. He added that mere possession of the territory by South Africa cannot ripen into a legal possession without the consent of the original grantor or unless and until recognized by the international community.[28]

In an Advisory Opinion issued on 11 July 1950, the ICJ held that the dissolution of the League of Nations and its supervisory machinery had not entailed the lapse of the Mandate, and that the mandatory Power (South Africa) was still under an obligation to give an account of its administration to the U.N., which was legally qualified to discharge the supervisory functions formerly exercised by the League of Nations. On the other hand, the mandatory Power was not under an obligation to place the Territory under trusteeship, although it might have certain political and moral duties in this connection. Finally, it had no competence to modify the international status of Southwest Africa unilaterally.[29]

The erstwhile trust territories which benefited from the strong advocacy of the Philippines and others for eventual independence include Cameroon, Somaliland, New Guinea, Rwanda, Burundi, Tanzania, Togo, Ghana, Samoa, Nauru, Marshall Islands, Micronesia, Northern Mariana Islands and Palau.

General Romulo would be later elected as President of the U.N. General Assembly at its 4th session in 1952 – the first Asian to hold said position- and received a ticker tape parade in New York.[30]

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[27] Jose D. Ingles, *Filipino Advocate and Spokesman: Selected Articles and Statements on Foreign Policy and World Politics*, The Philippine Branch of the International Law Association 131-133 (1992).

[28] *Id.*, at 132-133.

[29] International Status of South West Africa, Advisory Opinion, 1950 I.C.J. Rep. 128 (July 11), https://www.icj-cij.org/en/case/10.

[30] *Historical Background*, DEPARTMENT OF FOREIGN AFFAIRS, https://www.dfa.gov.ph/about/history-of-dfa.

Since the birth of the U.N. and until the present, the Philippines has been a strong voice for a number of causes that reflect its aspirations as a developing country and a responsible member of the international community. It advocated early on for an inclusive U.N. and the reform of its Security Council, notably the elimination of the veto powers of the latter's permanent members. A strong champion of human rights, it was elected in 1946 for a four-year term in the 18 member-Economic and Social Council that worked on the declarations or conventions on civil liberties, status of women, freedom of information, protection of minorities and the prevention of discrimination.

The Philippines was the first country in Southeast Asia to accede to the United Nations High Commissioner for Refugees' (UNHCR) main instruments in 1981, the 1957 Convention on the Status of Refugees, and its 1967 Protocol. In response to the "boat people" fleeing Vietnam, the Philippines in 1980 established in Bataan the then largest UNHCR-funded refugee-processing center.[31]

The country advocated in successive decades for equitable and balanced growth strategies and programs through a New International Economic Order (NIEO), non-proliferation of nuclear weapons (and against nuclear testing in the Pacific Ocean), democratization, inter-civilizational dialogue, women's rights, role of civil society, environmentalism, climate change mitigation and adaptation, and sustainable development, often in solidarity with the Group of 77 and the Non-Aligned Movement.

The country has hosted a number of strategic meetings and international conferences, such as the U.N. Conference on Trade and Development in 1979 and the special committee that drafted the Manila Declaration on the Peaceful Settlement of Disputes between States.

The current Philippine advocacies are in the following areas: connecting peace and security with the 2030 Agenda for Sustainable Development, particularly the eradication of poverty; full respect for the human rights and the humane treatment of migrants, regardless of their migration status, as well as of refugees and displaced persons; in the area of climate change and resilience, a sustained advocacy for the common but differentiated responsibilities; stronger political commitment to end persistent health challenges such as tuberculosis, cholera, malaria and HIV/AIDS; the elimination of nuclear weapons; and the rule of law and the peaceful settlement of disputes.

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[31] Morales, *supra* note 22, at 600.

In recognition of its leadership and vision, the Philippines won a non-permanent seat in the U.N. Security Council a number of times, and presided its sessions in 1957, 1963, 1980, 1981 and 2004. It garnered the endorsements of 176 countries in the 2004 campaign for a seat in the U.N. Security Council, which has a term of two years.

Filipino diplomats and officials have been elected or appointed to serve in different U. N. Governing Councils and standing and procedural committees, notably Jose D. Ingles, Leandro Verceles, Rafael Salas (first executive director of the U.N. Population Fund), Leticia Ramos-Shahani (Secretary-General of the World Conference on the U.N. Decade of Women in Nairobi, 1985) and Domingo L. Siazon, Jr. (Director-General, U.N. Industrial Development Organization).

Peaceful Settlement of Disputes and the Manila Declaration

The norm of peaceful settlement of disputes is outlined in Chapter VI of the UN Charter. Article 2(3) provides that "(a)ll Members shall settle their international disputes by peaceful means...," and in Article 33, parties to a dispute have a duty to resort to "peaceful means of their own choice" in order to resolve such dispute.

After more than three decades of the U.N. Charter's existence, the Philippines, as one of its original signatories, and similarly minded countries urged for its review and updating. Towards this end, the Philippines hosted in Manila in 1980 the meeting of the Special Committee on the Charter of the U.N. and on the Strengthening of the Role of the Organization.

The Manila Declaration was elaborated on the initiative of non-aligned countries, namely Egypt, Indonesia, Mexico, Nigeria, Romania, Sierra Leone, Tunisia, and the Philippines.[32]

On the basis of the text prepared by the Special Committee, the U.N. General Assembly on 15 November 1982 adopted by consensus as part of resolution 37/10 The Manila Declaration on the Peaceful Settlement of International Disputes.

John Merrills, an authority on the subject, cites the significance of the Manila Declaration in this manner. "What are States' legal obligations in this field? A comprehensive statement can be found in an important resolution of the U.N.

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[32] Emmanuel Roucounas, *Manila Declaration on the Peaceful Settlement of International Disputes*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, http://www.un.org/documents/ga/res/37/a37r010.htm.

General Assembly, the Manila Declaration, which confirms and elaborates the relevant provisions of the U.N. Charter and the General Assembly's earlier Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States of 1970 ..."[33]

The Manila Declaration reaffirmed some of the fundamental principles of the U.N. Charter, including the obligations to act in good faith, to settle disputes peacefully, to refrain from the threat or use of force, to refrain from the intervention in the affairs of any other state, to choose among the various means of peaceful settlement, and, in case of failure, to refer disputes to the Security Council.

Some U.N. Charter concepts were modified, such as the inclusion of the adverb "exclusively" in connection with the expression "settle international disputes by peaceful means," and the void left in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States is filled by referring to the obligation under the U.N. Charter as a source of international law.[34]

The Manila Declaration also adds to the classic notion of international law the concept of "generally recognized principles and rules of contemporary international law." The delegations responsible for this new expression believed that it reaffirmed certain fundamental principles, including the right of self-determination, the non-recognition of illicit territorial acquisitions, and the permanent sovereignty of states of their natural resources.[35]

Other new elements included the introduction of good offices among the means of settlement and the concept of meaningful negotiation, which is derived from the jurisprudence of the ICJ.

Most significantly, the Manila Declaration states that:

> *7. In the event of failure of the Parties to a dispute to reach an early solution by any of the above means of settlement, they shall continue to seek a peaceful solution and shall consult forthwith on mutually agreed means to settle the dispute peacefully...*

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[33] John Merrills, *The Means of Dispute Settlement*, International Law 549 (Malcolm Evans ed., 5th ed. 2018).

[34] Giorgio Bosco, *New Trends on Peaceful Settlement of Disputes between States*, 16 N.C. J. OF INT'L. L. & COM. REG. 235 (1991), http://scholarship.law.unc.edu/ncilj/vol16/iss2/3.

[35] *Id.*

> *8. States parties to an international dispute, as well as other States, shall refrain from any action whatsoever which may aggravate the situation so as to endanger the maintenance of international peace and security and make more difficult the peaceful settlement of the dispute, and shall act in this respect in accordance with the purposes and principles of the United Nations.*

The obligation, noted Merrills, is "not just to give peaceful methods a try, but to persevere for as long as necessary, while at the same time avoiding action which could make things worse. In other words, if a dispute cannot be settled, States must at least manage it and keep things under control."

It is important to keep in mind, noted Emmanuel Roucounas, that the context in which the Manila Declaration was negotiated and adopted was that of the difficult relations between the East and West, and of the intent of the non-aligned countries to seek clarification of existing international law in conjunction with their aspirations.[36] It is a "comprehensive and positive legal document," stated Giorgio Bosco.[37]

With the intent to strengthen the role of the ICJ, the Declaration also invited States to recognize as compulsory the jurisdiction of the ICJ, in accordance with Article 36 of its Statute, and/or to insert in treaties, whenever appropriate, clauses providing for the submission to the ICJ of disputes which may arise from the interpretation or application of such treaties.

It may be noted that even before the adoption of the Manila Declaration, the Philippines had entered a Declaration on January 18, 1972 recognizing the jurisdiction of the ICJ as *"compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes arising hereafter concerning:*

> *(a) the interpretation of a treaty;*
> *(b) any question of international law;*
> *(c) the existence of any fact which, if established, would constitute a breach of an international obligation;*
> *(d) the nature or extent of the reparation to be made for the breach of an international obligation."*[38]

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[36] Roucounas, *supra* note 32.

[37] Bosco, *supra* note 34.

[38] The exceptions to the Philippine declaration on the compulsory jurisdiction of the ICJ are the following disputes:

(a) in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement; or

Demonstrating its faith in international institutions as a proper, peaceful and effective platform to resolve its disputes with other States, the Philippines has on numerous occasions actively resorted to dispute mechanisms established under international law for the resolution of disputes.

When the U.N. General Assembly requested the ICJ for an advisory opinion on the Legality of the Threat or Use of Nuclear Weapons,[39] the Philippines participated in the oral arguments before the Court. Professor Merlin Magallona appeared before the ICJ in November 1995,[40] just as Jose D. Ingles did in the International Status of the Territory of Southwest Africa case in 1950.

Five years later, the Philippines sought intervention before the ICJ in the dispute between Malaysia and Indonesia over Pulau Ligitan and Pulau Sipadan. With the Philippine claim over certain parts of North Borneo (Sabah) remaining unresolved, there was a need to protect and preserve the country's legal rights and interest in the territory. Professor Magallona and Yale Professor W. Michael Reisman appeared before the ICJ and argued the Philippine position in June 2000.

The ICJ decided not to allow the requested intervention, but in reassuring words, the Court stated that the Philippine claim *"could not be affected by the Court's reasoning or interpretation of treaties involving Pulau Ligitan and Pulau Sipadan"* and that it *"remains cognizant of the positions stated before it by Indonesia, Malaysia and the Philippines."*[41]

(b) which the Republic of the Philippines considers to be essentially within its domestic jurisdiction; or

(c) in respect of which the other party has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purposes of such dispute; or where the acceptance of the compulsory jurisdiction was deposited or ratified less than 12 months prior to the filing of the application bringing the dispute before the Court; or

(d) arising under a multilateral treaty, unless (1) all parties to the treaty are also parties to the case before the Court, or (2) the Republic of the Philippines specially agrees to jurisdiction; or

(e) arising out of or concerning jurisdiction or rights claimed or exercised by the Philippines -

(i) in respect of the natural resources, including living organisms belonging to sedentary species, of the sea-bed and subsoil of the continental shelf of the Philippines, or its analogue in an archipelago, as described in Proclamation No. 370 dated 20 March 1968 of the President of the Republic of the Philippines; or

(ii) in respect of the territory of the Republic of the Philippines, including its territorial seas and inland waters.

[39] G.A. Res. 49/75 K, Request for Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (Dec. 15, 1994), https://www.icj-cij.org/en/case/95.

[40] MERLIN M. MAGALLONA, THE PHILIPPINE CONSTITUTION AND INTERNATIONAL LAW (2013).

[41] THE PHILIPPINE CLAIM TO A PORTION OF NORTH BORNEO: MATERIALS AND DOCUMENTS 400 (A. Suzette Suarez ed., 2003).

More recently, in January 2013, the Philippines brought its maritime disputes with China in the West Philippine Sea/South China Sea to international arbitration. The *South China Sea Arbitration Case,* which was initiated under Part XV and Annex VII of the U.N. Convention on the Law of the Sea (UNCLOS), has been considered a major breakthrough in the enforcement, not only of the dispute settlement provisions of UNCLOS, but also of the U.N. Charter.[42] This will be further discussed in the next section of this paper.

Much earlier, while a colony of the U.S., the Philippines was involved in an arbitration between the U.S. and The Netherlands over an island off the southern tip of Davao province. In the Island of Palmas (Miangas) (1928) case, the arbitrator ruled that discovery of *terra nullius* is not enough to establish sovereignty. It must be accompanied by effective control.[43]

As a member of the World Trade Organization (WTO), the Philippines has abided by its commitments under international trade agreements and also keenly enforced its rights, among others, by participating in dispute settlement proceedings under the ambit of the WTO.

The Philippines is currently a Party to 27 ongoing WTO cases, including 5 cases under which it acts as complainant, such as that against Brazil (Measures affecting Desiccated Coconut), the U.S. (Import Prohibition on Shrimp and Shrimp Products), Australia (Certain Measures affecting the Importation of Fresh Fruits and Vegetables, and a separate case on Measures affecting the Importation of Pineapples), and Thailand (Customs and Fiscal Measures on Cigarettes from the Philippines).[44]

The Archipelagic Doctrine in the Law of the Sea Convention

Perhaps, unsurprisingly, the area of international law in which the Philippines has most actively contributed in is the law of the sea. The Philippines, along with Indonesia and other island nations, played a key role in jumpstarting the advocacy for the "archipelagic doctrine" in international law. Philippine practice with respect to archipelagoes and archipelagic baselines shaped international law on these matters, through the content of its submissions to the conferences which led to the

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[42] Robert Beckman, *South China Sea Tribunal Ruling a Game Changer*, THE STRAITS TIMES, July 14, 2016.
[43] The Island of Palmas Case *(U.S. v. Netherlands)*, 2 J. Scott, Hague Ct. Rep. 829 (Perm Ct. Arb. 1928).
[44] *Philippines and the WTO, World Trade Organization*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/countries_e/philippines_e.htm (last visited July 13, 2018).

adoption of the 1982 UNCLOS, and also defined the scope of legal issues during negotiations in UNCLOS III.

Even before it was recognized as such under treaty or customary law,[45] the Philippines had long advocated that States which are composed of one or more archipelagoes must be treated differently in international law. Prior to the Philippine and Indonesian lobby, while it was recognized by many international law experts that the physical characteristics of archipelagoes (especially mid-ocean archipelagoes) might have an impact on the drawing of baselines and the determination of maritime zones and maritime entitlements, the prevailing view was that it was not apparent that different rules should apply to such States.[46]

The Philippine position is, of course, deeply rooted in the Philippines' geography and history. The Philippines is composed of 7,100 plus islands and other features strewn across a stretch of blue on a map. It is sandwiched in between two major bodies of water with the Pacific Ocean in the east, and the South China Sea in the west, including the West Philippine Sea. Aside from being home to abundant marine ecosystems, these waters are also the site of major international shipping lanes, whether for commercial or military navigational purposes. As a State, the Philippines has long recognized the strategic impact of location and geography on its economy and national security.

Historically, the Philippine position on the legal status of archipelagoes and archipelagic waters was reflected in treaties and diplomatic notes submitted by the Philippines even before the adoption of UNCLOS. In the Treaty of Paris (1898), in which Spain ceded to the U.S. certain territories, including the Philippines, the treaty referred to the "archipelago known as the Philippines Islands."[47] In a follow-up treaty in 1900 clarifying the scope of the territory ceded in the 1898 treaty, there was no separate reference made to the waters in between the islands.[48] In 1955, the Philippines officially communicated its position on the legal status of archipelagoes through a Note Verbale to the U.N. Said position was affirmed through another note in 1956, where the Philippines expressed its views on the International Law

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[45] Jorge Coquia, *Development of the Archipelagic Doctrine as a Recognized Principle of International Law*, 58 PHIL. L.J. 13-40 (1980).

[46] DONALD ROTHWELL & TIM STEPHENS, THE INTERNATIONAL LAW OF THE SEA 182-185 (2nd ed. 2016).

[47] Coquia, *supra* note 45, at 13, 15, 16. See: UN Doc. No. A/Conf. 13c.1/L.98; See also: Synoptical Table, UN Doc. A/Conf. 13 P C.1/L.11 Rec./1; See further: Note Verbale, dated January 20 1956 from the Permanent Mission of the Philippines to the United Nations, 2 Yearbook of the International Law Commission 70 (1956) and GAOR, Tenth Session, 1955, Supp. No. 8A (A/2916), 137.

[48] *Id.*

Commission's (ILC) draft articles on the law of the sea.[49] In these diplomatic notes, the Philippines expressed its view that:

> *all waters around, between, connecting different islands belonging to the Philippine Archipelago, irrespective of their width or dimension, are necessary appurtenances of its land territory, forming an integral part of the national or inland waters, subject to the exclusive sovereignty of the Philippines.*

By this treatment, the Philippines also expressed its view that such sovereignty extends not only to jurisdiction over navigational rights, but also to economic and marine resources, such as "natural deposits or occurrences of petroleum or natural gas" within the archipelago and seaward from its shores, but "not within the territories of other countries."[50] These views were also reflected later in domestic laws, such as Republic Act No. 3406 in 1961, and later in the 1973 and 1987 Philippine constitutions.[51]

While its State practice inspired many of the debates and the negotiating language in the crafting of the international law for archipelagoes, not all of the Philippines' positions were adopted in the outcome text of UNCLOS. Among others, the Philippines negotiated for waters in between and connecting the islands in an archipelago to be part of the regime of internal waters. However, the outcome text in UNCLOS created the regime of archipelagic waters, separate from the regime of internal waters and territorial sea and yet still different from the regime of high seas.

In one of his interventions in UNCLOS III, Arturo Tolentino, co-chair of the Philippine delegation, pointed out this "legal anomaly," where the regime of archipelagic waters (which are waters landwards from the baselines) allows for the more permissive passage in the normal mode of navigation in designated sea routes for all vessels, including foreign aircrafts and warships, while in the territorial sea, the regime of innocent passage would have otherwise imposed more restrictions on such vessels, such as requiring submarines to navigate on the surface and to show their flag.[52]

More recently, and still in the realm of the law of the sea, the *South China Sea Arbitration Case,* which the Philippines initiated under Part XV and Annex VII of

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[49] *Id.*

[50] *Id.*

[51] CONST. (1987), art. 1: *"...The waters around, between and connecting the islands of the archipelago, irrespective of their breadth and dimensions, form part of the internal waters of the Philippines."*

[52] Coquia, *supra* note 45, at 30-31.

UNCLOS, involved the characterization of certain features and Chinese actions in the South China Sea.[53] The Tribunal's pronouncements has significantly contributed to case law in the law of the sea, particularly in its discussion on the legal status of "historic rights" under UNCLOS, what constitutes an island under Articles 13 and 121, and the rights and duties of other States in a State's exclusive economic zone.[54] On the impact of dredging sand, reclamation and similar constructions on a low-tide elevation or on an island, the arbitral tribunal stated:

> *The inclusion of the term "naturally formed" in the definition of a low-tide elevation and an island indicates that the status of a feature is to be evaluated on the basis of its natural condition. Any human modification or installation built atop it cannot change the seabed into a low-tide elevation or a low-tide elevation into an island.*[55]

The tribunal's pronouncements in its award on admissibility is also widely cited as a guide on what constitutes compliance with the duty to abide by other agreements to seek settlement under Article 281 (1) and Article 282, and the duty to enter into negotiations and exchange views under Article 283 of UNCLOS.[56]

International Courts and Tribunals

Aside from participating in proceedings in international courts and tribunals, the Philippines has also contributed to the pool of scholarly jurists and international law experts who have sat in these tribunals.

In the ICJ, Cesar Bengzon, a former Chief Justice of the Philippines, was elected ICJ member in 1966 and served the full nine-year term, until 1979. During his service in the ICJ, he took part in deliberations in landmark cases, including the *Barcelona Traction Case* (Belgium/Spain), the *North Sea Continental Shelf Cases* (Germany/Denmark; Germany/Netherlands) and the Nuclear Test Case (Australia/France).[57]

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[53] South China Sea Arbitration *(Republic of the Philippines v. People's Republic of China),* PCA Case No. 2013-19, (Jul. 12, 2016).

[54] *Id. See also* Sean Murphy, International Law Relating to Islands (2017).

[55] *Id.,* at para. 305.

[56] South China Sea Arbitration *(Republic of the Philippines v. People's Republic of China),* PCA Case No. 2013-19 (Award), (Oct. 29, 2015).

[57] SYLVIA MENDEZ VENTURA, CHIEF JUSTICE CESAR BENGZON: A FILIPINO IN THE WORLD COURT 125-129 (1996).

The North Sea Continental Shelf cases involved Denmark, Germany, and the Netherlands regarding the "delimitation" of areas—rich in oil and gas—of the continental shelf in the North Sea. Germany's North Sea coast is concave, while the Netherlands' and Denmark's coasts are convex. If the delimitation had been determined by the equidistance rule ("drawing a line each point of which is equally distant from each shore"), Germany would have received a smaller portion of the resource-rich shelf relative to the two other states. Thus Germany argued that the length of the coastlines be used to determine the delimitation. The Court ultimately urged the parties to "abat[e] the effects of an incidental special feature [Germany's concave coast] from which an unjustifiable difference of treatment could result."[58]

Five ICJ judges wrote dissents to the main judgment. Judge Bengzon attached the following declaration to the judgment:

> *"I regret my inability to concur with the main conclusions of the majority of the Court. I agree with my colleagues who maintain the view that Article 6 of the Geneva Convention is the applicable international law and that as between these Parties equidistance is the rule for delimitation, which rule may even be derived from the general principles of law."*[59]

The case is viewed as an example of "equity *praeter legem*"—that is, equity "beyond the law"—when judges supplement the law with equitable rules necessary to decide the case at hand.

On the *Nuclear Test Case,* a biographer of Justice Bengzon narrated the following:

> *One of the last cases the court heard before Bengzon retired was decided against France's plan to conduct a nuclear test in an island adjacent to New Zealand and Australia. France argued that the ICJ had no police power to implement the decision ... Recalling the case, Bengzon said, "All we had was public opinion on our side – and what we did was to come out with all the facts, explore them, and make our judgment. France said we had no jurisdiction over it, but later voluntarily desisted from continuing their atomic bomb test.*[60]

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[58] North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, 1969 I.C.J. 3, at 56 (Feb. 20), https://www.icj-cij.org/files/case-related/51/051-19690220-JUD-01-00-EN.pdf.

[59] *Id.*

[60] Ventura, *supra* note 57, at 129.

In international trade law matters, Florentino P. Feliciano, former Justice of Supreme Court, was appointed member of the then newly established Appellate Body of the WTO in 1995, and served as its chairman for 2000-2001. The seven-person Appellate Body is the highest adjudicating body for trade disputes.[61] Aside from his substantive contributions to jurisprudence in international trade law, Justice Feliciano is remembered by his fellow international law experts (not least among them, former ICJ President Rosalyn Higgins who refers to him as her "benign first mate,"[62]) for his significant contributions to the development of the WTO rules of procedure. In particular, he is regarded to have advocated the consistent application of public international law principles, including rules of treaty interpretation, alongside WTO rules of procedure in the adjudication of international trade disputes.[63]

In the field of human rights and international humanitarian law, Raul Pangalangan, former Dean of the University of the Philippines College of Law, currently sits as a Judge in the ICC. Judge Pangalangan presided a 3-person trial chamber in the seminal case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi,* [64] which involved intentional attacks directed against religious and historic buildings, and other objects of cultural heritage under Article 8(2)(e)(iv) of the Rome Statute. The ICC convicted and sentenced to 9-year imprisonment Mr. Al-Mahdi, a Malian national and head of the *Hesbah* morality brigade, for war crimes constituting of the destruction in 2012 of 10 cultural and religious sites, specifically mausoleums, nine of which are protected UNESCO World Heritage sites. According to the trial chamber,

> *... all the sites but one ... were UNESCO heritage sites and, as such, their attack appears to be of particular gravity as their destruction does not only affect the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community ... destroying the mausoleum, to which the people of Timbuktu had an emotional attachment, was a war activity aimed at breaking the soul of the people of Timbuktu. In general, the population of Mali, who considered Timbuktu as a source of pride, were indignant to see these acts take place...*[65]

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[61] STEVE CHARNOVITZ, DEBRA STEGER & PETER VAN DEN BOSSCHE, LAW IN THE SERVICE OF HUMAN DIGNITY: ESSAYS IN HONOR OF FLORENTINO FELICIANO xix (2005).

[62] *Id.,* at 11.

[63] Luiz Olavo Baptista, *Interpretation and Application of WTO Rules: Florentino Feliciano and the First Seven*, in Charnovitz, *supra* note 61, at 127-135.

[64] *Prosecutor v. Ahmad Al Faqi Al Mahdi,* ICC-01/12-01/15, Judgment and Sentence, (27 September 2016).

[65] *Id.*, at para. 80.

The first judgment of its kind by the ICC which dealt with targeting cultural properties, it has been lauded for enhancing the visibility of cultural heritage and broadcasting the seriousness of crimes against it.[66]

III. The Department of Foreign Affairs and International Law

Philippine participation in international organizations and international tribunals is one of the aspects of foreign policy implementation. The guiding principles for the conduct of Philippine foreign policy are provided in the Constitution and relevant laws. These include the pursuit of an independent foreign policy and the principles of national sovereignty, territorial integrity, national interest and right of self-determination in relations with other States.[67]

The mandate to conduct the country's foreign relations is vested chiefly in the President and, by extension, his Secretary of Foreign Affairs. Although not expressly mentioned, this is implied from the powers expressly granted to the President in the Constitution and laws, such as the power to nominate and appoint, with consent of the Commission on Appointments, ambassadors, other public ministers and consuls; power to negotiate, and, with the concurrence of the Senate, enter into treaties and international agreements; and the power to manage the country's commercial and economic relations.[68]

Within the Executive branch, the DFA is the lead agency that advises and assists the President in planning, organizing, directing, coordinating and evaluating the total national effort in foreign relations.[69] In relation to Philippine participation in shaping international law, the Department's mandate includes the conduct of Philippine representation in the U.N., ASEAN and other international and regional organizations[70] and the negotiation of treaties and other agreements pursuant to the instructions of the President and in coordination with other government agencies.[71] Within the DFA, the principal offices primarily responsible for the execution of these mandates vis-à-vis international law are the Office of the United Nations and Other International Organizations (UNIO), Office of the

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[66] See, e.g. *International Criminal Court Brings a Cultural Vandal to Justice*, PBS NewsHour (August 22, 2016, 6:10 PM), https://www.pbs.org/newshour/show/international-criminal-court-brings-cultural-vandal-justice.

[67] CONST. (1987), art. II, sec. 7; 1987 ADM. CODE, Title I, Chapter 1, sec. 1.

[68] J. Eduardo Malaya, *Conflict and Cooperation in the Crafting and Conduct of Foreign Policy*, 55 ATENEO L. J. 559 (2010).

[69] 1987 ADM. CODE, Title I, Chapter 1, sec. 2.

[70] *Id*. sec. 3(3).

[71] *Id*. sec. 3(5).

ASEAN Affairs (DFA-ASEAN), Office of International Economic Relations (OIER) and the Office of Treaties and Legal Affairs (OTLA).[72]

OTLA: Legal Adviser to the Government on International Law

The Office of Treaties and Legal Affairs (OTLA) – or the "Office of the Legal Adviser" as stated in the Administrative Code of 1987 – is one of the principal offices in the DFA listed in the Foreign Service Act of 1991 (Republic Act No. 7157).[73] The Office provides legal assistance to the Secretary of Foreign Affairs on matters concerning the interpretation and application of Philippine laws and regulations, treaties, conventions and other international agreements, and assists in the negotiation of treaties and international agreements.[74]

In carrying out these tasks, OTLA is guided by the pillars of Philippine foreign policy, namely national security, economic security and the protection and promotion of the rights and interests of Filipinos overseas, as well as the Government's National Security Strategy and the Department's medium-term strategic plan, which are updated periodically.

Like its counterparts in other government agencies and large corporations, OTLA is the in-house legal counsel of the Department. In addition to providing guidance on treaty matters and rendering legal opinions on contracts entered into by the DFA, it assists the Board of Foreign Service Administration in the investigation and prosecution of administrative cases involving erring personnel.[75]

Unlike legal offices in other government departments, OTLA's linkage to international law is direct and pronounced, inasmuch as the office is consulted and often involved in the negotiation of international agreements, and reviews and facilitates the ratification of agreements concluded by the DFA and other government agencies. Its role in the treaty-making process is preeminent as underscored by the fact that to OTLA is reposed under Executive Order No. 459, series of 1997, the prerogative in making a determination whether an agreement is an executive agreement or a treaty. An executive agreement will require the ratification of the agreement by the President in order to be valid and effective, while a treaty will require both presidential ratification and concurrence to such ratification by the Senate.

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[72] *Id.* sec. 8(2) – (4) and Chapter 3, sec. 10.
[73] Foreign Service Act, Rep. Act. No. 7152 sec. 9 (1991).
[74] DFA Department Order No. 19A-95, sec. 12 (2004).
[75] *Id.*

The most important duty of the head of OTLA, the Assistant Secretary for Treaties and Legal Affairs, obviously, is to advise the Secretary of Foreign Affairs, other agencies and often the Office of the President, and even Congress, of the existing international law in respect to a particular issue, problem or situation. The purpose is to give the proper legal framework in making foreign policy decisions, so that the country's policy does not come in conflict with international law and the broad interests of the international community.

Harold Hongju Koh, who served in the U.S. State Department, observed that the Legal Adviser "must shift back and forth constantly between four rich and varied roles: counselor, conscience, defender of the national interest, and spokesperson for international law."[76] A legal adviser in the Croatian Foreign Ministry, Nick Stanko, also noted that even countries and their leaders who bluntly break fundamental rules and principles of international law almost invariably make a considerable effort to wrap their acts in a legally presentable or at least justifiable form.[77]

The OTLA is headed by a senior career Foreign Service Officer, with the rank of Chief of Mission, who is designated as Assistant Secretary for Treaties and Legal Affairs. The rest of OTLA's personnel complement consist of an Executive Director, variably four to six foreign service officers serving as division directors and principal assistants, and some 20 staff officers and employees.

Since 1946, twenty-seven (27) officials have occupied the position of Assistant Secretary for Treaties and Legal Affairs. One of them served as head of OTLA for 26 years – Ira Plana, who later served as Philippine Ambassador to The Netherlands, the host country of the ICJ, the PCA and other international legal institutions. Five held the position twice: Gauttier Bisnar, Eloy Bello III, Alberto Encomienda, Minerva Jean Falcon and J. Eduardo Malaya.

Lucas Madamba, 1946 – 1947	Franklin Ebdalin, 1996-2000
Diosdado Macapagal, 1948	Alberto Encomienda, 2000-2001
Gauttier Bisnar, 1949	Minerva Jean Falcon, 2002
Eduardo Quintero, 1950-1955	Eloy Bello III, 2002-2004

[76] Harold Hongju Koh, *The Role of the Legal Adviser* 4657 (Yale Faculty Scholarship Series, Paper, 2010).

[77] *The Role of the Legal Adviser in Modern Diplomatic Services,* Diplo Foundation (1998) [hereinafter *The Role of the Legal Adviser*].

Juan Arreglado, 1956-1960	Delia Menez-Rosal, 2005
Simeon Roxas, 1960-1964	Reynaldo Catapang, 2005-2006
Gauttier Bisnar, 1965-1967	Victor Garcia III, 2006-2008
Jose Plana, 1968-1984	Alberto Encomienda, 2008
Amante Manzano, 1984-1985	Jesus Yabes, 2008-2010
Ernesto Quirubin, 1985-1986	J. Eduardo Malaya, 2010-2011
Cesar Pastores, 1986-1988	Irene Susan Natividad, 2011-2014
Jorge Coquia, 1988-1991	Eduardo Jose de Vega, 2014-2016
Francisco Santos, 1991-1993	Leo Tito Ausan, 2016-2017
Minerva Jean Falcon, 1994	J. Eduardo Malaya, April 2017 to present
Jaime S. Bautista, 1994-1995	
Eloy Bello III, 1995-1996	

One of them, Eduardo Quintero, was later elected as a member of the 1971 Constitutional Convention, and another, Diosdado Macapagal, who served in 1948, later became President of the Republic of the Philippines.

To meet its mandate and address the needs of the Department and other stakeholders, OTLA operates through its four divisions:

(1) Law Division (Division I): This Division renders legal opinions on both domestic and international law with foreign policy implications, reviews contracts entered into by the principal offices of the Department, consular offices and foreign service posts. It also represents OTLA in the Technical Working Group of the Department's Bids and Awards Committee.
(2) Political Treaties Division (Division II): This Division assists in treaty negotiations, reviews draft agreements, and facilitates the Presidential ratification and Senate concurrence of treaties and other international agreements, notably on human rights, defense, labor, counter-terrorism, and status of forces.
(3) Economic Treaties Division (Division III): This Division assists in treaty negotiations, reviews draft agreements, and facilitates the Presidential ratification and Senate concurrence of treaties and other international

agreements, notably on investments, avoidance of double taxation, air services, transport and maritime matters, social security, free trade and economic partnerships. It also assists in agreements on socio-cultural cooperation, health, education, science and technology, tourism and sports.

(4) Litigation and Service of Documents Division (Division IV): This Division handles the prosecution of personnel facing administrative charges. It also facilitates the service of court processes to and from Philippine and foreign courts and private individuals and companies through the Philippine Foreign Service missions.

From Law Advisory to Law Policy Making

The core function of foreign ministries' legal offices is in treaty making and ratification. These offices, often called "treaties and legal office" in most ministries, assist in treaty negotiations and serve as the repository of agreements entered into by the country. To more fully reflect its functions and responsibilities, the office name DFA "Office of Legal Affairs," which had been used since 1946, was changed to "Office of Treaties and Legal Affairs," pursuant to Department Order No. 18-2018 (17 October 2018).

Treaties work is done at OTLA by the two treaties divisions - one dealing with political and security treaties and the other with economic and cultural treaties - which also manage the treaties archives.

As noted earlier, OTLA assists in treaty negotiations and reviews draft agreements. It guides those negotiating agreements on matters such as the distinction under international law between legally binding agreements and non-legally binding ones, and ascertain that proper terminologies for each category are used, notably "Parties," "Articles" and "shall" for the first category of agreements, and "Participants," "Paragraphs" and "will" for the other.[78]

As Nick Stanko noted, the legal office must "take care not only of the conformity of a new treaty with general rules of international law (particularly *jus cogens*, norms that cannot be altered or modified) and of his country's previously accepted legal commitments, but also of the legal-technical correctness and

[78] *See* J. Eduardo Malaya & Maria Antonina Mendoza-Oblena, *Philippine Treaty Law and Practice*, 85 PHIL. L.J. 505-522.

necessary precision of the text: clear and non-ambiguous formulation, appropriate final and transitory provisions, etc."[79]

After an agreement is concluded and signed, it is also the function of OTLA, on behalf of the DFA, as mentioned earlier, to make the determination, based on the Constitution and jurisprudence, whether the agreement is an executive agreement which requires presidential ratification, or a treaty which needs both presidential ratification and Senate concurrence. The distinction is based on the cases *USAFFE Veterans v. Treasurer of the Philippines, et. al.*[80] (1959) and *Commissioner of Customs v. Eastern Sea Trading* (1961).[81] According to the Supreme Court in the latter case:

> *International agreements involving political issues or changes of national policy and those involving international agreements of a permanent character usually take the form of treaties. But international agreement embodying adjustment of details carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements.*

To help strengthen capabilities in treaty practice in the Department and other government agencies and make accessible information on treaties in force for the Philippines, OTLA has undertaken the following initiatives:

a) Treaties Digitization Project: In coordination with the Supreme Court of the Philippines and the Foreign Service Institute, this project produced in 2010 the Philippine Treaties Online which is a feature in the website of the DFA. An updating of the treaties database also resulted in the publication of the book "Philippine Treaties Index (1946-2010)," edited by J. Eduardo Malaya, Maria Antonina M. Oblena and Allan P. Casupanan, which contains a comprehensive index of the bilateral and multilateral agreements entered into by the country.
b) Treaty Handbook: This puts together the laws, conventions, regulations and jurisprudence on treaty drafting, negotiations, and ratification, including Executive Order No. 459, series of 1997, and the Vienna Convention on the Law of Treaties, for use by officials of the DFA and other agencies involved in the treaty process.

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[79] *The Role of the Legal Adviser*, *supra* note 77.
[80] 105 Phil. 1030 (1959).
[81] G.R. No. 14279, October 31, 1961.

c) Seminar on Treaty Law and Practice for Government Agencies: OTLA commenced this program in October 20, 2017, and conducted the second one on July 26, 2018. Some 230 officers and personnel attended the latter seminar from 37 agencies.

In recent years, OTLA has taken a more proactive role in shaping the Department's foreign policy options in international law matters, and deepening appreciation for international law as a tool of Philippine foreign policy.

OTLA spearheaded in 2010 the country's accession to the Convention for the Pacific Settlement of International Disputes, and the Philippines became a member of the PCA in September 2010. Membership in the PCA assures the country of an alternative and cost efficient forum for settling current and future international disputes with States, international organizations or foreign investors. This became crucial when the Philippines in 2013 initiated international arbitration on its maritime disputes with China in the West Philippine Sea/South China Sea. A 5-person arbitral tribunal heard the *South China Sea Arbitration Case* under the auspices of the PCA, paving the way for an efficient conduct of the proceedings.

OTLA also initiated in 2010 the country's accession to The Hague Conference on Private International Law (HCCH), whose mandate is the harmonization of the rules of private international law. After the accession, OTLA, in partnership with the DFA Office of Consular Affairs and the Philippine Judicial Academy organized a lecture-forum with members of the judiciary, law professors and law practitioners to discuss and study Philippine accession to several HCCH conventions. Philippine accession to these conventions can provide long-term solutions for Filipinos and companies facing cross-border legal challenges. The Philippines also hosted on October 26-28, 2011 the HCCH Fourth Asia Pacific Conference which drew 230 delegates and participants from 28 countries across Asia, the Pacific, Australia, New Zealand and the Middle East.

The Philippines, through OTLA, took a major step in the HCCH processes with the accession in September 2018 to the Apostille Convention, which streamlines the consular authentication process, thus benefiting the millions of overseas Filipinos and enhancing the ease of doing business in the Philippines. In coordination with the Supreme Court, OTLA is also in the last stages in the planned accession to the HCCH Service Convention, which will help address court delays and enhance the administration of justice. Other HCCH conventions which are being considered for accession include the Evidence Convention and the Child Support Convention.

On December 4, 2017, OTLA convened a Colloquium on International Law Issues, the first to be hosted by the Department. There were two main goals that inspired the conceptualization of the colloquium. The first is to proactively shape the agenda of Philippine foreign policy by identifying international law issues which affect Philippine entities in various political, social and economic transactions; and second, to bring together Filipino international law experts and practitioners from the government sector, academe and law firms as a starting point for a domestic international law interest group in the Philippines that OTLA and similar entities can engage with.

By tapping on the expertise of members of the academe and the varied and cumulative experiences of practitioners from the public and private sectors, the colloquium identified pragmatic legal issues confronted by Philippine persons and industries, which may be addressed through international law advocacies that can be pursued effectively through diplomatic efforts, initially focusing on enhancing international legal and judicial cooperation and trade and investment facilitation.

Co-sponsored with the University of the Philippines' Institute of International Legal Studies and the Foreign Service Institute, the colloquium was held on December 4, 2017 and involved a series of panel presentations with open forum. It focused on 3 key areas in international law, which present opportunities and challenges for the advancement of Philippine foreign policy priorities, but which may have been overlooked as policy concern. Some 120 individuals, representing members of the academe and practitioners in the private and public sectors, including lawyers in the executive, judiciary and legislative departments, attended the event. The proceedings of the colloquium, which resulted in a harvest of recommendations, are published in this Yearbook.

While it is commonplace for the geographic offices of the DFA to conduct bilateral political and economic consultations, it has not traditionally been the case for OTLA. For the first time ever, OTLA hosted a Bilateral Legal Consultations with Australia on March 13, 2018. The consultations covered priority legal issues for both Philippines and Australia, such as the law of the sea, implementation of U.N. sanctions against North Korea, counter-terrorism, compliance with International Humanitarian Law, and human trafficking.

To assist in deepening expertise in the law of the sea at the Department and other agencies, OTLA arranged with the Embassy of Australia in Manila for the conduct of Training Workshops on Law of the Sea by the Australian National Centre for Ocean Resources and Security (ANCORS). Conducted on April 16-20, 2018 and again on August 13-17, 2018, the 5-day training programs were attended by

officials from the DFA and other agencies such as the Department of Environment and Natural Resources, Department of Energy, Bureau of Fisheries and Aquatic Resources and the Philippine Coast Guard. The subjects covered marine jurisdictional zones, dispute settlement, international legal framework for shipping, marine environment protection, maritime delimitation, maritime law enforcement and security, and joint development.

The law of the sea training program was an outcome of a conversation between OTLA's present leadership and Australian Ambassador to Manila Amanda Gorely in early 2017, where the matter of deepening cooperation in technical assistance was discussed.

Quo vadis international law?

Whether international law is a real alternative to power or merely playing second-fiddle[82] to power seems to remain unsettled. Even more so than in previous decades, one of the challenges for diplomats and officials engaging international law as a policy tool is that States are ultimately governed by their respective interests. As these interests shift, the goal of States' interactions may also change course.

Historically, these changing national interests do not only reflect paradigm shifts in the international landscape, but also embody shifts in the trajectories of governments at the domestic level. For instance, and in the context of international law, a presidential administration may focus on the active pursuit of a rules-based international order as the cornerstone of its foreign policy, while a succeeding administration may assess that a more effective policy to advance strategic security or economic interests would require a more flexible appreciation or interpretation of international law. Given the foreign policy architecture, it is clear how such changes in priorities, perceptions and plans at the top level can impact the conduct and content of foreign policy.

Viewed in this way, diplomacy may be perceived to be limited *and* limiting as a forum for developing international law, where international law is appreciated as an embodiment of values, principles, and institutions which are enduring, and not merely anchored on the shifting political goals of one or more influential States, or the views of a few groups or individuals who are currently in power at the domestic level.

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[82] Kritsiotis, *supra* note 7.

The Philippines' foreign policy has undergone reorientation in recent years, with closer engagements with major powers not traditionally considered its allies and partners. Such an update in its diplomatic approach is, of course, brought about by a re-assessment of the country's interests in view of threats faced today or expected to arise in the future, such as the need to address critical infrastructure gaps, increasing demand for energy, international terrorism, population growth, environmental degradation, climate change, and other risk scenarios brought about by emerging technologies. As the Philippines embarks on this updated approach in the conduct of its foreign policy, it will, of course, contend with current realities of diplomatic relations, some of which impact the efficacy of international law as a tool for foreign policy.

Among these realities is the return in some countries to unilateralism as well as the revival of the preference for bilateralism in the conduct of international relations. States are increasingly observed to actively pursue bilateralism as the more expedient and effective kind of diplomacy, availing themselves of the flexibility of direct bilateral negotiations compared to multilateral platforms, which do not only require competing with more stakes, but also having to abide by a pre-determined set of rules.

There has also been some veering away from multilateral bodies and international institutions, noted Joost Pauwelyn and Rebecca Hamilton,[83] particularly those with adjudicatory powers such as the International Criminal Court and the International Center for Investment Disputes. The withdrawal by the U.S. from the North American Free Trade Agreement and the Paris Agreement to combat climate change are merely the more dramatic manifestations of this trend. There is likewise a tendency – although not necessarily negative -- to favor regional or sub-regional bodies, where cooperation may not be driven by the desire to find common ground across States having differing opinions, but the desire to coalesce around common ideas already shared by "like-minded" States, or those with overlapping mutual interests. As more of these institutions and organizations (or mechanisms) emerge, one can expect an even more fragmented international legal order, which may be rules-based, but where each sphere is governed by its own set of rules.

Moreover, where threats to national security and sovereignty become increasingly complex, and less amenable to the usual categories under international law, States also become more open to abandoning or *modifying* widely accepted

[83] Joost Pauwelyn & Rebecca Hamilton, *Exit from International Tribunals*, SSRN (July 20, 2018), https://ssrn.com/abstract=3224179.

interpretations and understandings of international law, in order to allow themselves more freedom in decision-making and more policy space. While this signals that States still recognize the inherent legitimacy of international law as a standard for acceptable behavior in international relations, at least to the extent that they would still prefer to be *perceived* to abide by it than not, it also presents a challenge to the ability of international law to restrain State behavior and ensure its judiciousness. This can be observed in the tendency of some States to modify, by way of interpretation or even adaptation, the content of international law norms, such as those on international humanitarian law (IHL), in order to meet the requirements of warfare strategies deemed necessary to suppress or defeat national security threats. In other cases, there is also the tendency to use principles and prerogatives under international law, such as non-intervention or sovereign equality, not merely as tools for foreign policy, but as a shield from State accountability for acts otherwise deemed unlawful under international law.

Amidst all these, the role of diplomats and other officials remains as crucial and relevant as before, for at least two reasons: ensuring that foreign policy continues to be conducted in a way that is consistent with its obligations under international law, and ensuring that the enduring interests of the State are adequately represented and factored in the continuing evolution of international law. This would entail that as they help formulate and deliver positions in negotiations, diplomats and officials need not only be skilled negotiators, but must also possess adequate knowledge of international law and national interests, which include economic priorities, domestic laws and policies, geopolitical considerations, or even the plight of overseas nationals. Needless to say, these national interests are less singularly determined than law.

Finally, it is clear that the intersection of Philippine diplomacy and international law, while a point dominated by Filipino diplomats and officials by bureaucratic design, is not exclusive to them. Rather, international law experts and practitioners and the larger society significantly contribute in this process whether through direct participation as members of official delegations, submission of views and recommendations which inform Philippine positions, or otherwise providing advice to national policymakers, or even as members of international courts and tribunals. It is therefore a crucial point of convergence and an opportunity for societal benefit towards a deepening of the understanding and appreciation of international law as an instrument of Philippine foreign policy.

JUDICIALIZING INTERNATIONAL LAW: CHALLENGES TO INTERNATIONAL CRIMINAL JUSTICE

RAUL C. PANGALANGAN*

The creation of the International Criminal Court is only the latest step in the institutional turn in international law. Especially in the field of human rights, we have shifted away from raw politics toward rule-based global agencies like treaty bodies and, recently, international criminal tribunals.

These agencies and tribunals embody new enforcement regimes for human rights norms, but these are not merely new modes by which to apply the same substantive norms. When we shift from the parliament of the streets toward these global institutions, we do not merely course the same norms through a different procedure. Particularly with international criminal tribunals, we actually redefine the justice that we seek, clarify to whom it is owed, and in the end reconceive what it means to vindicate a right.

In a way, here I propose that H.L.A. Hart's secondary rules, the "rules about rules," actually loop back to the primary rules, the do's and don'ts that lay down obligations and countervailing rights. In the field of international human rights protection, those primary rules consist of the actual rights protected in international treaties and covenants. For a long while, those rights were enforced through politics, either via domestic mobilization and protest, or global maneuvering by states and international civil society.

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But in addition, those international instruments also include the secondary rules that embody the institutional turn cited above, namely, enforcement mechanisms like *reporting obligations* and – subject to additional consent requirements – *petitions mechanisms* where individual victims may file "communications" before treaty bodies. These mechanisms enforce *state responsibility*.

More recently, however, new international tribunals have been created that enforce *individual criminal responsibility* on persons guilty of the "most serious crimes of concern to the international community as a whole."[1] These international courts themselves carry their own unique institutional values, particularly respect for the accused's right to a fair trial and the victims' right to participate and seek reparations. We need to respect those constraints lest we foster unrealistic expectations of international justice or unfounded fears of international courts.

From State Responsibility to Individual Criminal Responsibility

With the creation of international criminal tribunals, the enforcement regime focuses on individuals rather than states, and holds these individuals responsible criminally rather than civilly.

The recourse to international criminal courts actually emerged earlier in the aftermath of the Second World War. At the Nuremberg Tribunal, the chief prosecutor for the United States, Justice Robert Jackson, explained:

> The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power....
>
> This principle of personal liability is a necessary as well as logical one if international law is to render real help to the maintenance of peace. An international law which *operates only on states* can be enforced only by war because the most practicable method of coercing a state is warfare.... Only *sanctions which reach individuals* can peacefully and effectively be enforced. (emphases supplied)[2]

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[1] ROME STATUTE, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S. 90 (hereinafter, ROME STATUTE).

[2] *Opening Statement before the International Military Tribunal*, Second Day, Wednesday, 11/21/1945, Part 04, in TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY

That principle was applied at the International Military Tribunal for the Far East,[3] or the Tokyo War Crimes Tribunal, and in national level prosecutions in Europe and Asia. In the Philippines, the leading examples are *In re Yamashita*[4] which established command responsibility for crimes against humanity, and *Kuroda v. Jalandoni*[5] which held that certain international humanitarian treaty obligations have crystallized into custom. International criminal justice remained dormant during the nearly half century of the Cold War since the rival permanent members of the U.N. Security Council held the veto amongst each other. But with the thawing of the Cold War, the U.N. Security Council created two *ad hoc* international criminal tribunals, in 1993 and 1994, respectively, for the mass atrocity crimes in Yugoslavia and Rwanda. By 1998, the International Criminal Court, a fully international, standing tribunal, was established by multilateral treaty, namely, the Rome Statute.

Yet this recent turn to individual criminal responsibility represents not just a change of forum, from treaty bodies to international criminal courts, but also a change in the standards of justice that are applied.

The "Poisoned Chalice" Metaphor: Fair Trial and Evidentiary Standards

The high threshold for due process protection for the accused or, in the language of the Rome Statute, the fair trial guarantees, was set by Justice Jackson at Nuremberg, when he spoke of the "poisoned chalice."

> We must never forget that the record on which we judge these defendants today is the record on which history will judge us

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TRIBUNAL. Volume II. Proceedings: 11/14/1945-11/30/1945. [Official text in the English language.] Nuremberg: IMT, 1947, pp. 98-102.

[3] *Judgment of International Military Tribunal for the Far East*, Part A (Chapters I, II, III) *et seq*., https://www.legal-tools.org/en/browse/record/321854/.

[4] *In re Yamashita,* 327 U.S. 1 (1946), affirming *Yamashita v. Styer*, G.R. No. L-129, [December 19, 1945], 75 PHIL 563-607) (for "having permitted members of his command "to commit brutal atrocities and other high crimes ... against unarmed non-combatant civilians").

[5] *Shigenori Kuroda v. Jalandoni*, G.R. No. L-2662, [March 26, 1949], 83 PHIL 171-194 (the Courts are "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" but may apply "the Hague and Geneva Conventions [which] form part of and are wholly based on the generally accepted principles of international law.")

> tomorrow. *To pass these defendants a poisoned chalice is to put it to our own lips as well*.
>
> ....
>
> If [the Nazi accused] are the first war leaders of a defeated nation to be prosecuted in the name of the law, they are also the first to be given a chance to plead for their lives in the name of the law.
>
> ....
>
> Despite the fact that public opinion already condemns their acts, we agree that here they must be given a *presumption of innocence*, and we accept the *burden of proving* criminal acts and the responsibility of these defendants for their commission. [6]

These principles are now codified in the Rome Statute. The accused enjoys the presumption of innocence[7]. The prosecution must prove his guilt beyond reasonable doubt.[8] The accused has the right to confront the witnesses against him; to be informed of the charges against him "in a language that [he] fully understands and speaks;"[9] to counsel of his own choosing;[10] to confront the witnesses against him and to call his own witnesses;[11] and the right against self-incrimination.[12]

For instance, contrast the presumption of innocence and the "reasonable doubt" standard required for individual criminal responsibility with the lower evidentiary standard for state responsibility where the truth may be proved with circumstantial evidence or historical studies and patterns. In a *desaparecido* case before the Inter-American Court of Human Rights, the Court held:

> 130. The practice of international and domestic courts shows that direct evidence, whether testimonial or documentary, is not the only

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[6] *Opening Statement before the International Military Tribunal*, *supra* note 2.
[7] ROME STATUTE, article 66, para. 1 (*Presumption of Innocence*).
[8] ROME STATUTE, article 66, paras. 2-3. (*Presumption of Innocence*).
[9] ROME STATUTE, article 67, para. 1.a (*Rights of the Accused*).
[10] ROME STATUTE, article 67, para. 1.b-1.c (*Rights of the Accused*).
[11] ROME STATUTE, article 67, para. 1.e (*Rights of the Accused*).
[12] ROME STATUTE, article 67, para. 1.g (*Rights of the Accused*).

> type of evidence that may be legitimately considered in reaching a decision. *Circumstantial evidence, indicia, and presumptions* may be considered, so long as they lead to conclusions consistent with the facts.
>
> 131. *Circumstantial or presumptive evidence* is especially important in allegations of disappearances, because this type of repression is characterized by an attempt to suppress all information about the kidnapping or the whereabouts and fate of the victim. (emphases supplied)[13]

Significantly, the Court expressly contrasts its work to that of criminal tribunals which are held to higher evidentiary standards.

> 134. The international protection of human rights should not be confused with criminal justice. *States do not appear before the Court as defendants in a criminal action.* The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible. (emphasis supplied) [14]

Victim Participation and Victim Reparations

The Rome Statute has elaborate rules allowing victim participation. The Statute enables the victims to present their "views and concerns" when their "personal interests are affected."[15] Victims' counsel takes part in questioning witnesses and, at appropriate stages of the trial, may be allowed to present their own evidence. The ICC Appeals Chamber has held that "to give effect to the spirit and intention of [victim participation] in the context of trial proceedings it must be interpreted so as to make participation by victims meaningful."[16]

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[13] *Velasquez Rodriguez*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

[14] *Id.*

[15] ROME STATUTE, article 68.3 (*Protection of the Victims and Witnesses and their Participation in the Proceedings*).

[16] *The Prosecutor v. Thomas Lubanga Dyilo,* Appeals Chamber (Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber's I Decision on Victim's Participation of 19 January 2008) ICC-01/04-01/16-1432 (11 July 2008), paras. 96-97.

This was a response to criticisms of the *ad hoc* international criminal tribunals that failed to bring the judicial process closer to the victim communities.

> The underlying idea of this *new victim-focus* in international criminal prosecutions is to bring the proceedings closer to the affected communities and, in doing so, strengthen their legitimacy. The better integration of victims into the proceedings is also meant to prevent them from taking vengeance, help them recover from their traumatic experiences, and contribute to the reconciliation of the society.[17] (emphasis in the original)

> International justice must provide redress for these victims in the name of securing peace, drawing a line between the present and the past, and facilitating the healing and moving forward of society.[18]

The rationale is that victims are not passive recipients of justice but active participants in the process by which they vindicate their rights, and that having a voice in the trial is part of the justice that they seek.

The Statute also provides for victim reparations "including restitution, compensation and rehabilitation."[19] The convicted person may be ordered to pay reparations to his victims,[20] but in addition, the Statute creates a Trust Fund[21] that receives contributions to carry out a two-fold mandate, *first*, to implement awards ordered by the Court against convicted persons (*reparations mandate*) and *second*, to provide "physical, psychological, and material support to victims and their families" on its own and separate from judicial orders (*assistance mandate*).[22]

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[17] KAI AMBOS, III TREATISE ON INTERNATIONAL CRIMINAL LAW 170 (hereinafter, AMBOS III) (Oxford, 2016) (citations omitted).

[18] OTTO TRIFFTERER AND KAI AMBOS (eds.), THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1685 (3rd ed., C.H. Beck, Hart, Nomos, 2016).

[19] ROME STATUTE, article 75 (*Reparations to Victims*).

[20] ROME STATUTE, article 75, para. 2 (*Reparations to Victims*).

[21] ROME STATUTE, article 79 (*Trust Fund*).

[22] RULES OF EVIDENCE AND PROCEDURE, rule 98 (*Trust Fund*); REGULATIONS OF THE TRUST FUND FOR VICTIMS, regulations 47 and 48; *see also* Trust Fund for Victims, Press Release Following Mr. Bemba's acquittal, 13 June 2018, available at https://www.icc-cpi.int/Pages/item.aspx?name=180613-TFVPR.

The important place of the victim under the Rome Statute is laudatory, unassailable and indispensable at this stage of history, but it entails significant risks in legitimacy, efficiency and judicial costs.

One, whereas the traditional criminal proceedings have only two sets of counsel, the Prosecution and Defense, at the ICC, there is a third set of counsel, namely, the Legal Representative for Victims, who take part in the presentation and the questioning of witnesses, and are entitled to be heard during the proceedings. This imposes additional burdens on both the material and symbolic resources of the ICC.

This entails new procedural burdens as it "generates a conflict with the right of the accused to an expeditious and fair trial [and] may undermine the strategy of the Prosecutor and thus hamper the prosecution and conviction of a defendant."[23] It also "create[s] high expectations for victims" that may lead to "disappointment and frustration,"[24] raising the "principled question of whether (international) criminal proceedings really are an appropriate forum for this empowerment exercise in the first place or if the (procedural) costs are rather too high."[25]

Two, the victims can be awarded reparations only if the accused is found guilty. In case of an acquittal, the victims are not entitled to any award even after they had actually proved in court the harms they suffered. Following the first reversal of guilt by the ICC Appeals Chamber in 2018,[26] the Trial Chamber hearing the reparations claims said:

> 3. The Chamber agrees ... that no reparations order can be made against [the accused] under Article 75 of the Statute. *The Chamber must respect the limitations of this Court* and recalls that it can only address compensation for harm suffered as a result of crimes when the person standing trial for his or her participation in those crimes has been found guilty.
>
> ....

[23] AMBOS III, *supra* n. 17, at 170-1.

[24] AMBOS III, *supra* n. 17, at 171.

[25] AMBOS III, *supra* n. 17, at 170.

[26] *The Prosecutor v. Jean-Pierre Bemba Gombo,* Appeals Chamber (Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III's Judgment pursuant to Article 74 of the Statute), ICC-01/05-01/08-3636-Red (8 June 2018).

> 6. The Chamber takes note of the Legal Representatives' submissions that *the victims are disappointed and have lost faith in the justice process* following [the] acquittal, highlighting that the Court was the only exception to the "climate of total impunity" prevalent in the Central African Republic ("CAR"). In this context, the Chamber notes that the Appeals Chamber's decision was not premised on any doubt about the harm suffered by the victims participating in the case. The Chamber recalls that the Appeals Chamber has recognised that certain crimes occurred ... and accordingly did not challenge the victims' status as such.
>
> ....
>
> 11. Noting that this Final Decision marks the formal end of the reparations proceedings in this case, the Chamber stresses the importance of the [Trust Fund's] *assistance mandate* ....[27] (emphases supplied)

In this instance, the acquittal terminated the victims' claim to reparations and it was only the Trust Fund's assistance mandate that now enables the Court to address the harms suffered.

Three, on the other hand, given finite resources, consistent with the Trial Chamber's sense that we must "respect the limitations of this Court," we must ensure that resources for judicial reparations are not displaced by projects under the open-ended assistance mandate. Otherwise, the Court becomes indistinguishable from welfare agencies and other non-judicial international bodies more suited for such humanitarian assistance.

"Fair Labeling" of the Crime Charged

Pursuing the logic of victim participation further, it is essential that the accused be charged with the crime that most faithfully reflects the true evil committed against the victim, and not simply the crime that is easiest to prove. More specifically, there may be other viable charges whose "elements" may be easier to satisfy, or for which more evidence is readily available, or for which jurisdiction is more secure and less prone to challenge. However, the principle of

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[27] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III (Final decision on the reparations proceedings), 01/05-01/08 (3 August 2018).

"fair labeling" requires that charging the precise crime is needed to satisfy the victim's sense of justice even if it raises the bar for the prosecution.[28] Given that more exacting standard of justice, an Al Capone-style prosecution will simply not suffice, e.g., of an underworld crime boss jailed for mere tax evasion.

To use an example, though in a state responsibility context, recall the debate on the so-called "comfort women" during the Second World War. How do we characterize legally the crime committed against them by the Japanese military?

At the outset, the term "comfort women" was rejected by a U.N. Special Rapporteur for its "derogatory connotations" and for serving as a "euphemistic term" to downplay the evil committed.[29] Another Special Rapporteur stated:

> [T]he phrase "comfort women" *does not in the least reflect the suffering*, such as multiple rapes on an everyday basis and severe physical abuse, that women victims had to endure during their forced prostitution and sexual subjugation and abuse in wartime. The Special Rapporteur, therefore, considers with conviction that the phrase "military sexual slaves" *represents a much more accurate and appropriate* terminology.[30] (emphases supplied)

Both Rapporteurs characterize the abuse as slavery, which is proscribed under a *jus cogens* prohibition, a peremptory norm of international law that brooks no derogation.[31] The term "systematic," it was explained, was used merely "as an adjective to describe certain forms of rapes, not to denote the invention of a new crime or a new burden of proof that must be established to prosecute an act of

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[28] See *The Prosecutor v. Mathieu Ngudjolo Chui*, Trial Chamber II (Judgment Pursuant to Article 74 of the Statute) (Concurring Opinion of Judge Christine Van den Wyngaert), ICC-01/04-02/12 (18 December 2018), paras. 28-29; Douglas Guilfoyle, *Responsibility for Collective Atrocities: Fair Labeling and Approaches to Commission in International Criminal Law*, 64 CURRENT LEGAL PROBLEMS 260(2011).

[29] Gay J. McDougall, Special Rapporteur, *Contemporary Forms Of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict*, E/CN.4/Sub.2/1998/13 22 June 1998, at Fn. 1 (hereinafter, McDougall Report).

[30] *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45. Report on the mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the issue of military sexual slavery in wartime*, E/CN.4/1996/53/Add.1 (4 January 1996).

[31] McDougall Report, *supra* n. 29, para. 28

rape."[32] The word "sexual" was used merely "as an adjective to describe a form of slavery, not to denote a separate offence."[33] To denote a new crime would have diluted the *jus cogens* character of the ban on slavery. Thus the preferred term "military sexual slavery," which does not soften the absoluteness of the prohibition, while meeting the victim's fair labeling concerns.

In the same vein, the ICC has upheld, in an interlocutory appeal, its jurisdiction *ratione materiae* over crimes of rape and sexual offenses allegedly committed by members of an armed group against child soldiers belonging to their own group.[34] Note that the *Ntaganda* indictment already included a wide range of charges: thirteen counts of war crimes (murder and attempted murder; attacking civilians; rape; sexual slavery of civilians; pillaging; displacement of civilians; attacking protected objects; destroying the enemy's property; and rape, sexual slavery, enlistment and conscription of child soldiers and using them to participate actively in hostilities) and five crimes against humanity (murder and attempted murder; rape; sexual slavery; persecution; forcible transfer of population).

The mistreatment of children in *Ntaganda* was already generally alleged under the charges of enlisting, conscripting and using child soldiers. But limiting the child soldier charges only to these would have excluded any sexual violence component. As of this writing, this case is pending a final determination by ICC Trial Chamber VI.

Courts as Chroniclers of History

History can be recorded by professional historians, investigative journalists, and human rights activist and their organizations. Their books and reports can document difficult historical periods where the truth is highly contested or elusive. They can serve as repositories of the collective memory. They can help victim communities bring closure to traumatic episodes in their lives.

But international criminal tribunals have one unique advantage in the task of authenticating the historical record. Criminal courts rely only on facts that have

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[32] McDougall Report, *supra* n. 29, para. 17.

[33] McDougall Report, *supra* n. 29, paras. 17, 30.

[34] *The Prosecutor v. Bosco Ntaganda*, Appeals Chamber (Judgment on the appeal of Mr. Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9") ICC-01/04-02/06 OA5 (15 June 2017). The author sat as *ad hoc* member of the Appeals Chamber in this case.

been proved beyond reasonable doubt and fully vetted through adversarial proceedings, where the party adversely affected has the full opportunity to challenge and exclude dubious evidence. Judicial decisions are specific; they contain names, dates and places. They give a human face to the broad sweep of history, and the details of the evil inflicted and traumas endured. Most important of all, they are neutral, compared to politicized sources that have a conscious ideological bent or agenda.

But courts see things through the prism of the concrete facts of a case, oblivious to history's panorama and the resulting narrative can be skewed or inadequate. The historians may tell us the exciting story of Al Capone the mobster imprisoned by crusading prosecutors, but the paltry records of courts tell merely a dull account of a tax evader done in by a blundering bookkeeper.

The Nature of Courts

The shift from politics to institutions also reminds us that courts' procedural constraints make them, in the words of Benjamin Cardozo, sanctuaries where

> the great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles ....[35]

In contrast, international human rights advocates aim for humanitarian outcomes that are more attuned, in the words of Oliver Wendell Holmes, to "overwhelming interest[s that] appeal [] to the feelings and distort [] the judgment."

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.[36]

Traditional courts are called upon to perform a straightforward function, namely, to punish the guilty and acquit the innocent. On the other hand, international criminal courts face additional, non-traditional expectations,

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[35] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 92-93 (1921).
[36] *Northern Securities Co. v. United States*, 193 U.S. 197 (1904), Holmes, J., dissenting.

namely, as a source of communal therapy, welfare support, and historical vindication. They exemplify the tension between the advocates' push for immediate decisions that are just and humane, and the judges' duty to keep the distance and neutrality required by rule-based decision-making.

An enforcement regime carries with it its own internal norms, its own rules of the game. In order to play, we need to respect those rules. Otherwise, we can score quick victories but in the long run erode the institution itself and render it damaged and ineffective for future cases. The episodic and opportunistic use of judicial institutions shows not just disregard for courts but also a lack of solidarity with future victims who thus inherit a damaged institution.

A SURVEY OF DEATH PENALTY IN INTERNATIONAL LAW

MERLIN M. MAGALLONA*

I. The Dialectic of War Crimes and Human Rights

It is the shock of reality out of the atrocities and barbarism in the Second World War, that brought humanity into a new level of realization as to the value of human life. The horrors of the Holocaust, the brutalities of Auschwitz and other extermination camps, and the mass extermination of civilian population in Hiroshima and Nagasaki by atomic bombing, should suffice to justify a total shift in the premises upon which human civilization will continue to uphold and protect the value of life.

The Philippines' own war experience in the desecration of life was concretized in the evidence it presented before the Military Tribunal for the Far East. As the Philippine prosecutor generalized, "the crimes committed to my country and my people were so shocking, so brutal and so revolting that resort to euphemisms would only do violence to the truth."[1]

II. New International Public Order of Human Rights

On the whole, it was humanity's experience of the appalling atrocities in the war that crystallized the emergence and internationalization of the protection of human rights. As early as 1941 and 1942, the Allied Powers recognized the abhorrence to inhumanity committed by the German and Japanese forces, which decisively led to the making of human rights as the foundation principles of the post-war international public order.

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1 R. JOHN PRITCHARD & SONIA M. ZAIDE, THE TOKYO WAR CRIMES TRIAL 12, 157 (1981).

In mid-1944, the Allied Powers proposed in the Dumbarton Oak meeting the establishment of "a general international organization" founded on respect for human rights and fundamental freedoms.[2] The Charter of the United Nations which was signed on 26 June 1945 in the San Francisco Conference on International Organization strengthened the Dumbarton Oak proposals. At its Preamble, the Charter correlated the war crimes with the new regime of human rights. It affirms that:

> We the Peoples of the United Nations determined
>
> - to save succeeding generations from the scourge of war, which twice in our time has brought untold sorrow to mankind, and
> - to reaffirm faith in fundamental human rights, in the dignity and worth of the human person ....
>
> Have resolved to combine our efforts to accomplish these aims.

Among the Purposes of the United Nations (UN) in Article I of its Charter is the emphasis on human rights in terms of "international cooperation... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".

As an international legal obligation, respect for human rights and fundamental freedoms on the part of every Member of the UN is defined in Articles 55 and 56 of the Charter. While Article 55 specifies that the United Nations shall promote "universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion;" Article 56 defines the following obligation:

> All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

III. Human Rights without Frontiers

Until 10 December 1948, when the UN General Assembly adopted the Universal Declaration of Human Rights in 30 articles, human rights under the UN Charter were never known in concrete identities. It was the Declaration that

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[2] MERLIN M. MAGALLONA, FUNDAMENTALS OF PUBLIC INTERNATIONAL LAW 243-246 (2005).

reaffirmed in enforceable terms the human rights under the UN Charter as a new foundation of the international public order. Almost thirty years after its adoption, the human rights and fundamental freedoms of the Declaration were translated into conventional rules of law under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. But by itself the Declaration has been regarded as an authoritative interpretation of the UN Charter and as a source of general principles of law.

By the end of the twentieth century, progress in human rights characterized regional developments, as their enforcement extended to broader problem-areas, such as the Convention on the Prevention and Punishment of the Crime of Genocide (1948); Convention Relating to the Status of Refugees (1951); Convention on the Political Rights of Women (1953); Slavery Convention (amended 1955); Convention relating to the Status of Stateless Persons (1953); International Convention on the Elimination of all Forms of Racial Discrimination (1966); International Convention on the Suppression and Punishment of the Crime of Apartheid (1973); Convention on the Elimination of All Forms of Discrimination Against Women (1979); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); Convention on the Rights of the Child (1989); and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).[3]

Based on UN initiative, regional systems of human rights developed thus: European Convention for the Protection of Human Rights and Fundamental Freedoms (1953); European Social Charter (1961 & 1996); Framework Convention for the Protection of National Minorities (1995); American Convention on Human Rights (1969); African Charter on Human and People's Rights (1981); and Arab Charter on Human Rights (1994).[4]

IV. Capital Punishment in the Universalization of Human Rights

Contemporaneous with the consolidation of human rights as the foundation of the international community, death penalty as capital punishment has been

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[3] For texts of these International Conventions, see BASIC DOCUMENTS OF HUMAN RIGHTS 108-272 (Ian Brownlie & Guy S. Goodwin-Gil eds., 2002).

[4] *Id.,* at 397-423, 665, 671-701, 728, 774.

relegated to the past when it was a punishment for a crime to behead a person; hence the word *capital* is derived from Latin *capitalis*, "of the head".[5]

In recent times, the broadest rejection of death penalty was demonstrated in the proceedings of the Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court which convened on 15 June 1998 in Rome. In the final result, the Rome Statute rejects death penalty. Attended by delegates from 160 States, the Rome Conference was a landmark departure from the maximum penalty of death imposed by the Nuremberg and Tokyo War Crime Trials. As notably observed by one commentator,

> Reflecting developments in international human rights law, the [International Criminal] Court excludes any possibility of capital punishment, despite the seriousness of the offenses that it will judge.[6]

In deliberate omission of the death penalty, the applicable penalties in Article 77 of the Rome Statute of the International Criminal Court[7] are limited to the following:

> 1. Subject to Article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in Article 5 of this Statute:
>
> (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
> (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.
>
> 2. In addition to imprisonment, the Court may order:
>
> (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

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[5] Lief H. Carter, *Capital Punishment* in OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 125 (Kermit L. Hall ed., 1992)

[6] WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 162 (2004).

[7] The Rome Statute is published in Compilation of Core Documents of the International Criminal Court by the Coalition for the International Court (2003).

> (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

Under Article 110 of the Rome Statute, the Court may review the sentence it has pronounced before its expiration. It has the right to decide any reduction of the sentence. The convicted person may make an appeal against his conviction on error of law or of law on "[a]ny other ground that affects the fairness or reliability of the proceedings or decision."[8] His sentence may be appealed from "on the ground of disproportionate between the crime and the sentence."[9] In such a case, the Court may consider that "there are grounds to reduce the sentence."[10]

An extraordinary remedy is provided by the Rome Statute in Article 84, as follows:

> 1. The convicted person or, *after death* spouses, children, parents or one person alive *at the time of the accused's death* who has been given express written instruction from the accused to bring such a claim, ... on the person's behalf, may apply to the Appeals Chamber *to revise the final judgment of conviction, or sentence*....

The Rome Statute may trace its origin from the first draft prepared for an International Criminal Court and adopted by the International Law Commission (ILC) in its forty-sixth session in 1994; it was submitted to the UN General Assembly in that year. In providing for "applicable penalties," article 47, paragraph 1(a) of the ILC draft makes no mention at all of death penalty. It recommends instead that:

> 1. The Court may impose on a person convicted of a crime under this Statute one or more of the following penalties:
>
> (a) A term of life imprisonment, or of imprisonment for a specific number of years;
> (b) A fine.

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[8] Rome Statute, art. 81, para. 1(b).
[9] *Id.* art. 81, para. 2(a).
[10] *Id.* art. 81, para. 2(c).

Both the *ad hoc* international criminal tribunals created by the UN Security Council are not allowed to impose death penalty. By authority of Resolution 827 of 25 May 1993, the Council established the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1997. In his compliance report, the UN Secretary General, stressed the recommendation that "The International Tribunal shall not be empowered to impose the death penalty." Without capital punishment, the principal penalty that may be imposed by the Trial Chamber under its Statute "shall be limited to imprisonment."

The same limitation is imposed on the International Criminal Tribunal for Rwanda, as established by Security Council Resolution 955 of 8 November 1994, in which it is provided in Article 23 of its Statute that the death penalty "shall be limited to imprisonment."[11]

V. Abolition of Death Penalty as Integral to International Human Rights

Where abolition of death penalty is not normatively declared, the right to life is affirmed by which the value of human life is held as paramount. The International Covenant on Civil and Political Rights[12] has the following formulation in paragraph 1, Article 6:

> Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life.

In this context, the right to life extends its abolitionist implication to death penalty under paragraph 2 of the same Article which provides that:

> In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the laws enforced at the time of the commission of the crime and not contrary to the provisions of the present Covenant.

[11] For text of both Statutes, see 5 Criminal Law Forum 597-714 (1994).
[12] 999 UN Treaty Series 172.

The right to life is strengthened as a norm against death penalty in the light of the further regulatory limitations as set forth in the following provisions of paragraph 4, 5 and 6 of the aforementioned Article 6:

> Any one sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
>
> Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
>
> Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

In Resolution 44/128 of 15 December 1989, the UN General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights.[13] It entered into force on 11 July 1991 with its undertaking on "an international commitment to abolish the death penalty." It declares that "all measures of abolition of death penalty should be considered as progress in the enjoyment of the right to life."

The State Parties to this Protocol are of the agreement under paragraph 1, Article 6, that its provisions shall apply as additional provisions of the Covenant." In particular, the Protocol provides in Article 1, as follows:

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.
2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

Much earlier than the Covenant, the European Convention for the Protection of Human Rights and Fundamental Freedoms which entered into force in 1953, carries the mandate on the right to life that it "shall be protected by

[13] For the text of the Second Protocol of the Covenant, *see* Brownlie & Goodwin-Gil, *supra* note 3, at 203.

law." It may be considered as integrated into the abolition of the death penalty by reason of its Protocol No. 6[14] which provides in Article 1 that:

> The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Under Article 6 of the Protocol, the provision on the abolition of the death penalty "shall be regarded as additional articles to the Convention."

It is virtually through the same process that the abolition of the death penalty is integrated into the right to life under the American Convention on Human Rights. Signed by 13 American States in 1969, it entered into force on 18 July 1978. Its protection of the right to life is provided under paragraph 1, Article 4, thus:

> Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of life.

Its protection of the right to life impliedly includes the abolition of the death penalty. Paragraph 2 of Article 2 of the Convention provides:

1. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court....
2. Capital punishment shall not be re-established in States that have abolished it.
3. In no case shall capital punishment be inflicted for political offenses or related common crimes....

Just the same, the States Parties to the American Convention have expressed their commitments to the abolition of the death penalty in a Protocol[15] on the following considerations:

1. That Article 4 of the American Convention on Human Rights recognizes the right to life and restricts the application of the death penalty;

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[14] Text of Protocol No. 6, European Convention, See Brownlie & Goodwin-Gil, *supra* note 3, at 398.

[15] Brownlie & Goodwin-Gil, *supra* note 3, at 701-702.

2. That everyone has the inalienable right to respect for his life, a right that cannot be suspended for any reason;
3. That the tendency among the American States is to be in favor of abolition of the death penalty;
4. That application of the death penalty has irrevocable consequences, forecloses the correction of judicial error, and precludes any possibility of changing or rehabilitating those convicted;
5. That the abolition of the death penalty helps to ensure more effective protection of the right to life;
6. That an international agreement must be arrived at that will entail a progressive development of the American Convention on Human Rights; and
7. That States Parties to the American Convention on Human Rights have expressed their intention to adopt an international agreement with a view to consolidating the practice of not applying the death penalty in the Americas....

Hence, in Article 1:

> The States Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction.

VI. Human Rights as Erga Omnes Obligation in International Law

It may be assumed that the protection of the right to life against the death penalty is included in the category of obligations *erga omnes*. The distinctive character of this obligation is described by the International Court of Justice (ICJ) in the *Barcelona Traction* Case by distinguishing it from obligation *inter se* which it owes to another State. The Court declares that:

> [A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another state.... By their nature... [they] are the concern of all states. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

As it gives examples of such obligations, the ICJ makes specific mention of "the principles and rules concerning the basic rights of the human person, ..."

VII. Derogation of Protection of Right to Life Against Death Penalty Rendered Impermissible Expressly by International Convention as a Source of Law

With regard to the International Covenant on Civil and Political Rights, in time of emergency that threatens the life of the nation, States Parties "may take measures derogating from their obligations," as allowed under Article 4 of the Covenant. However, this derogation clause explicitly excludes from its coverage Article 6 which protects the right to life and abolition of the death penalty.

Under the Second Protocol of the Covenant, the prohibition against execution and the demand to take all measures necessary to the abolition of the death penalty, "shall not be subject to any derogation under Article 4 of the Covenant."

Regarding the European Convention for the Protection of Human Rights and Fundamental Freedoms with respect to right to life,[16] as well as under its Protocol No. 6 on the abolition of the death penalty,[17] no derogation is permitted even in case of time of emergency.[18]

No derogation is permitted under the American Convention on Human Rights, even in time of war or other emergency.[19] The no-derogation clause applies to the protection of the right to life to which abolition of the death penalty is integrated.[20]

The Arab Charter on Human Rights, adopted by twenty-three members of the Arab League in 1994, provides for strict regulation in the application of the death penalty. It may be imposed "only for the most serious crimes. Anyone sentenced to death "shall have the right to seek pardon or commutation of the sentence. Death penalty shall not be imposed for a political offence.[21]

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[16] European Convention for the Protection of Human Rights, art. 2 [hereinafter Convention].
[17] *Id.*, art. 15; Protocol No. 6 of the Convention, art. 3 [hereinafter Protocol].
[18] Convention, *supra* note 16, art. 15; Protocol, *supra* note 17, art. 3.
[19] Convention, *supra* note 16, art. 27.
[20] *Id.* art. 4.
[21] The Arab Charter on Human Rights, arts. 10-11.

VIII. Abolition of Death Penalty as Integral Part of the Right to Life: Characterized as Peremptory Norm (*Jus Cogens*) of General International Law

In Article 53 of the Vienna Convention on the Law of Treaties, a peremptory norm of general international law (*jus cogens)* is characterized as:

> 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 norm of the same character.

In the presentation given above, a great number of States are shown as engaged in "general practice accepted as law," evidencing international custom. Even as they are categorized as obligations *erga omnes* the "principles and rules concerning the basic rights of the human person," may be regarded as well as "general principles of law recognized by civilized nations," which the ICJ considers as a source of international law.[22] Under the International Covenant alone, 169 State Parties which include the Philippines, may constitute "international community as a whole" in the acceptance and recognition of peremptory norm. Taking into account the regional application of the norms in question, as pointed above, their consolidation as such, and together with the States Parties of the International Covenant, may suffice to meet the standards in the making of peremptory norm.

Above all these considerations stands the right to life, together with the abolition of death penalty as integral part of it, as the most fundamental human right and as such, decisively, a peremptory norm of general international law.

This clears the way to the understanding that international law has gone through the process of renewing its foundation on the transcendental value of life.

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[22] Statute of the International Court of Justice, art. 38(c).

DEVELOPING COUNTRY IMPLEMENTATION OF MULTILATERAL ENVIRONMENTAL AGREEMENTS: THE PHILIPPINE EXPERIENCE*

ROMMEL J. CASIS**

ABSTRACT

The establishment of multilateral environmental agreements (MEAs) is absolutely necessary because environmental concerns cross boundaries. But despite their transnational reach, MEAs still rely on national governments to implement their provisions. This should not be a problem, as under the customary norm of *pacta sunt servanda,* all states must comply with their international obligations in good faith. But the principle of *common but differentiated responsibilities* allows developing states to have a standard of compliance different from developed countries. Thus, the question is: To what extent can the international community reasonably expect developing countries to implement MEAs? To answer this question, this paper examines the experience of the Philippines, a typical Asian developing state. By investigating the Philippine experience, this paper hopes to paint a picture of what could possibly be expected of developing countries when it comes to MEA implementation.

* Completed in January 2017, an earlier version of this paper was delivered during the 2016 Regional Conference of the Asian Society of International Law held 14-15 June 2016 in Hanoi, Vietnam.

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I. The Question

As the environment is shared by all, the threats facing it will inevitably cross national boundaries. Even while some problems may seem to be contained in the territory of one state, due to the interconnected nature of the environment, their effects would still have repercussions elsewhere. Environmental problems will invariably concern many states. As the culprits causing and the victims suffering from these environmental problems consist of many states, the establishment of multilateral environmental agreements (MEAs) is inevitable and necessary.

But MEAs, like all laws, are only as good as they are enforced. Like most enforcement of international law, MEAs rely on individual governments to implement their provisions. In most cases, countries need to have implementing legislation to comply with their obligations under MEAs. But to what extent can the international community reasonably expect developing countries to implement MEAs?

On the one hand, under the principle of *pacta sunt servanda,* parties to international agreements are bound to comply with their obligations in good faith regardless of their economic status. But under the principle of *common but differentiated responsibilities,* developing states, while also responsible for protecting the environment, are not held to the same standards as developed countries.

By definition, developing countries are understandably concerned about their economic growth, which may at times require sacrificing environmental concerns. It must also be noted that developing countries are characterized not merely by their lack of resources and limited technology (both of which make law enforcement more difficult). Most developing countries are also typically plagued with political instability. Given these challenges, how much should the international community expect from developing countries?

To answer this question, this paper examines the experience of the Philippines in implementing MEAs. As an Asian state with a history of being colonized, a tendency for political unrest, and being saddled with insurgencies and secessionist movements, the Philippines is a typical developing nation-state. It is also a party to many MEAs. Thus, by investigating the Philippine experience, this paper hopes to paint a picture of what could possibly be expected of developing countries when it comes to MEA implementation.

The Philippine government primarily implements MEAs through two agencies, the Biodiversity Management Bureau (BMB) and the Environmental Management Bureau (EMB). Both are bureaus under the Department of Environment and Natural Resources (DENR). The MEAs were allocated depending on their subject matter and the scope of the functions of the respective Bureaus.

Part II discusses how the BMB implements the MEAs assigned to it, while Part III explains how the EMB implements the MEAs assigned to it. Part IV identifies some observations regarding how the Philippines implements its MEAs' obligations.

The paper ends in Part V with brief concluding remarks.

II. The Biodiversity Management Bureau

The BMB is a bureau under the DENR, formerly known as the Protected Areas and Wildlife Bureau (PAWB) until 2013, when its name was changed and its jurisdiction expanded.

The BMB implements several MEAs, including:

- Convention on International Trade in Endangered Species of Wild Fauna and Flora;
- Convention on Wetlands of International Importance Especially as Waterfowl Habitat;
- Convention on the Conservation of Migratory Species of Wild Animals;
- Convention for the Protection of the World Cultural and Natural Heritage; and
- Convention on Biological Diversity.

A. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

1. CITES Background

The text of CITES was agreed on at a meeting of representatives of 80 countries in Washington, D.C., on 3 March 1973, and on 1 July 1975, CITES entered into force.[1]

The parties to the CITES recognize that wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come, and that people and States are and should be their best protectors.[2] Thus, CITES aims to ensure that international trade in specimens of wild animals and plants does not threaten their survival.[3]

Under the CITES, Parties should not allow trade in specimens of species included in its Appendices I, II, and III, except in accordance with its provisions.[4] Article II states:

1. Appendix I shall include **all species threatened with extinction which are or may be affected by trade**. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.

2. Appendix II shall include:

    (a) all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival; and

    (b) other species which must be subject to regulation in order that trade in specimens of certain species referred to in sub-

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[1] *What is CITES*, CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA, https://www.cites.org/eng/disc/what.php.

[2] Convention on International Trade in Endangered Species of Wild Fauna and Flora, pmbl., Mar. 3, 1973, 993 U.N.T.S. 243 [hereinafter CITES].

[3] *Id.*

[4] *Id.* art. II(4).

paragraph (a) of this paragraph may be brought under effective control.

3. Appendix III shall include all species which any Party identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the co-operation of other Parties in the control of trade. (emphasis supplied)

CITES provides rules for the trade of specimens listed in each of the Appendices.[5]

It also requires parties to take appropriate measures to enforce its provisions and to prohibit trade in specimens in violation thereof, including measures:[6]

- to penalize trade in, or possession of, such specimens, or both; and
- to provide for the confiscation or return to the State of export of such specimens.

2. Philippine Implementation of CITES

CITES was ratified by the Philippines on August 18, 1981.[7]

(a) Philippine Laws

Republic Act No. 9147 (R.A. No. 9147), or "Wildlife Resources Conservation and Protection Act," has as one of its objectives the regulation of the collection and trade of wildlife, which is defined by the law as "wild forms and varieties of flora and fauna, in all developmental stages, including those which are in captivity or are being bred or propagated."[8]

The law requires wildlife species to be exported to or imported from another country only as may be authorized by the Secretary of the Environment or Agriculture, as the case may be, or by the designated representative, subject to strict compliance with the provisions of this law and rules and regulations promulgated

[5] *Id.* art. III to V.
[6] *Id.* art. VIII.
[7] *List of Contracting Parties*, CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA, https://cites.org/eng/disc/parties/chronolo.php.
[8] Rep. Act No. 9147 (2001), § 5(x). Wildlife Resources Conservation and Protection Act of 2001.

pursuant thereto.[9] In addition, the law requires that the recipient of the wildlife is technically and financially capable of maintaining it.[10]

For the implementation of CITES, the law designates the management authorities for terrestrial and aquatic resources.[11] The Implementing Rules of R.A. No. 9147 further outline the functions of the CITES management and scientific authorities.[12]

Finally, the law makes the trading and transporting of wildlife illegal, unless otherwise allowed in accordance with it.

(b) Department Issuances

Since the Philippines ratified the CITES, there have been several issuances at the agency level which served as guidelines to implement it. Some of these issuances are listed in Table 1 below.

Table 1
Department Administrative Orders (DAOs) Relevant to CITES

DAO No.	Relevant Provision
DAO 88-90, as amended by DAO 90-30 and further amended by DAO 92-47	Provides for the allowable quota for certain wildlife species that may be collected from the wild under a wildlife permit for commercial purposes
DAO 99-96	Provides for the policies on the allocation of quota on wildlife
DAO 89-142	Provides for the guidelines on the disposition of confiscated wildlife species

[9] *Id.* § 11.
[10] *Id.*
[11] *Id.* § 19.
[12] Rep. Act No. 9147 Rules & Regs. (2004), Rules 19.1-3. This Joint DENR-DA-PCSD Adm. Order No. 01, S. 2004 implements the Wildlife Resources Conservation and Protection Act of 2001.

DAO 90-46	Provides for the format and criteria for proposals to register the first commercial captive–breeding operation for CITES Appendix/Animal Species
DAO 91-36	Provides for the guidelines governing the confiscation, seizure, and disposition of wild flora and fauna illegally collected, gathered, acquired, transported, and imported, including paraphernalia
DAO 91-55	Declaring *Dugong* as protected marine mammal of the Philippines
DAO 97-17	Establishing the disposition program for confiscated and donated wildlife in the custody of DENR Wildlife Rescue Centers and similar DENR facilities and providing guidelines therefor
DAO No.	**Relevant Provision**
DAO 97-33	Guidelines on the issuance of permit for the collection and transport of biological specimens from Protected Areas for use by DENR Biodiversity Conservation Program s/Projects
DAO 01-09	Guidelines in Establishing the Wild Fauna Marking and Identification System
DAO 08-08	Guidelines on Self-regulation of the Floriculture Industry for the Sustainable Management of Philippine Wild Flora
DAO 55-04	DENR Streamlining/Procedural Guidelines Pursuant to the Joint DENR-DA-PCSD Implementing Rules and Regulations of R.A. 9147

One of the issuances listed in Table 1 is DAO 91-55, which indicates that it was issued pursuant to Article VIII, Section 1 of CITES, requiring parties to penalize trade in, or possession of specimens. The order declares the *Dugong* or Sea Cow a protected marine mammal and thus prohibits the killing or taking of the same for whatever purpose.[13] It also provides for a criminal penalty for any person who shall

[13] DENR Dep't Adm..Order No. 55, § 1 (1991). The *Dugong* Protection Order of 1991.

hunt, kill, wound or take away, possess, transport and/or dispose it, dead or alive, its meat or any of its by-products.[14]

On the other hand, DAO 90-46 states that it was issued in furtherance of CITES Article VII (4), which provides that: "[s]pecimens of an animal species included in Appendix I bred in captivity for commercial purposes, or of a plant species included in Appendix I artificially propagated for commercial purposes, shall be deemed to be specimens of species included in Appendix II."

DAO 01-09 titled "Guidelines in Establishing the Wild Fauna Marking and Identification System" explicitly states that it was issued in compliance with Article VI of CITES. Under Article VI (7), the CITES provides:

> Where appropriate and feasible a Management Authority may affix a mark upon any specimen to assist in identifying the specimen. For these purposes, "mark" means any indelible imprint, lead seal or other suitable means of identifying a specimen, designed in such a way as to render its imitation by unauthorized persons as difficult as possible.

Thus, DAO 01-09 provides for six types of marking and identification systems used to properly identify and monitor individuals of birds, mammals, and reptiles, including their progenies.

In addition, DAO 08-08, which was issued pursuant to the CITES, aims to empower the floriculture industry through self-monitoring and compliance with sustainable practices in the production and utilization of endemic/indigenous wild flora and CITES-listed species.[15] The order does this by mandating the establishment of the Philippine Wild Flora Council.[16]

Furthermore, DAO 55-04, which covers species listed in the CITES appendices, provides for the rules for the issuance of a CITES Export/Import/Reexport Permit.[17]

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[14] *Id.* § 2.
[15] DENR Dep't Adm. Order No. 08, § 2 (2008). Guidelines on Self-Regulation of the Floriculture Industry
[16] *Id.* § 5.
[17] DENR Dep't Adm. Order No. 55, § 8 (2004). Guidelines to the Implementing Rules and Regulation of Rep. Act No. 9147.

Many of the orders cite Act No. 2590 as their basis, apart from CITES. This Act was issued in 1916 and provides that it is unlawful for any person to hunt, wound, take, or kill, or have in his or her possession, living or dead, or to purchase, offer, or expose for sale, transport, ship, or export, alive or dead, any protected bird, fish, shellfish, or mammal, or to sell or have in possession for sale any part of either.[18] It further provides that it is unlawful for any person to take or willfully destroy the nest or eggs of any protected bird or to have such nest or eggs in his or her possession.[19]

B. Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention)

1. Ramsar Convention Background

The Ramsar Convention provides the framework for national action and international cooperation for the conservation and wise use of wetlands and their resources.[20] It was adopted in the Iranian city of Ramsar in 1971, came into force in 1975, and was ratified by the Philippines on November 8, 1994.

The Convention requires parties to:

- designate suitable wetlands within its territory for inclusion in a "List of Wetlands of International Importance (List);"[21]
- formulate and implement their planning so as to promote the conservation of wetlands included in the List; and
- promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands.[22]

[18] Rep. Act No. 2590 (1916), § 1. An Act for the Protection of Game and Fish of 1916.
[19] *Id.*
[20] *About Ramsar*, RAMSAR, http://www.ramsar.org.
[21] Convention on Wetlands of International Importance Especially as Waterfowl Habitat, art. 1, Feb. 2, 1971, 996 U.N.T.S. 245 [hereinafter Ramsar Convention].
[22] *Id.* art. 4.

2. Philippine Implementation of Ramsar Convention

Six wetland sites in the Philippines have been declared as Ramsar sites as of May 2016 and were thus included in the said List:[23]

- Onlango Island Wildlife Sanctuary in Cebu;
- Naujan Lake National Park in Oriental Mindoro;
- Agusan Marsh Wildlife Sanctuary in Agusan Del Sur;
- Tubbataha Reefs National Marine Park in Sulu;
- Puerto Princesa Subterranean River National Park in Palawan; and
- Las Piñas-Parañaque Critical Habitat and Ecotourism Area.

The BMB oversees the formulation and implementation of the National Wetlands Action Plan. The most recent is the Action Plan 2011-2016. Some conservation projects to implement the said plan include:[24]

- DENR-PAWB *Pawikan* Conservation Project;
- Laguna de Bay Community Watershed Rehabilitation Project;
- Community-Based Forest and Mangrove Management Project;
- National Greening Program;
- Pasig River Rehabilitation Program; and
- Manila Bay Project to Implement the Operational Plan for the Manila Bay Coastal Strategy

[23] *List of Wetlands of International Importance*, RAMSAR (May 3, 2016), http://www.ramsar.org/sites/default/files/documents/library/sitelist.pdf.

[24] *The National Wetlands Action Plan for the Philippines 2011-2016*, PROTECTED AREAS AND WILDLIFE BUREAU – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES (2013), http://www.bmb.gov.ph/index.php/mainmenu-publications/statistics/doc_download/883-the-national-wetlandsaction-plan-for-the-philippines-2011-2016.

C. Convention on the Conservation of Migratory Species of Wild Animals (CMS)

1. CMS Background

CMS brings together the States through which migratory animals pass, the Range States, and lays the legal foundation for internationally coordinated conservation measures throughout a migratory range.[25]

CMS provides that parties:[26]

- should promote, co-operate in and support research relating to migratory species;
- shall endeavor to provide immediate protection for migratory species included in Appendix I;[27] and
- shall endeavor to conclude Agreements covering the conservation and management of migratory species included in Appendix II.[28]

2. Philippine Implementation of CMS

The Philippines signed CMS on June 2, 1980 and ratified it on March 30, 1993.

Pursuant to the CMS, the Governments of Malaysia and the Philippines entered into a Memorandum of Agreement where both governments established a Joint Management Committee (JMC) tasked to manage and protect the Turtle Island Heritage Protected Area (TIHPA) as a green turtle sanctuary through an integrated management program that shall highlight, at the minimum, the following:

- Implementation of an integrated and uniform approach to conservation and research that is oriented towards wise management of the TIHPA;

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[25] *About CMS*, CMS, http://www.cms.int/en/legalinstrument/cms.

[26] Convention on the Conservation of Migratory Species of Wild Animals, art. II(3), Jun. 23, 1979, 1651 U.N.T.S. 333 [hereinafter Bonn Convention].

[27] Appendix I lists migratory species which are endangered.

[28] Appendix II lists migratory species which have an unfavourable conservation status and which require international agreements for their conservation and management, as well as those which have a conservation status which would significantly benefit from the international cooperation that could be achieved by an international agreement.

- Establishment of a centralized database and information network on marine turtles;
- Development of appropriate information awareness programs primarily targeted towards the inhabitants of the Turtle Islands on the conservation of marine turtles and the protection of their habitats;
- Implementation of a joint marine turtle resource management program;
- Development and implementation of a training and development program for the staff of the TIHPA; and
- Development and undertaking of eco-tourism programs.[29]

The JMC, as the policy-making body of the TIHPA, is composed of 5 members from each country from the different government agencies in the respective countries, in partnership with National Government Organizations (NGOs) involved in marine turtle conservation.[30] An annual JMC meeting is alternately held in each country.[31]

The Philippines is also a signatory to the Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and Southeast Asia (IOSEA Marine Turtle MoU) that provides a framework for the conservation and replenishment of the depleted marine turtle populations.[32] Pursuant to this MoU, the *Pawikan* Conservation Project (PCP) formulates and implements conservation and protection policies, management and propagation schemes, as well as massive information and education programs to ensure the survival and growth of the country's marine turtle resources. It maintains the hatcheries in Turtle Islands Wildlife Sanctuary (TIWS) in Tawi-Tawi and in Nagbalayong, Morong, Bataan.[33]

The BMB, as the National Coordinator, also conducts the Annual Asian Waterbird Census (AWC) together with the DENR Regional Offices, NGOs, LGUs, volunteer groups, and private individuals in all regions within the Philippines and

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[29] Memorandum of Agreement Between the Government of the Republic of the Philippines and the Government of Malaysia on the Establishment of the Turtle Island Heritage Protected Area, May 31, 1996, *available at* http://www.gov.ph/1996/05/31/the-philippine-claim-to-a-portion-of-north-borneo-memorandum-ofagreement-between-the-government-of-the-republic-of-the-philippines-and-the-government-ofmalaysia-on-the-establishment-of-the-turtle-i/.

[30] *Two Nations, One Mission*, ONEOCEAN, http://oneocean.org/ambassadors/track_a_turtle/tihpa/.

[31] *Id.*

[32] *Introduction: IOSEA Marine Turtle MoU*, INDIAN OCEAN AND SOUTH-EAST ASIA, http://www.ioseaturtles.org/introduction.php.

[33] *The National Wetlands Action Plan for the Philippines 2011-2016*, *supra* note 24.

implements the National Wetlands Action Plan[34] as regards conservation of migratory species. The AWC is a joint initiative with the different member countries in Asia and runs parallel to other regional programs of the International Waterbird Census. In the Philippines, it takes place during the second and third week of January every year.

D. Convention for the Protection of the World Cultural and Natural Heritage (Heritage Convention)

1. Heritage Convention Background

The Heritage Convention was adopted under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO).[35] The Philippines ratified the Heritage Convention on September 19, 1985.

The Convention provides that it is for each State Party to this Convention to identify and delineate the different properties situated on its territory which are considered as *cultural heritage* and *natural heritage.*[36]

Article 1 of the Heritage Convention provides that the following are considered as cultural heritage:

- monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
- groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
- sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

Article 2 of the Convention provides that the following are considered as natural heritage:

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[34] *Id.*

[35] *Brief History*, THE WORLD HERITAGE CONVENTION, http://whc.unesco.org/en/convention/.

[36] Convention Concerning the Protection of the World Cultural and Natural Heritage, art. 3, Nov. 16, 1972, 1037 U.N.T.S. 151 [hereinafter Heritage Convention].

- natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;
- geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;
- natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

A party to this treaty must recognize its duty of ensuring the identification, protection, conservation, presentation and transmission of cultural and natural heritage situated on its territory for future generations.[37] But it adds:

> It will do all it can to this end, *to the utmost of its own resources* and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.[38] (emphasis supplied)

To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, the Heritage Convention states[39] that each State Party:

> Shall endeavor, in so far as possible, and as appropriate for each country:

(a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes;
(b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;
(c) to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage;

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[37] *Id.* art. 4.
[38] *Id.*
[39] *Id.* art. 5.

(d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and
(e) to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field. (emphasis supplied)

The Heritage Convention also provides that every State Party shall, in so far as possible, submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage, situated in its territory and suitable for inclusion in the "World Heritage List."

2. Philippine Implementation of Heritage Convention

Republic Act No. 7586, or the National Integrated Protected Areas System (NIPAS) Act of 1992, provides the legal framework for the establishment and management of protected areas in the Philippines.[40] It provides that, as a matter of policy, the Philippines recognizes that areas with biologically unique features, although distinct, possess common ecological values that may be incorporated into a holistic plan representative of its heritage.[41] To this end, the NIPAS Act establishes a system that encompasses outstanding remarkable areas and biologically important public lands that are habitats of rare and endangered species of plants and animals, biogeographic zones and related ecosystems, whether terrestrial, wetland, or marine. These areas are designated as "protected areas."

The categories of protected areas include:

- Strict nature reserve;
- Natural park;
- Natural monument;
- Wildlife sanctuary;
- Protected landscapes and seascapes;
- Resource reserve;
- Natural biotic areas; and

[40] *Overview of NIPAS*, PHILIPPINE CLEARING HOUSE MECHANISM FOR BIODIVERSITY, http://www.chm.ph/index.php?option=com_content&view=article&id=104&Itemid=180.
[41] Rep. Act No. 7586 (1992), § 2. National Integrated Protected Areas System Act of 1992.

- Other categories established by law, conventions or international agreements to which the Philippine Government is a signatory.

The BMB undertook to inscribe on the UNESCO World Heritage List (Natural Sites) the Mount Hamiguitan Range Wildlife Sanctuary (2014), the Tubbataha Reef National Marine Park (1993), and the Puerto Princesa Subterranean Natural Park (1999).[42]

Another law that is relevant to heritage protection is Republic Act No. 9072, or the "National Caves and Cave Resources Management and Protection Act," which mandates the conservation, protection, and management of caves and cave resources. Among other things, this law criminalizes the act of knowingly destroying, disturbing, defacing, marring, altering, removing, or harming the speleogem or speleothem of any cave and the gathering, collecting, possessing, consuming, selling, bartering, exchanging, or offering for sale without authority any cave resource.[43][44]

E. Convention on Biological Diversity (CBD)

1. CBD Background

The CBD was ratified by the Philippines on October 8, 1993.

The objectives[45] of the CBD are:

- the conservation of biological diversity;[45]
- the sustainable use[46] of its components; and
- the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.

The CBD requires parties, as far as possible and as appropriate, to cooperate with other parties, directly or, where appropriate, through competent international

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[42] *Properties inscribed on the World Heritage List: Philippines*, UNESCO, http://whc.unesco.org/en/statesparties/ph.

[43] Rep. Act No. 9072 (2001), § 7. National Caves and Cave Resources Management and Protection Act of 2001.

[44] Convention on Biological Diversity, art. 1., June 5, 1992, 1760 U.N.T.S. 79 [hereinafter CBD],

[45] "Biological Diversity" is defined by the Convention as the variability among living organisms from all sources including, *inter alia,* terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part. [Article 2]

[46] "Sustainable use" is defined under the CBD as the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations. [Article 2]

organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest for the conservation and sustainable use of biological diversity.[47]

The CBD also requires parties, in accordance with their particular conditions and capabilities, to:

- develop national strategies, plans or programs for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programs; and
- integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programs and policies.

In addition to the general measures, the CBD also provides that as far as possible and appropriate, parties should:

- identify and monitor biological diversity as well as processes and categories of activities which have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity;[48] and
- engage in *in situ* conservation[49] measure,s which include the establishment of a system of protected areas or areas where special measures need to be taken to conserve biological diversity.[50]

The Philippines also ratified the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization on May 25, 2015. The Nagoya Protocol is a supplementary agreement to the CBD and provides a transparent legal framework for the effective implementation of one of the three objectives of the CBD: the fair and equitable sharing of benefits arising out of the utilization of genetic resources.[51] It entered into force on October 12, 2014.[52] The objective of this Nagoya Protocol is the fair and equitable sharing of

[47] CBD, *supra* note 44, art. 5.
[48] *Id.* art. 7.
[49] *"In situ* conservation" is defined under the CBD as the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties. [Article 2]
[50] CBD, *supra* note 44, art. 8.
[51] *About the Nagoya Protocol*, CONVENTION ON BIOLOGICAL DIVERSITY, https://www.cbd.int/abs/about/default.shtml.
[52] *Id.*

the benefits arising from the utilization of genetic resources, including appropriate access to genetic resources and appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components.[53] The Protocol requires:

> Each Party shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of genetic resources that are held by indigenous and local communities, in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources, are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms.[54]

2. Philippine Implementation of CBD

(a) Republic Act No. 7586

Republic Act No. 7586 (RA No. 7586) or the NIPAS Act establishes a comprehensive system of integrated protected areas. It was passed to ensure, among other things, "that the use and enjoyment of these protected areas must be consistent with the principles of biological diversity and sustainable development."[55] The Act defines "protected area" as identified portions of land and water set aside by reason of their unique physical and biological significance, managed to enhance biological diversity and protected against destructive human exploitation.[56] Thus, the establishment of each protected area is intended to protect biodiversity.

(b) Republic Act No. 9147

Republic Act No. 9147 (RA No. 9147) or the "Wildlife Resources Conservation and Protection Act" mandates conservation of "the country's wildlife resources and their habitats for sustainability."[57] It provides that it is the policy of the

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[53] Nagoya Protocol to the Convention on Biological Diversity, art. 1, Oct. 29, 2010, 3008 U.N.T.S. 3 [hereinafter Nagoya Protocol].

[54] *Id.* art. 5(2).

[55] Rep. Act No. 7586 (1992), § 2. National Integrated Protected Areas System Act of 1992

[56] *Id.* § 4.

[57] Rep. Act No. 9147 (2001), § 2. Wildlife Resources Conservation and Protection Act of 2001.

State to conserve the country's wildlife resources and their habitats for sustainability. In pursuit of this policy, it lists the following objectives, *inter alia:*

- to conserve and protect wildlife species and their habitats to promote ecological balance and enhance biological diversity;
- to pursue, with due regard to the national interest, the Philippine commitment to international conventions, protection of wildlife and their habitats; and
- to initiate or support scientific studies on the conservation of biological diversity.

This law provides that bioprospecting is only allowed upon execution of an undertaking by any proponent, stipulating therein its compliance with and commitment(s) to reasonable terms and conditions that may be imposed by the DENR Secretary which are necessary to protect biological diversity.[58] This law also has rules on the collection and utilization of biological resources for scientific research,[59] biosafety,[60] protection of threatened species,[61] and establishment of critical habitats.[62]

(c) Republic Act No. 8371

Republic Act No. 8371 (R.A. No. 8371) or the Indigenous Peoples' Rights Act was enacted to promote the rights of indigenous cultural communities (ICCs) and indigenous people (IPs). It provides that access to biological and genetic resources and to indigenous knowledge related to the conservation, utilization, and enhancement of these resources shall be allowed within ancestral lands and domains of the ICCs/IPs only with a free, prior, and informed consent of such communities, obtained in accordance with the customary laws of the concerned community.[63]

[58] *Id.* § 14.
[59] *Id.* § 15.
[60] *Id.* § 16.
[61] *Id.* § 22.
[62] *Id.* § 25.
[63] Rep. Act No. 8731 (1997), § 35. Indigenous Peoples' Rights Act of 1997.

(d) Administrative Issuances

Some administrative issuances relevant to CBD are summarized in Table 2 below.

Table 2
Administrative Issuances Relevant to the CBD

DMC 90-20	Provides guidelines on the restoration of open and denuded areas within national parks and other protected areas for the enhancement of biological diversity
DAO 96-20	Provides for the implementing rules and regulations on the Prospecting of Biological and Genetic Resources
DAO 99-45	Provides for the rules and regulations on the sale and farming of saltwater crocodile
DAO 00-51	Provides for the guidelines and principles in determining fees for access to and sustainable use of resources in protected areas
DAO 00-13	Provides for guidelines on the implementation of the Biodiversity Monitoring System (BMS) in protected areas
M.O. 95-289	Provides for the Integration of the Philippines' Strategy for Biological Diversity Conservation in Sectoral Plans of National Government Agencies
E.O. 95-247	Provides for Guidelines and Framework for Prospecting of Biological and Genetic Resources.

In Memorandum Order No. 95-289, the President of the Philippines directed all national agencies and instrumentalities of the government to integrate the national framework and strategy on biological diversity conservation in the updating of their respective sectoral plans, programs, and projects, and that this effort should result in

the operationalization of the strategy in the implementation of their plans, programs, and projects.[64]

Executive Order No. 95-247 refers to Article 16 of the CBD, which mandates each party to take legislative, administrative, or policy measures, as appropriate, with the aim that contracting parties, in particular those that are developing countries which provide genetic resources, are provided access to and transfer of technology which makes use of those resources, on mutually agreed terms, including technology protected by patents and other intellectual property rights. This order requires a Research Agreement with the Philippine government before a person, entity, or corporation can engage in the prospecting of biological and genetic resources.[65]

In addition to the above department issuances, there have also been several biodiversity conservation projects undertaken by the BMB and its partner organizations. According to the Philippine Clearing House Mechanism, which is a website that provides relevant information in the country as part of the Philippine commitment to the CBD, the following are some of the biodiversity conservation programs:

- Philippine Raptors Conservation Program;
- *Pawikan* Conservation Program;
- Tamaraw Conservation Program;
- Palawan Wildlife Rescue and Conservation Center (formerly Crocodile Farming Institute);
- Philippine Cockatoo Conservation Program;
- Philippine Hornbill Conservation Program;
- Visayan Warty Pigs Conservation Program;
- Philippine Spotted Deer Conservation Program;
- Philippine Cloud Rats Conservation Program;
- Philippine Tarsier Conservation Program;
- Calamian Deer Conservation Program; and
- *Dugong* Conservation Program.

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[64] Mem. Order No. 289 (1995), § 1. This directs the National Biodiversity Strategy and Action Plan Integration.

[65] Exec. Order No. 247 (1995), § 3. This regulates the prospecting of biological and genetic resources in the Philippines.

The implementation of these conservation plans and programs is embodied in the Philippine Biodiversity Strategy Action Plan (PBSAP), the latest report of which is the 5th Report in 2014, and the Philippine Plant Conservation Strategy and Action Plan, which was developed pursuant to DENR Secretary Special Order 2003-32. In addition to these conservation plans, the 5th Report to CBD lists other initiatives from other government agencies, such as economic and fiscal incentives by the Department of Finance and the Department of Budget and Management (DBM), sector policies and programs in other industries by the Department of Science and Technology (DOST), the Department of Agriculture (DA), and the Department of Trade and Industry (DTI); and policies on governance by the President, Department Secretaries, the Judiciary, Legislative and LGUs.[66]

III. The Environmental Management Bureau

The EMB, a staff sectoral bureau[67] under DENR, implements several MEAs including:

- United Nations Framework Convention on Climate Change;
- Basel Convention on the Control of Transboundary Movements of Hazardous Waste;
- The Montreal Protocol on Substances that Deplete the Ozone Layer;
- Stockholm Convention on Persistent Organic Pollutants; and
- Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.

A. United Nations Framework Convention on Climate Change (UNFCCC)

1. UNFCCC Background

The UNFCCC was adopted on May 9, 1992 and entered into force on March 21, 1994. The Philippines ratified it on August 2, 1994. The ultimate objective of the Convention is the stabilization of greenhouse gas concentrations in the atmosphere

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[66] *The Fifth National Report to the CBD*, BIODIVERSITY MANAGEMENT BUREAU-DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES (2014), https://www.cbd.int/doc/world/ph/ph-nr-05en.pdf.

[67] Exec. Order No. 192 (1987), § 6. This is the act reorganizing the Department of Natural Resources of 1987.

at a level that would prevent dangerous anthropogenic interference with the climate system.[68]

The UNFCCC requires all parties *inter alia*:

- to develop, periodically update, publish and make available to the Conference of the Parties, national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, using comparable methodologies to be agreed upon by the Conference of the Parties;[69]
- to formulate, implement, publish and regularly update national and, where appropriate, regional programs containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change.[70]

2. *Philippine Implementation of the UNFCCC*

Even prior to the signing of the UNFCCC in 1992, then Philippine President Corazon Aquino created the Inter-Agency Committee on Climate Change (IACCC) in 1991 through Presidential Order No. 220. The IACCC, composed of government agencies and an umbrella non-government organization (NGO), coordinates, develops and monitors activities related to climate change in the country. It also formulates policy actions and recommendations, which shape the Philippines' positions in international negotiations on climate change.[71]

(a) The Climate Change Act

In 2009, Republic Act No. 9729 (R.A. No. 9729) or the Climate Change Act, which has been amended by R.A. No. 10174 in 2011, was enacted as one of the State's initiatives as a party to the UNFCCC. For the realization of the ultimate objective of

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[68] *Database UN Conventions – UNFCCC*, DENR INTERNATIONAL AGREEMENTS ON ENVIRONMENT AND NATURAL RESOURCES, http://intl.denr.gov.ph/index.php/database-un-conventions/article/17united-nations-framework-convention-on-climate-change-kyoto-protocol.

[69] United Nations Framework Convention on Climate Change, art. 4(1)(a), May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

[70] *Id.* art. 4(1)(b).

[71] *Second National Communication to UNFCCC – Philippines*, *UNFCCC*, https://unfccc.int/sites/default/files/resource/phlnc2.pdf.

the UNFCCC, as has been embodied by the said Act, the State created for this purpose the Climate Change Commission (CCC), which is an independent and autonomous national government agency. The Commission is the "sole policy-making body of the government which shall be tasked to coordinate, monitor and evaluate the programs and action plans of the government relating to climate change."[72]

(b) National Framework Strategy on Climate Change

In 2010, the CCC completed and released the National Framework Strategy on Climate Change (NFSCC), which provides for the general framework, Vision and Goal from 2010 to 2022.

(c) National Climate Change Action Plan

In April 2011, the National Climate Change Action Plan (NCCAP) was approved by the President. It outlined the "programs and strategies for adaptation and mitigation for 2011 to 2028"[73] for every priority area – Food Security, Water Sufficiency, Ecological and Environmental Stability, Human Security, Climate-Smart Industries and Services, Sustainable Energy, and Knowledge and Capacity Development.

The programs of the CCC are divided into two broad areas, as provided for in the National Climate Change Action Plan – Adaptation and Mitigation.

i. Adaptation

The projects under Adaptation are primarily geared towards "[a]djustment[s] in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities." Two of its major projects are the Project Twin Climate Phoenix and the Project ReBuild.

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[72] Rep. Act No. 9729 (2009), § 6. Climate Change Act of 2009.

[73] *National Climate Change Action Plan 2011-2028*, CLIMATE CHANGE COMMISSION (2011), http://climate.gov.ph/images/docs/NCCAP_TechDoc.pdf.

Project Twin Climate Phoenix

The Project Twin Climate Phoenix, as implemented by the CCC with technical assistance from the UN Development Programme (UNDP) and the Australian Agency for International Development (AusAID), focuses on the long-term recovery of the flood-affected areas and the strengthening of the capacities and competencies of these areas against future disasters brought about by climate change. The focused project areas are the catchment areas[74] of Cagayan de Oro, Iponan, Mandulog, and Iligan river systems, particularly Cagayan De Oro City and Iligan City, municipalities of Compostela Valley Province and Davao Oriental Province that were hit the hardest by Typhoon Pablo.[75]

Project ReBuild

Project ReBuild, or the "Resilience Capacity Building for Cities and Municipalities to Reduce Disaster Risks from Climate Change and Natural Hazards, Phase 1," is a project in partnership with UNDP and with funding assistance from the Government of New Zealand/New Zealand Aid Programme (NZAP). The objective of this Project is similar to that of the Project Twin Climate Phoenix in that it aims to increase the capacities of local communities to manage disaster risks and to adapt to overall impacts of climate change. The project areas involved are the city of Tuguegarao and municipalities of Enrile and Iguig in the Cagayan River Basin (CRB) in Region 2 and the pilot city of Passi and municipalities of Zarraga and Dumangas in the Jalaur River Basin (JRB) in Region.[76]

ii. Mitigation

On the other hand, the projects under Mitigation are programs which include "[h]uman intervention to address anthropogenic emissions by sources and removals by sinks of all greenhouse gases (GHG), including ozone-depleting substances and their substitutes."[77]

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[74] These are areas from which rainfall flows into a river, lake, or reservoir.

[75] *Project Brief: Project Climate Twin Phoenix*, CLIMATE CHANGE COMMISSION, http://www.climate.gov.ph/index.php/projects/adaptation/project-climate-twin-phoenix#project-brief.

[76] *Project Brief: Project ReBuild*, CLIMATE CHANGE COMMISSION, http://climate.gov.ph/index.php/projects/adaptation/project-rebuild.

[77] *Adaptation & Mitigation Projects*, CLIMATE CHANGE COMMISSION, http://climate.gov.ph/index.php/adaptation-mitigation#phl-initiatives-on-mitigation.

Low Emission Capacity Building Programme

One of the projects is the Low Emission Capacity Building (LECB) Programme, wherein the Philippines is one of the participating countries focused on the implementation of projects to mitigate climate change. To realize this goal, firstly, the Philippines has established the Philippine GHG Inventory Management and Reporting System (PGHGIMRS) to institutionalize the GHG inventory reporting process in the different government agencies. Secondly, the CCC developed Nationally Appropriate Mitigation Actions (NAMAs) and Low Emission Development Strategy (LEDS) Sectoral Roadmaps as guides, and institutional mechanisms were established for the monitoring and implementation of mitigation measures. Finally, Measurement, Reporting and Verification (MRV) Systems have been designed to support the implementation and evaluation of NAMAs and LEDS Sectoral Roadmaps.

B. Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention)

1. Basel Convention Background

The Basel Convention is an international treaty designed to reduce the movements of hazardous waste between nations, specifically to prevent the transfer of hazardous waste from developed to less developed countries (L.D.C.s).[78] It was adopted on March 22, 1989, by the Conference of Plenipotentiaries in Basel, Switzerland, in response to a public outcry following the discovery of deposits of toxic wastes imported to Africa and other parts of the developing world.[79] The Convention was ratified by the Philippines on October 21, 1993 and came into force on January 19, 1994.

Under Article 15, parties are required to submit a report on the previous calendar year, which includes information on transboundary movement of hazardous wastes in their area, measures adopted by parties in the implementation of the

[78] *Database UN Conventions – Basel Convention*, DENR INTERNATIONAL AGREEMENTS ON ENVIRONMENT AND NATURAL RESOURCES, http://intl.denr.gov.ph/index.php/mulitlateral/unconventions/ article/1-basel-convention.
[79] *Id.*

Convention, activities related to bilateral/multilateral agreements and arrangements, and other pertinent information.[80]

Subsequently, in 1995, an amendment has been made to the Convention, called the Ban Amendment, which provides for the prohibition by each party included in the proposed new Annex VII (Parties and other States which are members of the OECD, EC, Liechtenstein) of all transboundary movements to States not included in Annex VII of hazardous wastes covered by the Convention that are intended for final disposal, and of all transboundary movements to States not included in Annex VII of hazardous wastes covered by paragraph 1 (a) of Article 1 of the Convention that are destined for reuse, recycling or recovery operations.[81] However, this amendment has not been adopted by the Philippines.

2. *Philippine Implementation of the Basel Convention*

(a) Laws

Even prior to the ratification of the Convention in 1993, the Philippines had already enacted Republic Act No. 6969 (R.A. No. 6969) or the Toxic Substances and Hazardous and Nuclear Waste Control Act of 1990 wherein the government is obliged to "regulate, restrict or prohibit the importation, manufacture, processing, sale, distribution, use and disposal of chemical substances and mixtures that present unreasonable risk and/or injury to health or the environment."[82] It also provided for the prohibited acts which will be penalized accordingly, both criminally and administratively. The following are considered prohibited acts:

- knowingly use a chemical substance or mixture which is imported, manufactured, processed or distributed in violation of the Act or implementing rules and regulations or orders;

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[80] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, art. 15, Mar. 22, 1989, 1673 U.N.T.S. 126 [hereinafter Basel Convention].

[81] *The Basel Convention Ban Amendment*, BASEL CONVENTION, http://www.basel.int/Implementation/LegalMatters/BanAmendment/Overview/tabid/1484/Default.aspx.

[82] Rep. Act No. 6969 (1990), § 2. Toxic Substances and Hazardous and Nuclear Waste Control Act of 1990.

- failure or refusal to submit reports, notices or other information, access to records, as required by the Act, or permit inspection of establishment where chemicals are manufactured, processed, stored or otherwise held;
- failure or refusal to comply with the pre-manufacture and pre-importation requirements; and
- cause, aid or facilitate, directly or indirectly, in the storage, importation, or bringing into Philippine territory, including its maritime economic zones, even in transit, either by means of land, air or sea transportation or otherwise keeping in storage any amount of hazardous and nuclear wastes in any part of the Philippines.[83]

The importation of materials containing hazardous substances may be allowed only upon obtaining prior written approval from the Secretary of the DENR or his duly authorized representative.[84]

Republic Act No. 8479 or the Downstream Oil Industry Deregulation Act of 1998 provides that all oil importations shall be in accordance with the Basel Convention.[85]

(b) Administrative Issuances

The Implementing Rules and Regulations (IRR) of the Downstream Oil Industry Deregulation Act of 1998, or DOE Department Circular No. 98-03-004, provides that for effective monitoring, and for ensuring conformity to the Basel Convention, any person who shall import crude oil and/or petroleum products from foreign countries, freeports and economic zones, whether for trade or for his own use or requirement, shall file a notice with the Bureau prior to actual loading of every importation, indicating details and/or accompanying documents related to the importation.[86] It further provides that in the case of importations of slop/used/waste oils, sludges and similar petroleum products/by-products, such notice shall be accompanied by a clearance from the EMB/DENR pursuant to R.A. No. 6969, in accordance with the Basel Convention.[87]

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[83] *Id.* § 13.
[84] Dep't Adm. Order No. 28, General Policy (1994).
[85] Rep. Act No. 8479 (1998), §5. Downstream Oil Industry Deregulation Act of 1998.
[86] Dep't of Energy (DOE) Dep't Circular No. 98-03-004 (1998), § 6. Rules and Regulations Implementing Rep. Act No. 8479.
[87] *Id.*

C. Montreal Protocol on Substances that Deplete the Ozone Layer

1. Montreal Protocol Background

The Vienna Convention for the Protection of the Ozone Layer serves as a framework for the protection of the ozone layer. It was adopted in 1985 and entered into force in 1988. This Convention, however, did not recommend concrete actions that the signatories must undertake. Instead, to advance the goal specified by it, the Montreal Protocol was agreed upon. It is an international treaty that is "designed to reduce the production and consumption of ozone-depleting substances (ODS) in order to reduce their abundance in the atmosphere, and thereby protect the Earth's fragile ozone layer."[88]

The protocol includes a unique adjustment provision that enables the Parties to the Protocol to respond quickly to new scientific information and agree to accelerate the reductions required on chemicals already covered by the Protocol. These adjustments are then automatically applicable to all countries that ratified the Protocol.[89]

2. Philippine Implementation of the Montreal Protocol

The Philippines ratified it on March 21, 1993. As a State Party, the commitment to the Montreal Protocol is to phase out the consumption of all ODS. The formula for the consumption of ODS is the total number of imports plus production in the country, less any exports. However, the Philippines does not produce ODS, and as a result, no exportation could be undertaken. Thus, consumption in the Philippines is equal to the importation.

As an initiative for the achievement of the objectives laid down in the Montreal Protocol, the First Philippine Country Program for the Phase-out of ODS was prepared. For its execution, the Philippine Ozone Desk (POD) was created under EMB and was tasked to oversee and facilitate the phase-out projects of the different ODS.[90] All ODS are regulated by the POD, except for Methyl Bromide, which is controlled by the Fertilizer Pesticide Authority (FPA) of the Department of

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[88] *The Montreal Protocol on Substances that Deplete the Ozone Layer*, UNEP OZONE SECRETARIAT, http://ozone.unep.org/en/treaties-and-decisions/montreal-protocol-substances-deplete-ozone-layer.

[89] *Id.*

[90] *About Philippine Ozone Desk*, PHILIPPINE OZONE DESK, http://119.92.161.2/philozone/about.html.

Agriculture (DA).[91] Because of the gradual process of phasing out the ODS, the POD is the agency tasked with issuing permits for the ODS to the importers up to their quota importation.[92] Phase-out projects for ODS like Halon, Methyl Bromide, Methyl Chloroform, and Carbon Tetrachloride have been accelerated and have been phased out years before the target, as per the schedule agreed in the Protocol.[93] As of March 31, 2016, almost all the ODS listed under the Convention have already been phased out except for hydrochlorofluorocarbons (HCFCs), particularly HCFC 123, 22 and 141B, used as cooling agents, fire suppressants, cleaning agents or blowing agent. The phasing out of the HCFCs started in 2013 and is expected to be totally phased out by 2040. The phase-out schedule and control of importation of the HCFCs have been provided for in DENR Administrative Order No. 2013-25.[94]

D. Stockholm Convention on Persistent Organic Pollutants

1. Stockholm Convention Background

The Stockholm Convention is a global treaty to protect human health and the environment from the adverse effects of persistent organic pollutants (POPs). Adopted in 2001 and entered into force in 2004, it requires its parties to take measures to eliminate or reduce the release of POPs into the environment.[95]

Specifically, each party *inter alia* must:

- prohibit and/or take the legal and administrative measures necessary to eliminate its production and use of the chemicals listed in Annex A subject to the provisions of that Annex.[96]
- only import a chemical listed in Annex A or Annex B:[97]
  - For the purpose of environmentally sound disposal; or
  - For a use or purpose which is permitted for that Party under Annex A or Annex B

[91] Philippine Ozone Desk, 20 Frequently Asked Questions on the Protection of the Ozone Layer (2010).
[92] *Id.*
[93] *Id.*
[94] DENR Adm. Order No. 25, appendix III (2014).
[95] *Database UN Convention – Stockholm Convention*, DENR INTERNATIONAL AGREEMENTS ON ENVIRONMENT AND NATURAL RESOURCES, http://intl.denr.gov.ph/index.php/database-unconventions/article/12-stockholm-convention#updates.
[96] Stockholm Convention on Persistent Organic Pollutants, art. 3(1)(a), May 22, 2001, 2256 U.N.T.S. 119 [hereinafter Stockholm Convention].
[97] *Id.* art. 2(a)(i)-(ii).

- restrict its production and use of the chemicals listed in Annex B in accordance with the provisions of that Annex;[98] and
- develop and endeavour to implement a plan for the implementation of its obligations under this Convention.[99]

2. Philippine Implementation of the Stockholm Convention

The Philippines ratified the Stockholm Convention on February 27, 2004.

The Food and Pesticide Authority, by issuing FPA Board Resolution No. 001-15, banned Endosulfan Technical Grade and its related alpha and beta isomers and formulations. This was issued pursuant to the amendment made by the Conference of the Parties to the Stockholm Convention to Annex A to the Treaty to list technical endosulfan and its related isomers.

Pursuant to the obligation to provide an implementation plan, which outlines the programs of the government to meet the obligations under the Convention, a POPs Project Management Office under the EMB was established and oversees the overall coordination of the POPs National Implementation Plans (NIP).[100] The First NIP of the Philippines was submitted to the Stockholm Convention secretariat in 2006; the Second NIP was submitted in 2011, while the most recent NIP was submitted in 2014.[101] The Government requested assistance from the World Bank and Global Environment Facility (GEF) for financial assistance in order to meet its obligations under the Convention.[102] The project, named PHI: Integrated Persistent Organic Pollutants Management Project (PHGEF IPOPs Project), was approved by GEF and was implemented from 2011 to 2016.[103] The objective of the IPOPs Project is to assist the Philippines in meeting its obligations under the Stockholm Convention and to contribute to the development of capacity for the sound management of chemicals in the Philippines, in general.[104]

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[98] *Id.,* art. 3(1)(b).
[99] *Id.,* art. 7(a).
[100] *National Implementation Plan for the Stockholm Convention on POPs*, STOCKHOLM CONVENTION (2014), http://chm.pops.int/Implementation/NIPs/NIPTransmission/tabid/253/Default.aspx.
[101] *Id.*
[102] PHI: Integrated Persistent Organic Pollutant (POPs) Management Project, THE WORLD BANK, http://www.worldbank.org/projects/procurement/noticeoverview?id=OPooo1 8962&lang=en&print=Y.
[103] *Id.*
[104] *Project Implementation Plan for the Philippines: Integrated POPS Management Project*, ENVIRONMENTAL MANAGEMENT BUREAU – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES (Dec. 2010).

A related law to the Stockholm Convention is Republic Act No. 8749 or the "Philippine Clean Air Act of 1999," which mandates the establishment of an inventory list of all sources of POPs in the country.[105] The DENR is also required to develop short-term and long-term national government programs on the reduction and elimination of POPs such as dioxins and furans which shall be formulated within a year after the establishment of the inventory list.[106]

E. Rotterdam Convention on the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade

1. Rotterdam Convention background

The objective of the Rotterdam Convention is:

> to promote shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals in order to protect human health and the environment from potential harm and to contribute to their environmentally sound use, by facilitating information exchange about their characteristics, by providing for a national decision-making process on their import and export and by disseminating these decisions to Parties.[107]

[105]Rep. Act No. 8749 (1998), §42. Philippine Clean Air Act, of 1998.
[106] *Id.*
[107] Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, art. 1, Sept. 10, 1998, 2244 U.N.T.S. 337 [hereinafter Rotterdam Convention].

The Convention applies to banned[108] or severely restricted chemicals[109] and severely hazardous pesticide formulations.[110]

2. Philippine Implementation of the Rotterdam Convention

The Philippines has ratified the Convention on July 7, 2006. Since then, the Philippines has submitted 27[111] Import Responses, pursuant to Article 10, par. 2 of the Convention, which obligates the party to submit a "response concerning the future import of the chemical concerned." The response would either be a final decision: (1) To consent to import; (2) Not to consent to import; or (3) To consent to import only subject to specified conditions,[112] or an interim response.[113] Of the 27 issued Import Responses, there were eighteen responses which provided that no consent is given to the import of the specific chemical, while the rest of the responses stated that consent to import will be given only subject to specific conditions.[114] The Chemical Management Division of the EMB is tasked to oversee the regulation and implementation of the procedure on PIC.

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[108] "Banned chemical" means a chemical all uses of which within one or more categories have been prohibited by final regulatory action, in order to protect human health or the environment. It includes a chemical that has been refused approval for first time use or has been withdrawn by industry either from the domestic market or from further consideration in the domestic approval process and where there is clear evidence that such action has been taken in order to protect human health or the environment (*See* Rotterdam Convention, *supra* note 107, art. 2(b)).

[109] "Severely restricted chemical" means a chemical virtually all use of which within one or more categories has been prohibited by final regulatory action in order to protect human health or the environment, but for which certain specific uses remain allowed. It includes a chemical that has, for virtually all use, been refused for approval or been withdrawn by industry either from the domestic market or from further consideration in the domestic approval process, and where there is clear evidence that such action has been taken in order to protect human health or the environment (*See* Rotterdam Convention, *supra* note107, art. 2(c)).

[110] "Severely hazardous pesticide formulation" means a chemical formulated for pesticidal use that produces severe health or environmental effects observable within a short period of time after single or multiple exposure, under conditions of use (*See* Rotterdam Convention, *supra* note 107, art. 2(d)).

[111] *Database of Import Responses*, ROTTERDAM CONVENTION, http://www.pic.int/Procedures/ImportResponses/Database/tabid/1370/language/en-US/Default.aspx.

[112] Rotterdam Convention, *supra* note 107, art. 10, para. 4(a).

[113] *Id.* art. 10, para. 4(b).

[114] *Database of Import Responses, supra* note 111.

IV. Observations

A number of observations may be made regarding the manner by which the Philippines implements MEAs.

A. No Treaty-Specific Implementing Statute

The laws the Philippine government uses to implement conventions were not enacted specifically for that purpose. For the most part, many of these laws were enacted even prior to the conventions, which means they were not enacted with the MEAs in mind, let alone written specifically for their enforcement. The same is true even for the administrative issuances.

For example, in the case of the Ramsar Convention:

> A review of legislations and policies on Philippine wetlands commissioned in 2005 is indicative of the "invisibility" of the country's wetlands among its policy-making bodies, despite the ecosystem's valuable services. Many of the regulations with direct impact on wetlands do not make direct reference to them but instead regulate access to natural resources, jurisdictions over territory and management, or prohibit certain acts relating to the areas themselves. On the other hand, those with indirect application are an assortment of environmental regulations that affect wetlands allowing or restricting actions that eventually impact many ecosystems, as well.[115]

This practice may be a problem for "non-self-executing" treaties which specifically require implementing legislation in order to be effective domestically. But so far, this problem has not been encountered by the Philippines.

B. Substantial Reliance on Administrative Issuance

The MEAs are referred to in a number of administrative issuances promulgated by the Philippine government, and some in fact cite the MEAs as the reason for the issuance.

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[115] *The National Wetlands Action Plan for the Philippines 2011-2016, supra* note 24.

But the term "administrative" is misleading, as many of these issuances do not merely provide for administrative rules. Some of these administrative issuances impose criminal penalties for violations.[116]

The proliferation of administrative issuances pertaining to MEAs displays a strong reliance on such issuances for purposes of enforcement. Some may question this procedure due to the possibility that some of these rules will not have a statutory basis.

However, there are obvious advantages to relying on administrative issuances for MEA enforcement. First, administrative issuances do not undergo the same political obstacles as statutes and therefore may take less time and effort to complete. This consideration is important when the environmental problem sought to be remedied requires urgent attention. Second, the rules required to enforce MEAs may require technical knowledge more accessible to experts in the executive branch than the politicians in Congress. While congressmen may get their own experts to help them draft technical legislation, why go through this process when the experts themselves can directly write the rules? Third, the issuance of these regulations may not require the political horse trading that may be necessary for the passage of legislation. When political considerations are suppressed, the benefit is that the provisions are not "watered-down." This consideration is particularly relevant when what is needed is strict regulation and the regulated may include members of Congress or persons whose interests congressmen are known to protect.

C. Multiple Use of Legislation

Because the Philippine Congress has not enacted laws specifically for the enforcement of MEAs, the government has had to rely on existing or subsequent legislation on related subject matters. The result of this process is that the same piece of legislation can implement several MEAs. Examples of this are the NIPAS Act and the Wildlife Act, which include provisions that serve as basis for the implementation of the CITES, CBD, and CMS.

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[116] *See* for example DENR Adm. Order No. 55 (1991).

D. Implementation via Action Plans and Projects

Apart from laws and administrative issuances, government agencies draft "action plans" to outline their strategy to comply with MEAs. An example would be the National Wetlands Action Plan.

Also, many of the obligations under the MEAs are implemented via projects undertaken by the Bureaus and not by specific legislation.

These projects are often made possible by financial support from foreign governments or aid sources and by enlisting the participation of the private sector.

V. Conclusion

The Philippine experience shows that developing countries can, in good faith, comply with their obligations under the MEAs despite their limitations. Often, enforcement is accomplished via "recycling" of current legislation to justify the enforcement and the "re-furbishing" of existing bureaucracies for new challenges. Hardly anything new is ever created simply for the enforcement of MEAs.

One consequence of this process is that the same regulators take part in enforcement of various MEAs. The advantage of this is that the risk of conflicting efforts is diminished as the same group of people does the work. This allows the regulators to have a holistic view of environmental concerns.

On the other hand, this also means that these regulators are overworked and perhaps spread too thinly. This may affect effectiveness in getting the job done.

Nevertheless, this is the best the Philippine government is able to do at this time. Only time will tell if this will change in the years ahead.

A BRIEF REVIEW OF THE PRECAUTIONARY PRINCIPLE AS OBSERVED FROM PHILIPPINE STATE PRACTICE*

ROMMEL J. CASIS **

Introduction

The Precautionary Principle figures prominently in a growing number of laws and jurisprudence and has been the subject of much legal scholarship. Despite its prominence there is still disagreement as to its purpose and effect. While the idea of "precaution" may be universally accepted, the exact manner of operationalization of the precautionary principle is not.

This paper adds to the legal scholarship in the hope that its modest contribution can help bring clarity to the concept. This paper is intended to provide a basic understanding of the Precautionary Principle viewed primarily from the lens of Philippine laws and jurisprudence.

Part I of this paper briefly discusses the background and historical development of the Precautionary Principle. Part II reviews the various ways the principle is stated or defined. Part III identifies its rationale and effects. Part IV provides an overview of its status under International Law. Part V investigates how the principle is used under Philippine law and jurisprudence.

As a brief review, this paper makes no claim on exhaustiveness. Neither is it a comprehensive discussion on precautionary principle as an international legal concept. This paper is intended merely to introduce the concept in the hopes of

* This paper was first written as a lecture with the research assistance of Ms. Patricia Valeña and Ms. Rachel Castro. It was re-written for publication in the Philippine Yearbook of International Law.

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spurring further discussion of its more specific application under Philippine law. To this end the paper avoids discussing in depth opinions, both critical and supportive of the precautionary principle. As an introduction to the precautionary principle, this review merely provides a basic outline of the concept under international law in order to properly frame the discussion with respect to its application under Philippine law.

I. Background and Historical Development

Scholars trace the origin of the precautionary principle to *Vorsorgeprinzip*[1] which was incorporated in German domestic law in 1974.[2] Similar doctrines are said to have been introduced in Swedish and Swiss law.[3] Since then various states have incorporated the principle in their domestic laws.[4]

Sunstein and other scholars[5] identify the United Nations World Charter for Nature as giving the first international recognition to the principle in 1982, as it suggested that when "potential adverse effects are not fully understood, the activities should not proceed."[6] On the other hand, *Sirinskiene* says that the principle made its first appearance in international law in 1984 when an indirect reference to the precautionary principle was made in a non-binding international document–the Bremen Ministerial Declaration of the International Conference on the Protection of the North Sea.[7]

In 1985, the Vienna Convention for the Protection of the Ozone Layer is said to be the first multilateral treaty to make explicit reference to precaution[8] or the first

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[1] JONATHAN WIENER, PRECAUTION IN THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, 599 (2007); Steve Maguire & Jaye Ellis, *Redistributing the Burden of Scientific Uncertainty: Implications of the Precautionary Principle for State and Nonstate Actors*, GLOBAL GOVERNANCE 505–526 (Oct.-Dec. 2005); Cass R. Sunstein, Beyond the Precautionary Principle, 151 U. PA. L. REV. 1003–1058 (Jan. 2003).

[2] AGNE SIRINSKIENE, THE STATUS OF PRECAUTIONARY PRINCIPLE: MOVING TOWARDS A RULE OF CUSTOMARY LAW JURISPRUDENCE 350, 349–364 (2009).

[3] WIENER, *supra* note 1, at 599.

[4] *Id.* at 599–601.

[5] Rabbi Deloso, *The Precautionary Principle: Relevance in International Law and Climate Change*, 80 PHIL. L.J. 660, 689-690 (2006).

[6] Sunstein, *supra* note 1, at 1006.

[7] SIRINSKIENE, *supra* note 2, at 350.

[8] Deloso, *supra* note 5, at 661.

example of the acceptance of the "precautionary principle" in a major international negotiation.[9] But it merely states in its preamble that:

> Mindful also of the precautionary measures for the protection of the ozone layer which have already been taken at the national and international levels,[10]

In 1987 the London Ministerial Declaration of the International Conference on the Protection of the North Sea expressly used the term *precautionary approach*.[11] *Deloso* adds:

> From the North Sea Ministerial Forum, the concept of precaution was integrated into global marine environmental regimes, global environmental regimes, and into negotiations for a global fisheries regime for straddling and highly migratory stocks. In the Declaration of the Third International Conference on the Protection of the North Sea (Hague Declaration), the principle was adopted as a key premise for subsequent works. During negotiations of the Oslo and Paris (OSPAR) Commissions, the precautionary concept found its way beyond the North Sea to include the North-E ast Atlantic. Not only did the OSPAR Commissions reiterate the principle, instruments were also established for implementation of the precautionary policies.[12]

In 1992, Rio Declaration was issued and its Principle 15 reflects the most prominent statement of the precautionary principle. The Convention on Biological Diversity, which also provided for precautionary concept, was also adopted in 1992 during the Earth Summit.[13]

In 1994, the Guidelines to the Convention on International Trade in Endangered Species (CITES) which provided for a precautionary approach in determining whether species are threatened with extinction or are likely to withstand pressures of trade was adopted.[14]

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[9] Vienna Convention for the Protection of the Ozone Layer, pmbl., Mar. 22, 1985, 1513 U.N.T.S. 293.

[10] *Id.* at 7, para. 5.

[11] SIRINSKIENE, *supra* note 2, at 350.

[12] Deloso, *supra* note 5, at 661.

[13] *Id.* at 663.

[14] *Id.* at 66.

In the years following, more and more international instruments invoke the precautionary principle. *Wiener* notes that the precautionary principle has been adopted in over 50 multilateral instruments relevant to international environmental law.[15]

II. Definition and Statement

There is no single statement defining the precautionary principle. As *Wiener* notes, "[d]espite the widespread endorsement of *pr*ecaution as a *strategy* in many … cases there is no single agreed statement of understanding of the [precautionary principle] as a principle."[16] Some have noted at least 14 different definitions of the precautionary principle that exist in international law.[17]

The most well-known definition is Principle 15 of the Rio Declaration[18] which states:

> In order to protect the environment, the **precautionary approach** shall be widely applied by States according to their capabilities. *Where there are threats of serious or irreversible damage, lack of full scientific* certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. (emphasis supplied)

The basic elements of Principle 15 can be seen in the United Nations Framework Convention on Climate Change which states:

> The Parties should take **precautionary** measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. *Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures*, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all

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[15] WIENER, *supra* note 1, at 601.

[16] *Id.* at 602.

[17] David Vanderzwaag, *The Precautionary Principle in International Law and Policy: Elusive Rhetoric and First Embraces*, 8 J. OF ENVT'L. L. & PRAC. 355 (1999) cited in SIRINSKIENE at 351.

[18] SIRINSKIENE, *supra* note 2, at 351; Shirley V. Scott, *How Cautious is Precautious?: Antarctic Tourism and the Precautionary Principle*, 50 INT'L & COMP. L. Q. 963-971 (Oct. 2001).

> economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties.[19]

The preamble of the Convention on Biological Diversity provides:

> Noting also that where there is a threat of significant reduction or loss of biological diversity, *lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.*

The preamble to the 1979 Protocol to the Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions[20] provides:

> Convinced that where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that such precautionary measures to deal with emissions of air pollutants should be cost-effective,

Article 5(a) of the Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Water-Courses and International Lakes provides:

> (a) The precautionary principle, by virtue of which *action to prevent, control or reduce water-related disease shall not be postponed on the ground that scientific research has not fully proved a causal link* between the factor at which such action is aimed, on the one hand, and the potential contribution of that factor to the prevalence of water-related disease and/or transboundary impacts, on the other hand;[21]

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[19] United Nations Framework Convention on Climate Change, art. 3(3), May 9, 1992, S. Treaty Doc. No. 102–38 [hereinafter UNFCCC].

[20] Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions, pmbl., June 14, 1994, 2030 U.N.T.S. 122.

[21] Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, art. 5(a), June 17, 1999, 2331 U.N.T.S. 202 [hereinafter Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Water-Courses and International Lakes].

These statements correspond to what *Wiener* refers to as "Version 1" of the precautionary principle or that "uncertainty does not justify inaction."[22] He adds:

> all formulations have an essential element in common: rational decisions may and should be taken on the basis of uncertain science, despite a "lack of full scientific certainty" or of "conclusive evidence to prove a causal relation between input and their effects."[23]

On the other hand, the Wingspread Declaration states:

> Where an activity raises *threats of harm* to the environment or human health, precautionary measures **should be taken** even if some cause and effect relationships are not fully established scientifically.[24]

Wiener refers to this as a more aggressive statement of the principle and refers to it as "Version 2" or that "uncertainty justifies action."[25] He adds that "version 2 is more precautionary than version 1, insofar as version 2 affirmatively impels regulatory intervention rather than just permitting it."[26]

Despite the numerous ways the precautionary principle is stated, there appears elements common to most of them. *Deloso*, after surveying international agreements from 1984 to 2004 found that:

> it can be concluded that the precautionary principle under current international law formulations provides for three fundamental elements: (a) risk or threat of serious damage to human health, and/or environment; (b) lack of complete or absolute certainty as to causes and/or impacts; (c) reasonable action to address (a).[27]

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[22] WIENER, *supra* note 1, at 604.

[23] *Id.*

[24] *Wingspread Statement on the Precautionary Principle*, GLOBAL DEVELOPMENT RESEARCH CENTER (1998), https://www.gdrc.org/u-gov/precaution-3.html.

[25] WIENER, *supra* note 1, at 605.

[26] *Id.*

[27] Deloso, *supra* note 5, at 671.

III. Rationale and Effects

A. The Need to Act Swiftly

One rationale for the precautionary principle is the ability to act quickly on grave threats to the environment.

John argues that despite the different ways the precautionary principle is stated they "share a common core …[that] we should seek to prevent some threats of damage, particularly threats of serious environmental damage, even when we lack scientific certainty about their existence or magnitude."[28]

Kriebel points out that:

> The precautionary principle has arisen for several reasons; among them is the perception that the pace of efforts to fight problems like climate change, ecosystem degradation, and resource depletion is too slow. Another is that environmental and health problems continue to grow faster than the ability of the society to identify and correct them. Also, the potential for catastrophic effects on global ecological systems has decreased the confidence in the abilities of environmental science and policy to identify and control hazards.[29]

The precautionary principle is based on the premise that when it comes to dangers to the environment, preventive action should not wait.

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[28] Stephen John, *In Defence of Bad Science and Irrational Policies: An Alternative Account of the Precautionary Principle*, 13 ETHICAL THEORY & MORAL PRAC. 4, 3–18 (2010).

[29] David Kriebel, Joel Tickner, Paul Epstein, John Lemons, Richard Levins, Edward L. Loechler, Margaret Quinn, Ruthann Rudel, Ted Schettler & Michael Stoto, *The Precautionary Principle in Environmental Science*, 109 ENVT'L. HEALTH PERSP., 871, 871–876 (2001).

B. Shifting the Burden of Proof

Maguire and *Ellis* argue that "a major function of the precautionary principle is the redistribution of the burden of scientific uncertainty."[30]

According to *Scott*, "[t]he precautionary principle places on those wishing to undertake an action the burden of proof that it will not harm the environment."[31]

Wills argues:

> In its non-absolute form, the essence of this approach is not a rejection of scientific and economic analyses; it reverses the burden of proof. The principle stems from the inadequacy of scientific knowledge, however, its qualified application logically requires the use of the best available science and economics in order to establish the appropriate standards of proof that should be met by would-be developers.[32]

IV. Status of the Principle Under International Law

The recognized sources of International Law are:

a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b) international custom, as evidence of a general practice accepted as law;
c) the general principles of law recognized by civilized nations;
d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[33]

In order to be binding on states, the precautionary principle must either be a conventional rule, a customary norm or a general principle of law.

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[30] Steve Maguire & Jaye Ellis, *Redistributing the Burden of Scientific Uncertainty: Implications of the Precautionary Principle for State and Nonstate Actors*, 2 GLOB. GOVERNANCE 506, 505–526 (2005).

[31] Shirley V. Scott, *How Cautions is Precautious?: Antarctic Tourism and the Precautionary Principle*, 50 INT'L & COMP. L. Q. 964, 963-971 (Oct. 2001).

[32] Ian Wills, *The Environment, Information and the Precautionary Principle*, 4 AGENDA: J. POL'Y ANALYSIS & REFORM 52-53, 51-62 (1997).

[33] Statute of the International Court of Justice, art. 38, Oct. 24, 1945, 1 U.N.T.S. XVI.

A. The Precautionary Principle as Conventional Law

States are bound by the precautionary principle as stated in conventions they are a party to under the principle of *pacta sunt servanda*. The precautionary principle has been included, either explicitly or implicitly, in many environmental treaties.[34]

Writing in 2006, *Deloso* lists 30 international environmental agreements and seven (7) international declarations which include the precautionary principle although each of the said instruments contains its own version of the precautionary principle.[35]

However, as will be noted below, in most of these treaties, the precautionary principle does not by itself prescribe an obligation but merely guidance in the application of treaty provisions.

B. The Precautionary Principle as Customary Law

Custom has two elements: state practice, and *opinio juris*. For the precautionary principle to be considered customary law, there must be both widespread and virtually uniform state practice in conformity with it, and evidence that said practice is brought about by a belief in the existence of a rule requiring such practice.

The precautionary principle's status as customary law is not universally accepted. Some scholars argue that it is[36] customary while others do not.[37]

It has been argued that there is a general and consistent state practice to adopt a precautionary approach in multilateral treaties of general application.[38] *Deloso* lists several multilateral treaties which allegedly incorporate the precautionary principle, though he admits that most of them provide for it in the preamble.[39] He argues, however, that the obligations embodied in the treaties would have to be interpreted in light of such preambular statements.[40] Still, some of these preambular statements

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[34] SCOTT, *supra* note 31, at 964.

[35] Deloso, *supra* note 5, at 671.

[36] *See* WIENER, *supra* note 1, at 601.

[37] *See id.* at 602; SIRINSKIENE, *supra* note 2, at 353.

[38] Deloso, *supra* note 5, at 689.

[39] *Id.* at 689–690.

[40] *Id.*

merely refer to the taking of precautionary measures only. For instance, in the Montreal Protocol,[41] the preambular statement merely states:

> Determined to protect the ozone layer by taking **precautionary measures** to control equitably total global emissions of substances that deplete it, with the ultimate objective of their elimination on the basis of developments in scientific knowledge, taking into account technical and economic considerations,

Also some of those listed merely makes reference to Principle 15 of the Rio Declaration.[42] But some do provide that in taking measures to implement the treaty the Parties shall be guided in particular by the Precautionary Principle.[43]

Apart from multilateral treaties, *Deloso* identifies several multilateral declarations supporting or adopting the precautionary principle.[44] He argues that these declarations "suggest that states have affirmed the precautionary principle on matters involving human health and protection from any serious or irreversible harm.[45] *Sirinskiene* identifies "more than 90 international declarations and agreements."[46] *Sirinskiene* also argues that:

> State practice is further rejected in the applications and decisions of national and international courts where legal parties defend their legal interests based on the precautionary principle. Classical examples of such application of the precautionary principle are the *Gabčikovo-Nagymaros Project (The Danube Dams)* and *French underground nuclear tests* cases in the ICJ.[47]

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[41] Montreal Protocol on Substances that Deplete the Ozone Layer, pmbl., Sept. 16, 1987, 1522 U.N.T.S. 3.

[42] Cartagena Protocol on Biosafety to the Convention on Biological Diversity, art. 1, Jan. 29, 2000, 2226 U.N.T.S. 208; Stockholm Convention on Persistent Organic Pollutants, art. 1, May 22, 2001, 2556 U.N.T.S. 119.

[43] Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Water-Courses and International Lakes, *supra* note 21, art. 5(a).

[44] Deloso, *supra* note 5, at 690.

[45] *Id.*

[46] SIRINSKIENE, *supra* note 2, at 355.

[47] *Id.* at 357.

Deloso argues that the increase in the number of signed and ratified treaties containing the precautionary principle "can be proof of a sense of obligation on the part of the states to adopt the precautionary principle." [48]

Deloso also argues that additional "evidence of the emergence of a customary norm of international law… is the adoption of the norm in national policies.[49] *Sirinskiene* identifies domestic law as another indicator of state practice.

As such, while there may be widespread practice or at least mention of the precautionary principle in numerous international instruments, evidence of *opinio juris* is not as plentiful, unless the same instruments used to determine state practice is also used to determine *opinio juris.*

C. The Precautionary Principle as a General Principle of Law

A general principle of law is "a general principle recognized in the legal systems of independent states."[50] These are principles "which can be derived from a comparison of the various systems of municipal law, and the extraction of such principles as appear to be shared by all, or a majority, of them." [51] Thus, if a sufficient number of states adopt the precautionary principle in their domestic law, it may be regarded as a general principle of law.

Deloso identified domestic legislation in Germany, United Kingdom, Canada and India pertaining to the precautionary principle.[52]

Sirinskienne notes that:

> The precautionary principle is widely used in the domestic environmental law of Germany, Belgium, and the Nordic countries (Denmark, Norway, Sweden, Finland and Island). In 2005, the principle was incorporated into the Preamble of the Constitution of France and is now part of the "Environmental charter" of the Constitution (another part of this preamble is the 1789 Declaration of the Rights of Man and the Citizen).

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[48] Deloso, *supra* note 5, at 691.

[49] *Id.* at 692.

[50] HUMPHREY WALDOCK, *General Course on Public International Law*, *in* INTERNATIONAL LAW (DJ Harris ed. 2011).

[51] HUGH THIRLWAY, *The Sources of International Law*, *in* INTERNATIONAL LAW 128 (Malcolm Evans ed., 2006).

[52] Deloso, *supra* note 5, at 693-694.

> Therefore, in French domestic law the precautionary principle is treated as a constitutional principle, which claims to be on the same level as the principles of the Declaration of the Rights of Man and the Citizen. A systematic analysis of the French Constitution reveals that the relationship between articles 1 and 5 may be interpreted as giving broader application for the pre-cautionary principle and that the principle may also be applied in certain areas of public health.
>
> The precautionary principle is found not only in the domestic laws of European countries. For example, in 1992 the principle became part of the National Strategy for Ecologically Sustainable Development in Australia. In 1993, the principle was incorporated into Australia's Environmental Protection Act. In 1996, the precautionary principle was defined in the oceans Act of Canada. In 1999, the Environmental Protection Act of Canada, which also regulates the activities of public administration institutions, was also supplemented with the precautionary principle. Even US law makes some indirect allusions to the precautionary principle (as measures) when dealing with questions of food safety and air pollution. Furthermore, as part of environmental impact assessment, the precautionary principle may be found in the local laws of about fifty countries.[53]

Sirinskiene gave the reasons stated above as examples of state practice in order to justify that the precautionary principle is custom. However, they can also be understood as proof that, in domestic legal systems of independent states, the principle enjoys general recognition.

[53] SIRINSKIENE, *supra* note 2, at 356.

V. The Precautionary Principle Under Philippine Law

A. Statutes and Administrative Issuances

1. Statutes

a. Republic Act No. 9729 (RA 9729)

RA 9729, also known as "The Climate Change Act of 2009" is intended to mainstream climate change into government policy formulations by establishing the framework strategy and program on climate change and creating for this purpose the Climate Change Commission.

Section 2 of RA 9729 provides:

> SEC. 2. *Declaration of Policy*. – It is the policy of the State to afford full protection and the advancement of the right of the people to a healthful ecology in accord with the rhythm and harmony of nature. In this light, the State has adopted the Philippine Agenda 21 framework which espouses sustainable development, to fulfill human needs while maintaining the quality of the natural environment for current and future generations.
>
> Towards this end, the State adopts the principle of protecting the climate system for the benefit of humankind, on the basis of climate justice or common but differentiated responsibilities and the Precautionary Principle *to guide decision-making in climate risk management*…[54]

Thus, while the precautionary principle was mentioned in the declaration of policy, its use is identified for a specific purpose, that is "to guide decision-making in climate risk management."[55]

b. Republic Act No. 10067 (RA 10067)

RA 10067 is also known as the "Tubbataha Reefs Natural Park (TRNP) Act of 2009." It established the TRNP in the province of Palawan as a protected area under the NIPAS Act and the Strategic Environmental Plan for Palawan Act.

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[54] Rep. Act No. 9729, §2. Climate Change Act of 2009.
[55] *Id.*

Section 13(q) of RA 10067 provides that the powers and functions of the Tubbataha Protected Area Management Board (TPAMB)[56] include:

> Determine, based on existing scientific evidence, laws, rules and regulations, international instruments, traditional resource utilization, management modalities in the area, carrying capacity, *and observing precautionary principle, the modes of utilization of the TRNP and all the resources found therein*. Permits shall only be issued for such modes of utilization and enjoyment as the TPAMB and this Act shall allow;

Thus, the TPAMB is supposed to observe the precautionary principle in determining the modes of utilization and enjoyment of the TRNP.

c. Republic Act No. 10654 (RA 10654)

RA 10654 amends Republic Act No. 8550, otherwise known as "The Philippine Fisheries Code of 1998," provides that it is the policy of the State:

> (f) *To adopt the precautionary principle* and manage fishery and aquatic resources, in a manner consistent with the concept of an ecosystem-based approach to fisheries management and integrated coastal area management in specific natural fishery management areas, appropriately supported by research, technical services and guidance provided by the State; and xxx

Presumably the adoption of the precautionary principle is in connection with the management of fishery and aquatic resources.

2. Administrative Issuances

Under Philippine Law, administrative issuances are issued to support the implementation of statutes issued by Congress. These issuances fill in the details which the statutes may not have identified. They are also useful to understand how the law is operationalized. The Precautionary Principle is mentioned in a number of administrative issuances and it serves particular purposes.

[56] Under § 10, Rep. Act No. 10067, the TPAMB is the sole the policy-making and permit-granting body of the Tubbataha Reefs National Park.

One purpose is to serve as a guiding principle. For example, Executive Order 514[57] provides that the precautionary approach shall guide biosafety decisions.

DOH Administrative Order No. 0009-13 provides:

> *Precautionary Principle and Prevention*. As embodied in the Rio Declaration under Principle 15 states that where there are threats of serious or irreversible damage to the environment, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. *In the development of policies and guidelines on chemicals safety, agencies shall consider the importance of precautionary measures in avoiding human health and environmental impacts of new, existing or future chemicals use.* Furthermore, concerned agencies shall contribute to the scientific understanding of the links between environmental exposure and human health impacts, and the need to ensure the participation and protection of vulnerable groups, such as women, children, older persons, indigenous populations and socially and economically disadvantaged groups, including equitable provision of comprehensible information.[58]

Another purpose is to have the principle as one of the basic considerations in specific processes. For instance, EMB Memorandum Circular No. 005-11 provides that the principles of precautionary approach should be applied in incorporating Disaster Risk Reduction/Climate Change Adaptation into the Environmental Impact Assessment process.[59] It further states:

> The precautionary approach recognizes that the absence of full scientific certainty should not be used as a reason to postpone decisions where there is a risk of serious or irreversible harm, and that precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically.

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[57] Exec. Order No. 514, § 2.6 (2006), Establishing the National Biosafety Framework, prescribing guidelines for its implementation, strengthening the National Committee on Biosafety of the Philippines, and for other purposes.

[58] Dep't of Health Adm. Order No. 0009-13, § V(1) (2013). National Chemical Safety Management and Toxicology Policy.

[59] EMB Mem. Circ. No. 005-11, annex 1, at 4 (2011), Incorporating Disaster Risk Reduction (DRR) and Climate Change Adaptation (CCA) concerns in the Philippine EIS System.

Thus, this circular adopts "Version 1" of the precautionary principle.

Sometimes, similar to its role in certain statutes, the precautionary principle is included in the preambular clauses explaining the rationale for the issuance.[60]

The precautionary principle is also used to guide planners in the planning process[61] or in the validation of the safety and efficacy of certain products and derivatives.[62]

3. Ordinances

The precautionary principle has been incorporated into the environmental legislation of several cities and municipalities. These local government units are mandated to apply a precautionary approach in the assessment of risk of environmental harm,[63] and to take immediate preventive action, using the best available knowledge, in situations where there is reason that something is causing a potentially severe or irreparable environment harm even in the absence of conclusive scientific evidence establishing a causal link.[64]

Specific applications include climate-related measures. A Quezon City ordinance on the open burning of refuse[65] makes specific reference to Sec. 2 of the Climate Change Act of 2009, adopting the precautionary principle to guide decision-making in climate risk management.[66] Similarly, the Environment Code of Cebu

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[60] Fisheries Adm. Order No. 223-03, pmbl., Moratorium on the issuance of new commercial fishing vessel and gear license (2003).

[61] HLURB Guidelines for the Application of the Strategic Planning Process in the Preparation of the Comprehensive Land Use Plan (CLUP) and to Import Urban Area and Problems, at 103 (2001).

[62] Rep. Act. No. 8423, Rules & Regs. Implementing Traditional and Alternative Medicine Act of 1997, Rule 5, § 4 (2000).

[63] Aleosan Municipal Ordinance No. 058-11, Ordinance Enacting the Environment Code of the City of Aleosan, Province of Cotabato (2011); San Carlos City Ordinance No. 08-12 San Carlos City Environment Code art. B, §2B.01 (2012); Kalibo General Ordinance No. 005-09 § 4 (2009); A Resolution Enacting the Masbate Provincial Environment Code of 2000 § 2 (2000).

[64] Lingayen Municipal Ordinance No. 012-14 An Ordinance Enacting the Municipal Environment Code of the Municipality of Lingayen, Pangasinan.

[65] Quezon City Ordinance No. Sp-2122-11, An Ordinance Prohibiting the Open Burning of Garbage, Trash or Any Other Refuse Materials Within the Territorial Jurisdiction of Quezon City and for Other Purposes, pmbl. (2011); Carmona Municipal Ordinance No. 007-06, §9(2)(c) (2006), an ordinance enacting the Municipal Environment Code of Carmona, Cavite.

[66] Climate Change Act, Republic Act No. 9729, § 2 (2009).

mandates the use of the precautionary principle as the guide of all decision-making in climate risk management.[67] The principle has also been applied to the regulation of genetic-based erosion and genetic pollution vis-à-vis transgenic organisms through genetic engineering,[68] waste-water treatment,[69] and land-degradation.[70]

B. Judicial Rules and Jurisprudence

1. Rules of Procedure for Environmental Cases (RPEC)

Rule 1 Section 4(f) of the RPEC provides:

> (f) Precautionary principle states that when human activities may lead to threats of serious and irreversible damage to the environment that is scientifically plausible but uncertain, actions shall be taken to avoid or diminish that threat.

This definition seems to follow Version 2 of the Precautionary Principle as described by *Wiener*[71] requiring action despite uncertainty. This rule therefore seems to provide for a substantive duty and not merely a rule of procedure as described in Rule 20.

Rule 20 of the RPEC states:

> SECTION 1. *Applicability.*—When there is a lack of full scientific certainty in establishing a causal link between human activity and environmental effect, the court shall apply the precautionary principle in resolving the case before it.
>
> The constitutional right of the people to a balanced and healthful ecology shall be given the benefit of the doubt.
>
> SECTION 2. *Standards for Application.*—In applying the precaution- ary principle, the following factors, among others, may be considered: (1) threats to human life or health; (2) inequity to present or future

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[67] Cebu Provincial Ordinance No. 13-12, § 1, art. XIII (2012).

[68] *Id.*

[69] San Carlos City Ordinance No. 08-12 San Carlos City Environment Code, § 4F.02 (2012).

[70] Tubungan Municipal Ordinance No. 09-09, § 3(c) (2009), providing for the Comprehensive Ordinance on Environment and for other purposes of Tubungan, Iloilo.

[71] *See* pt. II *infra*.

> generations; or (3) prejudice to the environment without legal consideration of the environmental rights of those affected.

2. Supreme Court Cases

While few in number, the Philippine Supreme Court cases that discuss the precautionary principle are high profile cases of primordial importance.

a. West Tower Condominium v. First Philippine Industrial Corporation et al[72]

i. The Facts of the Case

The First Philippine Industrial Corporation (FPIC) operates two pipelines: (1) the White Oil Pipeline (WOPL) System, which covers a 117-kilometer stretch and transports diesel, gasoline, jet fuel and kerosene; and (b) the Black Oil Pipeline (BOPL) System, which extends 105 kilometers and transports bunker. A Petition for the Issuance of a *Writ of Kalikasan* was filed following the leak in the WOPL system owned by First Philippine Industrial Corporation (FPIC) in Makati City. At one point the petitioners invoked the precautionary principle and asserted that the possibility of a leak in the BOPL System leading to catastrophic environmental damage is enough reason to order the closure of its operation. The Court defined the principle in accordance with Sec. 4(f), Rule 1 of the Rules of Procedure for Environmental Cases:

> the precautionary principle states that when human activities may lead to threats of serious and irreversible damage to the environment that
>
> is scientifically plausible but uncertain, actions shall be taken to avoid or diminish the threat.

The Court ordered the Department of Energy (DOE) to oversee the implementation of its orders to the FPIC. Particularly, the Court was concerned about the management of the pipelines. Upon confirmation of the DOE that the pipelines were ready for commercial operations, the Court will issue an order to resume its operations. The Court also directed FPIC to undertake and continue the remediation, rehabilitation and restoration of the affected Barangay Bangkal environment until full restoration of the affected area to its condition prior to the leakage is achieved.

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[72] G.R. No. 194239, June 16, 2015.

ii. Application of the Principle

The Leonen Dissenting Opinion

In his dissent, Justice *Leonen* argued:

> The Writ of Kalikasan has served its functions and, therefore, is functus officio. The leaks have been found and remedied. The various administrative agencies have identified the next steps that should ensure a viable level of risk that is sufficiently precautionary. In other words, they have shown that they know what to do to prevent future leaks. The rest should be left for them to execute. (emphasis supplied)

Furthermore, *Leonen* said:

> This need for "balance" and the incidence of oil pipeline tragedies prompted the majority to further delay the lifting of the temporary environmental protection order despite findings that support the pipeline's integrity/safety. The majority also ruled that the procedures already conducted in the presence of the Department of Energy should be repeated in light of the uncertainty and fear caused by the cited oil pipeline disasters. In trying to achieve "balance," therefore, and in adopting the Court of Appeals' findings, **the majority adopted a strict application of the precautionary principle. This may result to situations inconsistent with environmental protection.**
>
> Under the Rules, the precautionary principle shall be applied in resolving environmental cases when the causal link between human activity and an environmental effect cannot be established with certainty. Based on this principle, an uncertain scientific plausibility of serious and irreversible damage to the environment justifies actions to avoid the threat of damage. Avoidance of threat or damage, as in this case, usually comes in the form of inhibition of action or activity.
>
> Strict application of the precautionary principle means that the mere presence of uncertainty renders the degree of scientific plausibility for environmental damage irrelevant. Speculations may be sufficient causes for the grant of either a temporary environmental protection order or a permanent environmental protection order, regardless of the extent of losses and risks resulting from it.

This interpretation may be inconsistent with the purpose of avoiding threat or damage to the environment and to the people's general welfare. It was argued that:

> If [the precautionary principle] is taken for all that it is worth, it leads in no direction at all. The reason is that risks of one kind or another are on all sides of regulatory choices, and it is therefore impossible, in most real-world cases, to avoid running afoul of the principle. Frequently, risk regulation creates a (speculative) risk from substitute risks or from foregone risk-reduction opportunities. And because of the (speculative) mortality and morbidity effects of costly regulation, any regulation—if it is costly— threatens to run afoul of the Precautionary Principle.

In the end, the inhibition of pipeline activities may in itself be a plausible and equally harmful threat to the general welfare compared to the threat posed by the pipeline. Permitting the increase of air pollution and unnecessary use of public resources may be inconsistent with the precautionary principle that the majority tried to apply in resolving the case.

Thus, dealing with environmental issues is not as simple as applying the precautionary principle in its strict sense when faced with uncertainty. We must recognize the interconnectedness of variables and issues so that we can address them more effectively and truly in accordance with our policy of taking care of the people's general welfare through environmental protection. (citations omitted)

The Velasco Ponencia

Justice Velasco responded to the dissent in this way:

Justice Leonen, in his dissent, is of the view that the petition should be denied and the TEPO immediately lifted in light of the DOE's issuance of a certification attesting to the safety of the WOPL for continued commercial operations, thereby rendering the instant petition moot and academic, seeking, as it does, the checking of the pipeline's structural integrity. According to his dissent, the writ of kalikasan issued by the Court has already served its functions and, therefore, is functus officio. Moreover, he argues that directing the DOE and FPIC to repeat their

previous procedures is tantamount to doubting the agency's performance of its statutorily-mandated tasks, over which they have the necessary expertise, and implies that said DOE certification is improper, a breach, allegedly, of the principle of separation of powers.

He also contends that the majority ordered the repetition of the procedures and tests already conducted on the WOPL because of the fear and uncertainty on its safeness despite the finding of the DOE in favor of its reopening, taking into consideration the occurrence of numerous pipeline incidents worldwide. The dissent argues that the precautionary principle should not be so strictly applied as to unjustifiably deprive the public of the benefits of the activity to be inhibited, and to unduly create other risks.

The dissent's contentions that the case is already moot and academic, that the writ of kalikasan has already served its function, and that the delay in the lifting of the TEPO may do more harm than good are anchored on the mistaken premise that the precautionary principle was applied in order to justify the order to the DOE and the FPIC for the conduct of the various tests anew. The following reasons easily debunk these arguments:

1. The precautionary principle is not applicable to the instant case;
2. The DOE certification is not an absolute attestation as to the WOPL's structural integrity and in fact imposes several conditions for FPIC's compliance;
3. The DOE itself, in consultation with FPIC and the other concerned agencies, proposed the activities to be conducted preparatory to the reopening of the pipeline; and
4. There are no conclusive findings yet on the WOPL's structural integrity.

Section 1, Rule 20 of A.M. No. 09-6-8-SC or the Rules of Procedure for Environmental Cases, on the Precautionary Principle, provides that "[w]hen there is lack of full scientific certainty in establishing a causal link between human activity and environmental effect, the court shall apply the precautionary principle in resolving the case before it."

According to the dissent, the directive for the repetition of the tests is based on speculations, justified by the application of said principle. This, however, is not the case. Nowhere did We apply the precautionary

principle in deciding the issue on the WOPL's structural integrity.

> The precautionary principle only applies when the link between the cause, that is the human activity sought to be inhibited, and the effect, that is the damage to the environment, cannot be established with full scientific certainty. Here, however, such absence of a link is not an issue. Detecting the existence of a leak or the presence of defects in the WOPL, which is the issue in the case at bar, is different from determining whether the spillage of hazardous materials into the surroundings will cause environmental damage or will harm human health or that of other organisms. As a matter of fact, the petroleum leak and the harm that it caused to the environment and to the residents of the affected areas is not even questioned by FPIC.

Thus, while the dissent argued that the strict application of the precautionary principle may result in greater environmental harm, the majority countered by stating that the precautionary principle did not apply at all.

b. International Service v. Greenpeace[73]

i. The Facts of the Case

Petitioners and other institutions agreed to undertake a collaborative research and development project on eggplants that are resistant to the fruit and shoot borer later described as "Bt Talong." A contained experiment was started in 2007 and officially completed on March 3, 2009. Thereafter, field testing of Bt talong commenced on various dates in the several approved trial sites in Davao City and Laguna.

Subsequently, Greenpeace, MASIPAG and individual respondents (Greenpeace, et al.) filed a petition for *writ of kalikasan* and writ of continuing *mandamus* with prayer for the issuance of a Temporary Environmental Protection Order (TEPO). Greenpeace, et al. argued that this case called for the application of the precautionary principle, the *Bt talong* field testing being a classic environmental case where scientific evidence as to the health, environmental and socio-economic safety is insufficient or uncertain and preliminary scientific evaluation indicates reasonable grounds for concern that there are potentially dangerous effects on human health and the environment. In response, it was argued that the precautionary principle is not applicable considering that the field testing is only a part of a

[73] G.R. No. 209271, Dec. 8, 2015.

continuing study being done to ensure that the field trials have no significant and negative impact on the environment. There was no resulting environmental damage of such magnitude as to prejudice the life, health, property of inhabitants in two or more cities or provinces.

The appellate court concluded that the precautionary principle set forth in Section 1, Rule 20 of the Rules of Procedure for Environmental Cases was relevant, stressing the fact that the "over-all safety guarantee of the *Bt talong* remained unknown. In its Resolution denying the Motion for Reconsideration the appellate court said:

> Of course, the *bt talong's* threat to the human health of the Filipinos as of now remains **uncertain**. This is because while, on one hand, no Filipinos has ever eaten it yet, and so, there is no factual evidence of it actually causing acute or chronic harm to any or a number of ostensibly identifiable perms, on the other hand, there is correspondingly no factual evidence either of it not causing harm to anyone. However, in a study published on September 20, 2012 in *"Food and Chemical Toxicology,"* a team of scientists led by Professor GillesEric Seralini from the University of Caen and backed by the Francebased Committee of Independent Research and Information on Genetic Engineering came up with a finding that rats fed with Roundup-tolerant genetically modified corn for two years developed cancers, tumors and multiple organ damage. The seven expert witnesses who testified in this Court in the hearing conducted on November 20, 2012 were duly confronted with this finding and they were not able to convincingly rebut it. **That is why we, in deciding this case, applied the precautionary principle** in granting the petition filed in the case at bench. (emphasis supplied)

ii. Application of the Principle

The Court began by explaining its understanding of the background of the precautionary principle:

> The precautionary principle originated in Germany in the 1960s, expressing the normative idea that governments are obligated to "foresee and forestall" harm to the environment. In the following decades, the precautionary principle has served as the normative guideline for policymaking by many national governments. The Rio Declaration on Environment and Development, the outcome of the 1992 United Nations Conference on Environment and Development held in Rio de Janeiro, defines the rights of the people to be involved in the

development of their economies, and the responsibilities of human beings to safeguard the common environment. It states that the long term economic progress is only ensured if it is linked with the protection of the environment. For the first time, the precautionary approach was codified under Principle 15, which reads:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.
>
> Principle 15 codified for the first time at the global level the precautionary approach, which indicates that lack of scientific certainty is no reason to postpone action to avoid potentially serious or irreversible harm to the environment. It has been incorporated in various international legal instruments.

The Court then explained the connection between the Cartagena Protocol and the Precautionary Principle:

> The Cartagena Protocol on Biosafety to the Convention on Biological Diversity, finalized and adopted in Montreal on January 29, 2000, establishes an international regime primarily aimed at regulating trade in GMOs intended for release into the environment, in accordance with Principle 15 of the Rio Declaration on Environment and Development.

After quoting Part V, Rule 20 of the Environmental Rules of Procedure the Court said:

> Under this Rule, the precautionary principle finds direct application **in the evaluation of evidence** in cases before the courts. The precautionary principle bridges the gap in cases where scientific certainty in factual findings cannot be achieved. By applying the precautionary principle, **the court may construe a set of facts as warranting either judicial action or inaction, with the goal of preserving and protecting the environment**. This may be further evinced from the second paragraph where bias is created in favor of the constitutional right of the people to a balanced and healthful ecology. In effect, **the**

> **precautionary principle shifts the burden of evidence of harm away from those likely to suffer harm and onto those desiring to change the status quo**. An application of the precautionary principle to the rules on evidence will enable courts to tackle future environmental problems before ironclad scientific consensus emerges.
>
> For purposes of evidence, the precautionary principle should be treated as a principle of last resort, where application of the regular Rules of Evidence would cause in an inequitable result for the environmental plaintiff—(a) settings in which the risks of harm are uncertain; (b) settings in which harm might be irreversible and what is lost is irreplaceable; and (c) settings in which the harm that might result would be serious. When these features—**uncertainty**, the **possibility of irreversible harm**, and the **possibility of serious harm**—coincide, the case for the precautionary principle is strongest. When in doubt, cases must be resolved in favor of the constitutional right to a balanced and healthful ecology. Parenthetically, judicial adjudication is one of the strongest fora in which the precautionary principle may find applicability. (Citations omitted)

The Court found that all the three conditions were present in this case—uncertainty, the possibility of irreversible harm and the possibility of serious harm. It further explained that although "the goal of increasing crop yields to raise farm incomes is laudable, independent scientific studies revealed uncertainties due to unfulfilled economic benefits from *Bt* crops and plants, adverse effects on the environment associated with use of GE technology in agriculture, and serious health hazards from consumption of GM foods." It further explained:

> Alongside the aforesaid uncertainties, the non-implementation of the [National Biosafety Framework (NBF)] in the crucial stages of risk assessment and public consultation, including the determination of the applicability of the [Environmental Impact Statements] requirements to GMO field testing, are compelling reasons for the application of the precautionary principle. There exists a preponderance of evidence that the release of GMOs into the environment *threatens* to damage our ecosystems and not just the field trial sites, and eventually the health of our people once the *Bt* eggplants are consumed as food. Adopting the precautionary approach, the Court rules that the principles of the NBF need to be operationalized first by the coordinated actions of the concerned departments and agencies before allowing the release into the environment of genetically modified eggplant. The more prudent course

> is to immediately enjoin the *Bt talong* field trials and approval for its propagation or commercialization until the said government offices shall have performed their respective mandates to implement the NBF.
>
> The Court stated further that:
>
> the precautionary approach entailed inputs from all stakeholders, including the marginalized farmers, not just the scientific community. This proceeds from the realization that acceptance of uncertainty is not only a scientific issue, but is related to public policy and involves an ethical dimension. For scientific research alone will not resolve all the problems, but participation of different stakeholders from scientists to industry, NGOs, farmers and the public will provide a needed variety of perspective foci, and knowledge. (citations omitted)

Thus, the Court in this case applied the Precautionary Principle merely as a rule on evidence which shifts the burden of proof.

c. SJS Officers v. Lim[74]

i. The Facts of the Case

The case involved consolidated petitions, assailing the validity of Ordinance No. 8187 amending the Manila Comprehensive Land Use Plan and Zoning Ordinance of 2006, by creating a Medium Industrial Zone (MIZ) and Heavy Industrial Zone (HIZ) enacted by the Sangguniang Panlungsod of Manila. The creation of a MIZ and the HIZ effectively lifted the prohibition against owners and operators of businesses, including the oil companies who intervened in this case, from operating in the designated commercial zone.

The petitions were a sequel to the case of *Social Justice Society v. Mayor Atienza, Jr.*[75] where the Court ordered the relocation and transfer of the Pandacan oil terminals.

The Court declared the ordinance unconstitutional.

ii. Application of the Principle

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[74] G.R. No. 187836, Nov. 25, 2014.

[75] G.R. No. 156052, Mar. 7, 2007.

Justice *Leonen* in his concurring and dissenting opinion said that:

> The precautionary principle certainly does not sanction a suspension of judicial rules with respect to evidence, reason, and legal interpretation.

In response to an argument made by Mayor Atienza that Ordinance 8187 violates the precautionary principle, Justice *Leonen* said:

> The precautionary principle applies when it can be shown that there is plausible risk, and its causes cannot be determined with scientific certainty. It is not available simply on the basis of imagined fears or imagined causes. Otherwise, it will be absurd. Rather than a reactive approach to fear, the precautionary principle is evolving as a proactive approach in protecting the environment." Furthermore, being only a principle, it does not trump the requirements for proper invocation of remedies or act to repeal existing laws.

d. Mosqueda v. Pilipino Banana Growers and Exporters Association[76]

i. Facts of the case

The Sangguniang Panlungsod of Davao City enacted Ordinance No. 0309, Series of 2007, imposing a ban against aerial spraying as an agricultural practice by all agricultural entities within Davao City. The Pilipino Banana Growers and Exporters Association, Inc. (PBGEA) and two of its members, namely: Davao Fruits Corporation and Lapanday Agricultural and Development Corporation (PBGEA, et al.), filed their petition in the trial court to challenge the constitutionality of the ordinance, and to seek the issuance of provisional reliefs through a temporary restraining order alleging that the ordinance exemplified the unreasonable exercise of police power; violated the equal protection clause; amounted to the confiscation of property without due process of law. The trial court upheld the validity of the ordinance but was reversed by the appellate court.

This case consists of consolidated petitions for review assailing the appellate court's decision.

The Court affirmed the ruling of the appellate court.

[76] G.R. No. 189185, Aug. 16, 2016.

ii. Application of the principle

The petitioners argued that the appellate court failed to apply the precautionary principle, by which the State was allowed to take positive actions to prevent harm to the environment and to human health despite the lack of scientific certainty. The respondents countered that that the precautionary principle cannot be applied blindly, because its application still requires some scientific basis; that the principle is also based on a mere declaration that has not even reached the level of customary international law and was not on a treaty binding on the Government.

The petitioners pleaded that the Court should look at the merits of the ordinance based on the precautionary principle arguing that under the principle, the City of Davao is justified in enacting Ordinance No. 0309-07 in order to prevent harm to the environment and human health despite the lack of scientific certainty.

The Court disagreed. It began its explanation by explaining its understanding of the background of the principle:

> The principle of precaution originated as a social planning principle in Germany. In the 1980s, the Federal Republic of Germany used the *Vorsogeprinzip* ("foresight principle") to justify the implementation of vigorous policies to tackle acid rain, global warming and pollution of the North Sea. It has since emerged from a need to protect humans and the environment from increasingly unpredictable, uncertain, and unquantifiable but possibly catastrophic risks such as those associated with Genetically Modified Organisms and climate change, among others. The oft-cited Principle 15 of the 1992 Rio Declaration on Environment and Development (1992 Rio Agenda), first embodied this principle, as follows:
>
> > Principle 15
> >
> > In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The Court then explained the principle's application under Philippine law:

In this jurisdiction, the principle of precaution appearing in the *Rules of Procedure for Environmental Cases* (A.M. No. 09-6-8-SC) involves matters of evidence in cases where there is lack of full scientific certainty in establishing a causal link between human activity and environmental effect. In such an event, the courts may construe a set of facts as warranting either judicial action or inaction with the goal of preserving and protecting the environment.

It is notable, therefore, that the precautionary principle shall only be relevant if there is concurrence of three elements, namely: *uncertainty, threat of environmental damage* and *serious or irreversible harm*. In situations where the threat is relatively certain, or that the causal link between an action and environmental damage can be established, or the probability of occurrence can be calculated, only preventive, not precautionary measures, may be taken. Neither will the precautionary principle apply if there is no indication of a threat of environmental harm, or if the threatened harm is trivial or easily reversible.

The Court held that the elements were not present. It said:

To begin with, there has been no scientific study. Although the precautionary principle allows lack of full scientific certainty in establishing a connection between the serious or irreversible harm and the human activity, its application is still premised on empirical studies. Scientific analysis is still a necessary basis for effective policy choices under the precautionary principle.

Precaution is a risk management principle invoked after scientific inquiry takes place. This scientific stage is often considered synonymous with risk assessment. As such, resort to the principle shall not be based on anxiety or emotion, but from a rational decision rule, based in ethics. As much as possible, a complete and objective scientific evaluation of the risk to the environment or health should be conducted and made available to decision-makers for them to choose the most appropriate course of action. Furthermore, the positive and negative effects of an activity is also important in the application of the principle. The potential harm resulting from certain activities should always be judged in view of the potential benefits they offer, while the positive and negative effects of potential precautionary measures should be considered. (citations omitted)

The Court found that the only study conducted to validate the effects of aerial spraying was the *Summary Report on the Assessment and Fact-Finding Activities on the Issue of Aerial Spraying in Banana Plantations* but said that this was not a scientific study that could justify the resort to the precautionary principle. It said that in fact, the Sangguniang Bayan ignored the findings and conclusions of the fact-finding team that recommended only a regulation, not a ban, against aerial spraying.

The Court held that it should not apply the precautionary approach in sustaining the ban against aerial spraying:

> if little or nothing is known of the exact or potential dangers that aerial spraying may bring to the health of the residents within and near the plantations and to the integrity and balance of the environment. It is dangerous to quickly presume that the effects of aerial spraying would be adverse even in the absence of evidence. Accordingly, for lack of scientific data supporting a ban on aerial spraying, Ordinance No. 0309-07 should be struck down for being unreasonable.

e. Spouses Imbong v. Ochoa, Jr.[77]

i. Facts of the Case

This case questions the constitutionality of Republic Act No. 10354, otherwise known as the Responsible Parenthood and Reproductive Health Act of 2012 or RH Law. The Court declared the RH Law constitutional. *ii. Application of the Principle*

In Justice *Leonardo-DeCastro's* Concurring Opinion, she said:

> … in cases involving the environment, there is a precautionary principle which states that "when human activities may lead to threats of serious and irreversible damage to the environment that is scientifically plausible but uncertain, actions shall be taken to avoid or diminish that threat. (citations omitted)

[77] G.R. Nos. 204819, 204934, 204957, 204988, 205003, 205043, 205138, 205478, 205491, 205720, 206355, 207111, 207172 & 207563, Apr. 8, 2014.

After quoting Rule 20 of the Rules of Procedure for Environmental Cases, she added:

> The precautionary principle seeks to protect the rights of the present generation as well as to enforce intergenerational responsibility, that is, the present generation should promote sustainable development and act as stewards or caretakers of the environment for the benefit of generations yet unborn. In its essence, the precautionary principle calls for the exercise of caution in the face of risk and uncertainty. It acknowledges the peculiar circumstances surrounding environmental cases in that "scientific evidence is usually insufficient, inconclusive or uncertain and preliminary scientific evaluation indicates that there are reasonable grounds for concern" that there are potentially dangerous effects on the environment, human, animal, or planet health. For this reason, the precautionary principle requires those who have the means, knowledge, power, and resources to take action to prevent or mitigate the harm to the environment or to act when conclusively ascertained understanding by science is not yet available.
>
> The right to health, which is an indispensable element of the right to life, deserves the same or even higher degree of protection. Thus, if it is scientifically plausible but uncertain that any foreign substance or material ingested or implanted in the woman's body may lead to threats of serious and irreversible damage to her or her unborn child's right life or health, care should be taken to avoid or diminish that threat. The principle of prudence requires that such a rule be adopted in matters concerning the right to life and health. In the face of the conflicting claims and findings presented by the parties, and considering that the right to health is inextricably intertwined with the right to life, it is proper to refer to the principle of prudence, which is the principle relied on by the framers of the 1987 Constitution on matters affecting the right to life. Thus, any uncertainty on the adverse effects of making contraceptives universally accessible on the life and health of the people, especially of women, should be resolved in a way that will promote life and health.

De Castro argued that "the application by logical and actual necessity of the precautionary principle also gains relevance in the discussion of the implications of the RH Law on the people's right to health" because the "unresolved medical issue on the potentially life-threatening effects of hormonal contraceptives and IUDs demands a cautious approach in the face of risk and uncertainty so as to prevent or

mitigate the harm or threat of harm to the people, particularly to women." Thus, she believed that "[t]he principle of prudence and the precautionary principle in matters concerning the right to life and health may be better promoted by continuing the regulation of the sale, dispensation and distribution of contraceptive drugs and devices under Republic Act No. 4729."

Justice *De Castro* said finally:

> Considering the relevant medical issues and health concerns in connection with contraceptives and devices, the regulated framework under Republic Act No. 4729 where contraceptive drugs and devices are sold, dispensed or distributed only by duly licensed drug stores or pharmaceutical companies pursuant to a doctor's prescription is no doubt more in harmony with the principle of prudence and the precautionary principle than the apparently unrestricted or universal access approach under the RH Law. This is so as the bodies of women may react differently to said drugs or devices depending on many factors that only a licensed doctor is capable of determining. Thus, the universal access policy should be read as qualified by the regulated framework under Republic Act No. 4729 rather than as impliedly repealing the said law.

Thus, similar to its application in international law, the precautionary principle has moved from environmental law to public health concerns and human rights.

VI. Conclusion

Similar to its popularity in international law, the precautionary principle figures prominently in Philippine law and jurisprudence. It can be found in most, if not all sources of domestic legislation. Not only has Congress seen it fit to include it in statutes, the executive branch has also incorporated it in local government and administrative issuances. The judiciary has likewise incorporated it in rules of procedure and applied it in landmark cases. Clearly, the precautionary principle is permanently etched in Philippine practice.

But similar to its status under international law, the application of the precautionary principle under Philippine law is also unclear. It is ironic that while the precautionary principle seeks to overcome the problem of scientific uncertainty, it nevertheless creates uncertainty as to its application. In statutes and administrative issuances, the precautionary principle is used as a guide to interpretation or operationalization of the obligations stated therein. But without a clearly defined

statement of the precautionary principle in most of these issuances, it will always be uncertain whether or not it is applied as it should. Without a clear statement in these laws themselves of what the precautionary principle requires, there is a danger that it would simply become an admonition to "be careful" and nothing more.

However, it may be said that it is exactly the lack definite statement of the precautionary principle which makes it so attractive to the lawmaker. It has been argued that:

> Paradoxically, we conclude that the application of precaution will remain politically potent so long as it continues to be tantalizingly ill-defined and imperfectly translatable into codes of conduct, while capturing emotions of misgivings and guilt.[78]

But the absence of exact meaning may also mean that Philippine practice as such contributes little as state practice. If all Philippine legislation does is pay lip service to the concept, state practice would simply be a recognition that the principle exists and nothing more.

In the case of judicial practice, there appears to be more certainty. The RPEC provides for a definition of the precautionary principle and some guidelines on when it applies. The jurisprudence as well provides for more insight on the Court's attitude towards the precautionary principle.

Clearly, the application of the precautionary principle under Philippine law requires further study. By doing so, Philippine practice may influence the development of this principle under international law.

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[78] Timothy O'Riordan & Andrew Jordan, *The Precautionary Principle in Contemporary Environmental Policy and Politics,* 4 ENV'TL. VALUES 195, quoted in WIENER, *supra* note 1, at 602.

NOTES ON THE TREATY ON PROHIBITION OF NUCLEAR WEAPONS

MERLIN M. MAGALLONA

On 20 September 2017, during the 72nd Session of the United Nations General Assembly, the Treaty on the Prohibition of Nuclear Weapons was opened for signature. The Philippines was among the first Member States to sign the Treaty on the date.

At various times during the Cold War, in the supreme attempt to prevent the Hiroshima and Nagasaki catastrophe, the contending powers concluded agreements on limitations of nuclear weapons. These began with the Treaty on Non-Proliferation of Nuclear Weapons of 1968, followed by agreements on test ban of nuclear weapons: Treaty Banning Nuclear Weapon Test in the Atmosphere, in Outer Space and Under Water in 1963, Treaty on the Limitation of Underground Weapons Tests in 1974. Then the Comprehensive Nuclear Test Ban Treaty prohibited all nuclear testing.

The Treaty on the Prohibition of Nuclear Weapons gives finality to the international legal regulation of nuclear weapons. In 1995, the United Nations General Assembly, together with the World Health Organization, requested for an Advisory Opinion from the International Court of Justice (ICJ) on The *Legality of the Threat or Use of Nuclear Weapons*. By seven votes to seven, the ICJ concluded that:

> the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular, the principles and rules of humanitarian law;
>
> However, in view of the current state of international law and of the elements of fact at its disposal, the Court cannot conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake; . . .

Assuming that the Prohibition Treaty would enter into force, there would be no impediment to conclude that as a result, the threat or use of nuclear weapons would as a rule be unlawful.

But, at the start, the decisive problem is, would the States owning, possessing or controlling nuclear weapons be Parties to the Treaty?

The repeated nuclear threats by North Korea directed at the United States in particular, became most serious when on Wednesday, last November 29, it launched what it considers as its "greatest ICBM" to be armed with a "super large heavy nuclear warhead" that can devastate the "whole mainland of the United States."

It was such a great relief when a policy upheaval came on June 12, achieved by the summit meeting of US President Donald Trump and Kim Jong-Un of North Korea. Thereby, immediately the "nuclear weapons program" that threatened the United States lost its diplomatic urgency and the denuclearization of the Korean peninsula came into view.

However, the United States is in the process of undermining its own commitment in the diplomatic agreement that prevents Iran from obtaining or developing nuclear weapons. It has been reported that President Trump will refuse to certify anew that Iran has been complying with the nuclear deal – a move that will enable the U.S. Congress to impose sanctions on Iran that violate the agreement.

The nuclear deal under question is the Joint Comprehensive Plan of Action which was concluded in 2015 between Iran and the five members of the UN Security Council – the United States, Britain, France, Russia and China, together with Germany. The nuclear deal is embodied in the UN Security Resolution 2231 and thus enjoys the support of the whole Security Council membership, and virtually by the whole United Nations. Resolution 2331 "calls upon" Iran not to work on "ballistic missiles designed to be capable of delivering nuclear weapons."

On August 7, as reported by the AFP, President Trump "re-imposed a wave of tough, unilateral sanctions against Iran, bringing back into effect harsh penalties that had been lifted under a historic multi-party nuclear agreement that Trump abandoned in May.

TREATY ON THE PROHIBITION OF NUCLEAR WEAPONS

The States Parties to this Treaty,

Determined to contribute to the realization of the purposes and principles of the Charter of the United Nations,

Deeply concerned about the catastrophic humanitarian consequences that would result from any use of nuclear weapons, and recognizing the consequent need to completely eliminate such weapons, which remains the only way to guarantee that nuclear weapons are never used again under any circumstances,

Mindful of the risks posed by the continued existence of nuclear weapons, including from any nuclear-weapon detonation by accident, miscalculation or design, and emphasizing that these risks concern the security of all humanity, and that all States share the responsibility to prevent any use of nuclear weapons,

Cognizant that the catastrophic consequences of nuclear weapons cannot be adequately addressed, transcend national borders, pose grave implications for human survival, the environment, socioeconomic development, the global economy, food security and the health of current and future generations, and have a disproportionate impact on women and girls, including as a result of ionizing radiation,

Acknowledging the ethical imperatives for nuclear disarmament and the urgency of achieving and maintaining a nuclear-weapon-free world, which is a global public good of the highest order, serving both national and collective security interests,

Mindful of the unacceptable suffering of and harm caused to the victims of the use of nuclear weapons (hibakusha), as well as of those affected by the testing of nuclear weapons,

Recognizing the disproportionate impact of nuclear-weapon activities on indigenous peoples,

Reaffirming the need for all States at all times to comply with applicable international law, including international humanitarian law and international human rights law,

Basing themselves on the principles and rules of international humanitarian law, in particular the principle that the right of parties to an armed conflict to choose methods or means of warfare is not unlimited, the rule of distinction, the prohibition against indiscriminate attacks, the rules on proportionality and precautions in attack, the prohibition on the use of weapons of a nature to cause superfluous injury or unnecessary suffering, and the rules for the protection of the natural environment,

Considering that any use of nuclear weapons would be contrary to the rules of international law applicable in armed conflict, in particular the principles and rules of international humanitarian law,

Reaffirming that any use of nuclear weapons would also be abhorrent to the principles of humanity and the dictates of public conscience,

Recalling that, in accordance with the Charter of the United Nations, States must refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations, and that the establishment and maintenance of international peace and security are to be promoted with the least diversion for armaments of the world's human and economic resources,

Recalling also the first resolution of the General Assembly of the United Nations, adopted on 24 January 1946, and subsequent resolutions which call for the elimination of nuclear weapons,

Concerned by the slow pace of nuclear disarmament, the continued reliance on nuclear weapons in military and security concepts, doctrines and policies, and the waste of economic and human resources on programmes for the production, maintenance and modernization of nuclear weapons,

Recognizing that a legally binding prohibition of nuclear weapons constitutes an important contribution towards the achievement and maintenance of a world free of nuclear weapons, including the irreversible, verifiable and transparent elimination of nuclear weapons, and determined to act towards that end,

Determined to act with a view to achieving effective progress towards general and complete disarmament under strict and effective international control,

Reaffirming that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control,

Reaffirming also that the full and effective implementation of the Treaty on the Non-Proliferation of Nuclear Weapons, which serves as the cornerstone of the nuclear disarmament and non-proliferation regime, has a vital role to play in promoting international peace and security,

Recognizing the vital importance of the Comprehensive Nuclear-Test-Ban Treaty and its verification regime as a core element of the nuclear disarmament and non-proliferation regime,

Reaffirming the conviction that the establishment of the internationally recognized nuclear-weapon-free zones on the basis of arrangements freely arrived at among the States of the region concerned enhances global and regional peace and security, strengthens the nuclear non-proliferation regime and contributes towards realizing the objective of nuclear disarmament,

Emphasizing that nothing in this Treaty shall be interpreted as affecting the inalienable right of its States Parties to develop research, production and use of nuclear energy for peaceful purposes without discrimination,

Recognizing that the equal, full and effective participation of both women and men is an essential factor for the promotion and attainment of sustainable peace and security, and committed to supporting and strengthening the effective participation of women in nuclear disarmament,

Recognizing also the importance of peace and disarmament education in all its aspects and of raising awareness of the risks and consequences of nuclear weapons for current and future generations, and committed to the dissemination of the principles and norms of this Treaty,

Stressing the role of public conscience in the furthering of the principles of humanity as evidenced by the call for the total elimination of nuclear weapons, and recognizing the efforts to that end undertaken by the United Nations, the International Red Cross and Red Crescent Movement, other international and regional organizations, non-governmental organizations, religious leaders, parliamentarians, academics and the hibakusha,

Have agreed as follows:

Article 1
Prohibitions

1. Each State Party undertakes never under any circumstances to:

(a) Develop, test, produce, manufacture, otherwise acquire, possess or stockpile nuclear weapons or other nuclear explosive devices;
(b) Transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly or indirectly;
(c) Receive the transfer of or control over nuclear weapons or other nuclear explosive devices directly or indirectly;
(d) Use or threaten to use nuclear weapons or other nuclear explosive devices;
(e) Assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Treaty;
(f) Seek or receive any assistance, in any way, from anyone to engage in any activity prohibited to a State Party under this Treaty;
(g) Allow any stationing, installation or deployment of any nuclear weapons or other nuclear explosive devices in its territory or at any place under its jurisdiction or control.

Article 2
Declarations

1. Each State Party shall submit to the Secretary-General of the United Nations, not later than 30 days after this Treaty enters into force for that State Party, a declaration in which it shall:

(a) Declare whether it owned, possessed or controlled nuclear weapons or nuclear explosive devices and eliminated its nuclear-weapon programme, including the elimination or irreversible conversion of all nuclear-weapons-related facilities, prior to the entry into force of this Treaty for that State Party;

(b) Notwithstanding Article 1(a), declare whether it owns, possesses or controls any nuclear weapons or other nuclear explosive devices;
(c) Notwithstanding Article 1(g), declare whether there are any nuclear weapons or other nuclear explosive devices in its territory or in any place under its jurisdiction or control that are owned, possessed or controlled by another State.

2. The Secretary-General of the United Nations shall transmit all such declarations received to the States Parties.

Article 3
Safeguards

1. Each State Party to which Article 4, paragraph 1 or 2, does not apply shall, at a minimum, maintain its International Atomic Energy Agency safeguards obligations in force at the time of entry into force of this Treaty, without prejudice to any additional relevant instruments that it may adopt in the future.

2. Each State Party to which Article 4, paragraph 1 or 2, does not apply that has not yet done so shall conclude with the International Atomic Energy Agency and bring into force a comprehensive safeguards agreement (INFCIRC/153 (Corrected)). Negotiation of such agreement shall commence within 180 days from the entry into force of this Treaty for that State Party. The agreement shall enter into force no later than 18 months from the entry into force of this Treaty for that State Party. Each State Party shall thereafter maintain such obligations, without prejudice to any additional relevant instruments that it may adopt in the future.

Article 4
Towards the total elimination of nuclear weapons

1. Each State Party that after 7 July 2017 owned, possessed or controlled nuclear weapons or other nuclear explosive devices and eliminated its nuclear-weapon programme, including the elimination or irreversible conversion of all nuclear-weapons-related facilities, prior to the entry into force of this Treaty for it, shall cooperate with the competent international authority designated pursuant to paragraph 6 of this Article for the purpose of verifying the irreversible elimination of its nuclear-weapon programme. The competent international

authority shall report to the States Parties. Such a State Party shall conclude a safeguards agreement with the International Atomic Energy Agency sufficient to provide credible assurance of the non-diversion of declared nuclear material from peaceful nuclear activities and of the absence of undeclared nuclear material or activities in that State Party as a whole. Negotiation of such agreement shall commence within 180 days from the entry into force of this Treaty for that State Party. The agreement shall enter into force no later than 18 months from the entry into force of this Treaty for that State Party. That State Party shall thereafter, at a minimum, maintain these safeguards obligations, without prejudice to any additional relevant instruments that it may adopt in the future.

2. Notwithstanding Article 1(a), each State Party that owns, possesses or controls nuclear weapons or other nuclear explosive devices shall immediately remove them from operational status, and destroy them as soon as possible but not later than a deadline to be determined by the first meeting of States Parties, in accordance with a legally binding, time-bound plan for the verified and irreversible elimination of that State Party's nuclear-weapon programme, including the elimination or irreversible conversion of all nuclear-weapons-related facilities. The State Party, no later than 60 days after the entry into force of this Treaty for that State Party, shall submit this plan to the States Parties or to a competent international authority designated by the States Parties. The plan shall then be negotiated with the competent international authority, which shall submit it to the subsequent meeting of States Parties or review conference, whichever comes first, for approval in accordance with its rules of procedure.

3. A State Party to which paragraph 2 above applies shall conclude a safeguards agreement with the International Atomic Energy Agency sufficient to provide credible assurance of the non-diversion of declared nuclear material from peaceful nuclear activities and of the absence of undeclared nuclear material or activities in the State as a whole. Negotiation of such agreement shall commence no later than the date upon which implementation of the plan referred to in paragraph 2 is completed. The agreement shall enter into force no later than 18 months after the date of initiation of negotiations. That State Party shall thereafter, at a minimum, maintain these safeguards obligations, without prejudice to any additional relevant instruments that it may adopt in the future. Following the entry into force of the agreement referred to in this paragraph, the State Party shall submit to the Secretary-General of the United Nations a final declaration that it has fulfilled its obligations under this Article.

4. Notwithstanding Article 1(b) and (g), each State Party that has any nuclear weapons or other nuclear explosive devices in its territory or in any place under its jurisdiction or control that are owned, possessed or controlled by another State shall ensure the prompt removal of such weapons, as soon as possible but not later than a deadline to be determined by the first meeting of States Parties. Upon the removal of such weapons or other explosive devices, that State Party shall submit to the Secretary-General of the United Nations a declaration that it has fulfilled its obligations under this Article.

5. Each State Party to which this Article applies shall submit a report to each meeting of States Parties and each review conference on the progress made towards the implementation of its obligations under this Article, until such time as they are fulfilled.

6. The States Parties shall designate a competent international authority or authorities to negotiate and verify the irreversible elimination of nuclear-weapons programmes, including the elimination or irreversible conversion of all nuclear-weapons-related facilities in accordance with paragraphs 1, 2 and 3 of this Article. In the event that such a designation has not been made prior to the entry into force of this Treaty for a State Party to which paragraph 1 or 2 of this Article applies, the Secretary-General of the United Nations shall convene an extraordinary meeting of States Parties to take any decisions that may be required.

Article 5
National implementation

1. Each State Party shall adopt the necessary measures to implement its obligations under this Treaty.

2. Each State Party shall take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Treaty undertaken by persons or on territory under its jurisdiction or control.

Article 6
Victim assistance and environmental remediation

1. Each State Party shall, with respect to individuals under its jurisdiction who are affected by the use or testing of nuclear weapons, in

Article 6
Victim Assistance and Environmental Remediation

1. Each State Party shall, with respect to individuals under its jurisdiction who are affected by the use or testing of nuclear weapons, in accordance with applicable international humanitarian and human rights law, adequately provide age-and gender-sensitive assistance, without discrimination, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion.

2. Each State Party, with respect to areas under its jurisdiction or control contaminated as a result of activities related to the testing or use of nuclear weapons or other nuclear explosive devices, shall take necessary and appropriate measures towards the environmental remediation of areas so contaminated.

3. The obligations under paragraphs 1 and 2 above shall be without prejudice to the duties and obligations of any other States under international law or bilateral agreements.

Article 7
International Cooperation and Assistance

1. Each State Party shall cooperate with other States Parties to facilitate the implementation of this Treaty.

2. In fulfilling its obligations under this Treaty, each State Party shall have the right to seek and receive assistance, where feasible, from other States Parties.

3. Each State Party in a position to do so shall provide technical, material and financial assistance to States Parties affected by nuclear-weapons use or testing, to further the implementation of this Treaty.

4. Each State Party in a position to do so shall provide assistance for the victims of the use or testing of nuclear weapons or other nuclear explosive devices.

5. Assistance under this Article may be provided, inter alia, through the United Nations system, international, regional or national organizations or institutions, non-governmental organizations or institutions, the International

6. Without prejudice to any other duty or obligation that it may have under international law, a State Party that has used or tested nuclear weapons or any other nuclear explosive devices shall have a responsibility to provide adequate assistance to affected States Parties, for the purpose of victim assistance and environmental remediation.

Article 8
Meeting of States Parties

1. The States Parties shall meet regularly in order to consider and, where necessary, take decisions in respect of any matter with regard to the application or implementation of this Treaty, in accordance with its relevant provisions, and on further measures for nuclear disarmament, including:

(a) The implementation and status of this Treaty;
(b) Measures for the verified, time-bound and irreversible elimination of nuclear-weapon programmes, including additional protocols to this Treaty;
(c) Any other matters pursuant to and consistent with the provisions of this Treaty.

2. The first meeting of States Parties shall be convened by the Secretary-General of the United Nations within one year of the entry into force of this Treaty. Further meetings of States Parties shall be convened by the Secretary-General of the United Nations on a biennial basis, unless otherwise agreed by the States Parties. The meeting of States Parties shall adopt its rules of procedure at its first session. Pending their adoption, the rules of procedure of the United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination, shall apply.

3. Extraordinary meetings of States Parties shall be convened, as may be deemed necessary, by the Secretary-General of the United Nations, at the written request of any State Party provided that this request is supported by at least one third of the States Parties.

4. After a period of five years following the entry into force of this Treaty, the Secretary-General of the United Nations shall convene a conference to review the operation of the Treaty and the progress in achieving the purposes of the Treaty. The Secretary-General of the United Nations shall convene further

review conferences at intervals of six years with the same objective, unless otherwise agreed by the States Parties.

5. States not party to this Treaty, as well as the relevant entities of the United Nations system, other relevant international organizations or institutions, regional organizations, the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies and relevant non-governmental organizations, shall be invited to attend the meetings of States Parties and the review conferences as observers.

Article 9
Costs

1. The costs of the meetings of States Parties, the review conferences and the extraordinary meetings of States Parties shall be borne by the States Parties and States not party to this Treaty participating therein as observers, in accordance with the United Nations scale of assessment adjusted appropriately.

2. The costs incurred by the Secretary-General of the United Nations in the circulation of declarations under Article 2, reports under Article 4 and proposed amendments under Article 10 of this Treaty shall be borne by the States Parties in accordance with the United Nations scale of assessment adjusted appropriately.

3. The cost related to the implementation of verification measures required under Article 4 as well as the costs related to the destruction of nuclear weapons or other nuclear explosive devices, and the elimination of nuclear-weapon programmes, including the elimination or conversion of all nuclear-weapons-related facilities, should be borne by the States Parties to which they apply.

Article 10
Amendments

1. At any time after the entry into force of this Treaty, any State Party may propose amendments to the Treaty. The text of a proposed amendment shall be communicated to the Secretary-General of the United Nations, who shall circulate it to all States Parties and shall seek their views on whether to consider the proposal. If a majority of the States Parties notify the Secretary-General of

the United Nations no later than 90 days after its circulation that they support further consideration of the proposal, the proposal shall be considered at the next meeting of States Parties or review conference, whichever comes first.

2. A meeting of States Parties or a review conference may agree upon amendments which shall be adopted by a positive vote of a majority of two thirds of the States Parties. The Depositary shall communicate any adopted amendment to all States Parties.

3. The amendment shall enter into force for each State Party that deposits its instrument of ratification or acceptance of the amendment 90 days following the deposit of such instruments of ratification or acceptance by a majority of the States Parties at the time of adoption. Thereafter, it shall enter into force for any other State Party 90 days following the deposit of its instrument of ratification or acceptance of the amendment.

Article 11
Settlement of disputes

1. When a dispute arises between two or more States Parties relating to the interpretation or application of this Treaty, the parties concerned shall consult together with a view to the settlement of the dispute by negotiation or by other peaceful means of the parties' choice in accordance with Article 33 of the Charter of the United Nations.

2. The meeting of States Parties may contribute to the settlement of the dispute, including by offering its good offices, calling upon the States Parties concerned to start the settlement procedure of their choice and recommending a time limit for any agreed procedure, in accordance with the relevant provisions of this Treaty and the Charter of the United Nations.

Article 12
Universality

Each State Party shall encourage States not party to this Treaty to sign, ratify, accept, approve or accede to the Treaty, with the goal of universal adherence of all States to the Treaty.

Article 13
Signature

This Treaty shall be open for signature to all States at United Nations Headquarters in New York as from 20 September 2017.

Article 14
Ratification, acceptance, approval or accession

This Treaty shall be subject to ratification, acceptance or approval by signatory States. The Treaty shall be open for accession.

Article 15
Entry into force

1. This Treaty shall enter into force 90 days after the fiftieth instrument of ratification, acceptance, approval or accession has been deposited.

2. For any State that deposits its instrument of ratification, acceptance, approval or accession after the date of the deposit of the fiftieth instrument of ratification, acceptance, approval or accession, this Treaty shall enter into force 90 days after the date on which that State has deposited its instrument of ratification, acceptance, approval or accession.

Article 16
Reservations

The Articles of this Treaty shall not be subject to reservations.

Article 17
Duration and withdrawal

1. This Treaty shall be of unlimited duration.

2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of the Treaty have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to the Depositary. Such notice

shall include a statement of the extraordinary events that it regards as having jeopardized its supreme interests.

3. Such withdrawal shall only take effect 12 months after the date of the receipt of the notification of withdrawal by the Depositary. If, however, on the expiry of that 12-month period, the withdrawing State Party is a party to an armed conflict, the State Party shall continue to be bound by the obligations of this Treaty and of any additional protocols until it is no longer party to an armed conflict.

Article 18
Relationship with other agreements

The implementation of this Treaty shall not prejudice obligations undertaken by States Parties with regard to existing international agreements, to which they are party, where those obligations are consistent with the Treaty.

Article 19
Depositary

The Secretary-General of the United Nations is hereby designated as the Depositary of this Treaty.

Article 20
Authentic texts

The Arabic, Chinese, English, French, Russian and Spanish texts of this Treaty shall be equally authentic.

DONE at New York, this seventh day of July, two thousand and seventeen.

PROCEEDINGS

2017 COLLOQUIUM ON INTERNATIONAL LAW ISSUES*

ABSTRACT

THE 2017 COLLOQUIUM on International Law Issues was convened by the Office of Treaties and Legal Affairs of the Department of Foreign Affairs, in cooperation with the University of the Philippines Law Center - Institute of International Legal Studies and the Foreign Service Institute. It focused on two key areas in international law, which present opportunities and challenges for the advancement of Philippine foreign policy priorities, namely international legal and judicial cooperation, and trade and investment facilitation. The initiative was undertaken as an effort to proactively engage the law academe and legal practitioners, and contribute to the international law agenda of Philippine foreign policy by identifying and addressing international law issues that affect Philippine entities in various political, social and economic transactions.

Conducted on December 4, 2017 at the Hotel Jen in Pasay City, the event brought together 120 international law experts and practitioners from the public and private sectors, and the academe.

The following are the papers presented at the Colloquium:

I. *International Legal and Judicial Cooperation (Extradition, Mutual Legal Assistance and Transfer of Sentenced Persons Agreements)* by Chief State Counsel Ricardo V. Paras III, Department of Justice (pp. 150-157 in this Yearbook).
II. *International Judicial Cooperation through The Hague Conference on Private International Law (HCCH) Conventions* by Professor Elizabeth Aguiling-Pangalangan, U.P. College of Law (pp. 157-167).
III. *Trade and Investment Facilitation: Ratification of Trade Treaties* by Professor Rommel J. Casis, U.P. Law Center (pp. 177-190).
IV. *Invisible Peoples in International Law: Prolegomena to Discern the Future of International Law* by the Honorable Marvic M.V.F. Leonen, Associate Justice of the Supreme Court of the Philippines (pp. 212-229).

* Conducted on 4 December 2017, 8:30 am-1:30 pm, Hotel Jen Manila, Roxas Boulevard, Pasay City.

INTRODUCTION

ATTY. JOHAIRA WAHAB-MANANTAN: Good Morning. My name is Johaira Wahab-Manantan from the Department of Foreign Affairs – Office of Treaties and Legal Affairs. Today's Colloquium is the first of its kind, hosted by the Department of Foreign Affairs, in partnership with the Foreign Service Institute and the U.P. Law Center's Institute of International Legal Studies. This Colloquium is being held under the auspices of the Foreign Service Institute's Mabini Dialogue Series.

Before we open our program, we would like to acknowledge some of our guests who are present here today: Supreme Court Justice (ret.) Adolfo Azcuna, Chancellor of the Philippine Judicial Academy; Undersecretary Manuel Antonio Teehankee, Director-General Claro S. Cristobal, Foreign Service Institute; Assistant Secretary J. Eduardo Malaya of the Office of Treaties and Legal Affairs of the DFA; Chief State Counsel Ricardo V. Paras III of the Department of Justice; Commissioner Ernesto L. Albano, Tariff Commission; Commissioner Allan B. Gepty of the Tariff Commission; former Dean of the U.P. College of Law and former Undersecretary of the Department of Foreign Affairs for Migrant Workers Affairs, Dean Merlin Magallona; Dean Sedfrey Candelaria of the Ateneo Law School; Dean Rodel A. Taton of the San Sebastian College Graduate School of Law; Dean John Paolo A. Villasor of the University of Negros Occidental – Recoletos; and Atty. Andre Palacios, Chair of the Integrated Bar of the Philippines's Committee on International Law and International Affairs.

To formally open our program, we would like to invite Ambassador Claro S. Cristobal of the Foreign Service Institute to give the welcome remarks.

WELCOME REMARKS

FSI DIRECTOR-GENERAL CLARO S. CRISTOBAL: Honorable Justice Adolfo Azcuna, Honorable Ricardo V. Paras, Chief State Counsel, Dean Sedfrey Candelaria, Dean Rodel Taton, friends, colleagues, ladies and gentlemen.

It is with great pleasure that I welcome you to the 2017 Colloquium on International Law Issues. I would also like to take this opportunity to thank the Office of Treaties and Legal Affairs of DFA and the University of the Philippines'

Institute of International Legal Studies for the opportunity to co-organize this timely event.

International Law has always played an important role in ensuring the cordial and harmonious relationship between and among states. International law is duly regarded as one of the key instruments in international relations that guide the community of nations to the path of harmony, peace and security.

This Colloquium will underscore this facet of international law and highlight the important relationship between international law and Philippine foreign policy. With wide-ranging topics to be discussed from international, legal, and judicial cooperation to international trade and investment, this Colloquium will be of valuable help to the Department of Foreign Affairs and other relevant government institutions in determining issues and areas of international law that affect the Philippines' economic, social and political undertakings. This meeting of brilliant legal minds is also expected to identify priorities under international law and legal research that are essential in shaping the international law agenda of Philippine foreign policy.

With its distinguished speakers and panelists, this Colloquium, I am certain, will produce outcomes that provide policy directions to the DFA, particularly the Office of Treaties and Legal Affairs, which is the DFA's primary adviser on international law, as well as other offices in the department, particularly the UN and International Organizations Office.

Therefore, I look forward to the fruitful and dynamic discussions in today's Colloquium. Once again, welcome to the first Colloquium on International Law Issues.

Thank you.

ATTY. WAHAB-MANANTAN: Thank you Ambassador Cristobal. We would now like to call on Assistant Secretary J. Eduardo Malaya to deliver his remarks.

ADDRESS

ASSISTANT SECRETARY J. EDUARDO MALAYA: *Maraming salamat,* Johaira.

Justice Adolfo Azcuna, Chief State Counsel Ricardo Paras Undersecretary Dondi Teehankee, distinguished guests, fellow members of the Bar, friends, ladies and gentlemen.

On behalf of Secretary of Foreign Affairs Alan Peter Cayetano, I wish to welcome you all to this 2017 Colloquium on International Law Issues. Today, we have assembled a distinguished array of law practitioners and other friends of the law, from both public and private sectors, to jumpstart our initiative to foster a sustained partnership in helping shape a Philippine agenda in international law.

The idea for convening today's colloquium was first conceptualized by the DFA Office of Treaties and Legal Affairs (DFA-OTLA). You may ask, why the DFA Office of Legal Affairs? What is the significance of this office to international law? Like its counterparts in other government departments and agencies, as well as in large corporations, it serves as the in-house counsel of the Department. In the case of DFA-OTLA, it provides legal advice and assistance to the Secretary of Foreign Affairs on matters concerning the interpretation and application of Philippine laws and regulations, as well as, treaties, conventions and other international agreements and assist in the negotiations of treaties and international agreements. It also facilitates the service of legal documents and taking of depositions, and together with the Department of Justice, processes requests for extradition and mutual legal assistance from other countries.

As can be noted above, DFA-OTLA's linkage to international law is direct and pronounced inasmuch the Office is consulted and often involved in the negotiations of international agreements, and reviews and facilitates the ratification of agreements concluded by the DFA and other government agencies. In this sense, the Office services not only the DFA but also the entire Philippine bureaucracy in the negotiation and conclusion of treaties. Its role in the treaty-making process is pre-eminent as underscored by the fact that to the DFA-OTLA is reposed the prerogative in making a determination whether an agreement is an executive agreement or a treaty. As we can recall from Political Law, an executive agreement requires the ratification by the President in order to be valid and effective; while a treaty requires both presidential ratification and concurrence by the Senate. Reflecting on his experience as legal adviser in the Croatian foreign

ministry, Nick Stanco observed that in connection with the conclusion of agreements and their ratification, he and his service must, and I quote, "take care not only of the conformity of a new treaty with the general rules of international law, particularly *jus cogens*, but also of the legal, technical correctness and necessary precision of the text, clear and non-ambiguous formulation, appropriate final and transitory provisions, and the like."

The most important duty of the legal adviser, obviously, is to advise the Secretary of Foreign Affairs, other agencies and often the Office of the President and even Congress, of the existing international law with respect to a particular issue, problem or situation. The purpose is to give the proper legal framework in making appropriate foreign policy decisions so that the country's policy does not come in conflict with international law and the broad interest of the international community. It is significant to note that even countries and their leaders who bluntly break fundamental rules and principles of international law almost invariably make a considerable effort to wrap their acts in a legally presentable or at least justifiable form.

The finest tradition of the foreign ministry lawyer is perhaps described by the scholar-practitioner Harold Koh, who said that, and I quote, "He must shift back and forth constantly between four rich and varied roles: that of counselor, conscience, defender of the national interest, and spokesperson for international law." In a similar manner, the DFA-OTLA in 2011 for instance, led the way in the country's accession to both the Convention for the Pacific Settlement of International Disputes which established the Permanent Court of Arbitration, and The Hague Convention on Private International Law, as well as helped sustain the interest to accede to the Rome Statute of the International Criminal Court, to which the Philippines became a State party later in that same year. All these three major developments in international law for the country took place in 2011. With respect to membership in the Permanent Court of Arbitration (PCA), one would recall that a few years ago, in 2014, we filed an arbitration case over the West Philippine Sea dispute, and an arbitral tribunal under the auspices of the PCA heard the case. A curious question could have been, "If the Philippines was not a State-Party to the Convention for the Pacific Settlement of International Disputes, would it have been possible for the case to be heard by an arbitral tribunal operating under the auspices of the PCA?" Well, we don't have to go deeper into this issue because, lucky enough, a few years earlier, our country became a State-Party to the Convention.

To fulfill more fully its mandate, DFA-OTLA has increasingly taken a proactive role in helping shape foreign policy options through strengthening capabilities in treaty law and practice on the side of the government, and deepening appreciation of international law as a tool and guide for Philippine foreign policy. To this end, OTLA conducted last September, a Seminar on Philippine Treaty Law and Practice for Government Agencies and circulated the *Philippine Treaty Handbook* for the reference of DFA and other government agencies. And today, we are having this Colloquium on International Law.

There are two main objectives that inspired the conceptualization of this Colloquium. The first is to proactively shape a Philippine agenda in international law by identifying international law issues which affect Philippine entities in various political, social, and economic transactions. And second, to bring together Filipino international law experts and practitioners from the government sector, academe and law firms, as a starting point for a domestic international law interest group in the Philippines that the DFA-OTLA and similar entities can engage with. Hopefully, by tapping expertise in the academe and the varied and cumulative experiences of practitioners in both the public and private sector, OTLA can identify pragmatic legal issues confronted by Philippine entities and industries which may be addressed through international law advocacies and effectively pursued through diplomatic initiatives, initially focusing on the subjects that we will be discussing this morning, enhancing international legal cooperation, and trade and investment facilitation.

We are pleased to announce that today's proceedings are expected to be published by the U.P. Law Center in the soon to be revived *Philippine Yearbook of International Law*, which last saw print in 1989, the details of which will be presented later by Atty. Celeste Mallari of the U.P. Law Center's Institute of International Law Studies (IILS). And thanks indeed to the IILS director, Prof. Rommel Casis, for his consent to the revival of the *Philippine Yearbook of International Law*.

Ladies and gentlemen, today we reaffirm our conviction on the reality of International Law as both a product and influencer of international political dynamics. We recognize the role of international law as a means of strengthening international peace and security, and promoting friendly relations and cooperation among states. OTLA would like to take this opportunity, as a concluding comment to call your attention to certain upcoming international legal conferences in 2018 wherein the DFA is involved with and which you may find

practice or areas of expertise. We have included in your kit a listing of major activities and conferences that will take place next year, notably those under the auspices of The Hague Conference on Private International Law and the UNCITRAL. If anyone is interested to join and help us out in these conferences, you are welcome. Of course, we are hoping that you can find your way to those conferences. But certainly, we would like to have an inclusive process as much as possible, which is why we are having this Colloquium.

I would like to conclude these remarks by reiterating our thanks to all of you for joining us this morning and allowing me to share these thoughts. As an advocate and student of law, I have much to learn and I look forward to the sessions ahead.

ATTY. WAHAB-MANANTAN: Thank you Assistant Secretary Malaya.

Proceeding now to the heart of our program, and to get us started with our first session on International Legal and Judicial Cooperation, we are honored to introduce our first main presenter, Chief State Counsel Ricardo Paras III from the Department of Justice.

SESSION 1: INTERNATIONAL LEGAL AND JUDICIAL COOPERATION

ATTY. WAHAB-MANANTAN: Chief State Counsel Paras has been in government service for thirty-two years. He started as Trial Attorney and Solicitor at the Office of the Solicitor-General, before moving to the Department of Justice (DOJ) as State Counsel in 1987. He was appointed as Assistant Secretary in 1988 and served as such until 2004. He served as Undersecretary for six months, before he was appointed as Chief State Counsel in 2004.

He received his law degree from the Ateneo Law School in 1982 and taught Public International Law at the Lyceum College of Law for four years. And he belongs to a family of lawyers and jurists that we all know. His father was the late Atty. Ricardo Paras Jr., while his grandfather was the late Chief Justice of the Supreme Court of the Philippines, Ricardo M. Paras. His late uncle, Supreme

Court Justice Edgardo Paras is a known Law Professor and author of law books in Civil and International Law.

Colleagues, join us in welcoming Chief State Counsel Paras of the DOJ.

EXTRADITION, MUTUAL LEGAL ASSISTANCE AND TRANSFER OF SENTENCED PERSONS AGREEMENTS

CHIEF STATE COUNSEL RICARDO V. PARAS III

The Honorable Justice Adolfo Azcuna, Undersecretary Dondi Teehankee, Ambassador Claro Cristobal, and my friend, Ambassador Ed Malaya. Deans Sedfrey Candelaria and Rodel Talon. Ladies and gentlemen, good morning.

INTRODUCTION

Before the celebrated extradition case of former Congressman Mark Jimenez, only a few lawyers knew that we had an extradition law and that the Philippines has in fact concluded a number of extradition treaties. In fact, when I was in Vienna last November 6-11, for the 5th Conference of State Parties to the UN Convention Against Corruption, matters pertaining to the principles of dual criminality and specialty in extradition were taken up, which incidentally was the subject of a question in the recent bar examination in Political Law. The members of the Philippine delegation were surprised that I was able to readily provide the answers. Well, I said, extradition and legal assistance are part of my daily chores at the Department.

Extradition is not a new concept of international cooperation, as it dates as far back as 1280 B.C. when Ramses II of Egypt and Prince Hattusili III of the Hittites concluded a peace treaty providing for the exchange of criminals of one nation found in the territory of another. The same is true with mutual legal assistance to each other. Countries have long been providing legal assistance to each other. However, it was mostly done through informal channels and between the law enforcement authorities of two States. As for transfer of sentenced persons, this is still relatively new to us.

Extradition, mutual legal assistance in criminal matters and transfer of sentenced persons are just three of the effective tools of international legal cooperation. I will not discuss judicial cooperation, which is included in the title

of this session, as the same pertains to the judicial branch of our government, although the implementation of certain types of international legal cooperation necessarily involves judicial process.

I. Extradition

Extradition is the surrender, upon request of a State, of an accused or convicted person, found in the territory of another state.

Extradition process in the Philippines is primarily governed by Presidential Decree (P.D.) No. 1069 or the Philippine Extradition Law, the applicable extradition treaty, and if not inconsistent with the summary nature of extradition proceedings, also the Rules of Court.

Unlike other jurisdictions which allow extradition on the basis of national legislation, treaty or reciprocity, the Philippines, as provided under P.D. No. 1069, may grant extradition only on the basis of a treaty or convention. Allowing extradition on the basis of law or reciprocity is one of the policy issues confronting the Department of Justice as it works on the amendment of P.D. No. 1069.

At present, we have extradition treaties with 14 countries, namely: Australia, Canada, China, Hong Kong Special Administrative Region, India, Indonesia, Korea, Micronesia, Spain, Switzerland, Thailand, UK, US, and the most recent one, with Russia, which was signed in October 2017 on the occasion of the 31st ASEAN Summit in Manila.

The Philippines is also a State Party to multilateral treaties containing the so-called mini-extradition provisions, and this includes the UN Convention Against Corruption (UNCAC), the UN Convention against Transnational Organized Crime (UNTOC), the ASEAN Convention on Counter-Terrorism (ACCT), and the ASEAN Convention Against Trafficking in Persons (ACTIP).

While both UNCAC and UNTOC can serve as legal basis for making a request for extradition, the Philippines cannot however utilize the same as legal basis because a request for extradition under UNCAC may be granted even if the dual criminality requirement is not met. Our extradition law on the other hand, requires dual criminality; hence, the Philippines entered a declaration to UNCAC whereby the latter Convention cannot be made a basis for a request for extradition. Likewise, UNTOC cannot be a basis for a request for extradition

because Section 5(A) of the Convention requires a declaration from a State that it will take the Convention as the legal basis for cooperation on extradition with the other State Parties of the Convention. The Philippines did not make such declaration when we acceded to the Convention.

We may therefore have to look into our accession to other multilateral treaties allowing extradition, as being a State Party thereto may not be a sufficient legal basis for making or granting extradition request.

The benefit of extradition treaties for ordinary Filipinos is that if they are victims of crimes, the perpetrators of these crimes cannot evade prosecution by fleeing from the Philippines, because they can be brought back here to face trial, if they are found in the territory of a treaty partner.

II. Mutual Legal Assistance Treaty in Criminal Matters

Mutual legal assistance is the formal process of seeking legal assistance to and from a foreign government in criminal and related proceedings. It is a formal process of intergovernmental legal cooperation in the investigation, prosecution and punishment of criminal offenders. I mention here that it is a formal process because it has to be distinguished from the informal process of cooperation such as law enforcement-to-law enforcement cooperation.

Mutual Legal Assistance as a tool of international legal cooperation cannot be utilized in administrative or civil proceedings or actions unless the civil action is closely linked or related to a criminal proceeding. An example of this is the request for assistance submitted by the Philippines to the United States to recover the proceeds of corruption of two former generals of the Armed Forces of the Philippines. The nature of the action subject of the request for assistance was a civil action for forfeiture, not a criminal proceeding. The request must be able to establish the relation of a civil action to a criminal proceeding, such as graft and corruption.

Bangladesh also recently requested us for legal assistance under UNTOC to recover US$15 million surrendered by Kim Wong, which was part of the US$81 million bank heist from the Bangladesh Central Bank through the hacking of the bank's SWIFT code. We successfully filed a third-party claim in the civil forfeiture proceedings and recovered the said amount for them. What was

recovered was only a small part of the amount stolen, and recovery of the remaining amount may take considerable time.

Please note that in making a request for legal assistance, the law enforcement agency or prosecution office initiating the request has to be stated and the US does not consider a Senate or Blue Ribbon investigation to be a proper basis for a request, as an investigation conducted in aid of legislation or investigation by a congressional committee, such as the Senate Blue Ribbon Committee, is not the investigation or criminal proceeding contemplated under MLATs.

It must be emphasized that there is no surrender of fugitives in the Mutual Legal Assistance process, as it is mainly used in gathering evidence to assist the investigation or prosecution that is being conducted in the requesting State.

Unlike extradition, the Philippines does not have a stand-alone legislation on mutual legal assistance in criminal matters. It is able to provide assistance on the basis of a treaty, law or reciprocity.

At present, the Philippines has MLATs with nine (9) countries, namely: Australia, China, Hong Kong, South Korea, Russia, Spain, Switzerland, UK and the US. It also has a regional MLAT with the other nine ASEAN Member States. These MLATs allow a wide range of assistance, from the provision of documents, taking of evidence or obtaining statements of witnesses, effecting service of documents, executing requests for search and seizure, ocular inspections, tracing, forfeiture and confiscation of property derived from the commission of an offense, to appearance of witnesses before the courts of the requesting state. The UNCAC, UNTOC, ACCT and ACTIP contain provisions on mutual legal assistance; hence, it can be the basis for a request for assistance.

The Philippines will also be able to seek or provide assistance on the basis of reciprocity. For this, an undertaking has to be made by the requesting State that it would provide the same type of cooperation to the requested State. This is quite similar to the request for letter rogatory under our Rules of Court. However, a request for assistance may be made even at the investigation stage, when law enforcement authorities are still gathering evidence or determining the identity of the possible perpetrators which is not so in the case of a letter rogatory as it requires that there be a case already filed in court.

A request for assistance requiring compulsory processes or court intervention for its execution may not be made on the basis of reciprocity, as the request of this nature may only be made on the basis of a treaty or a law, such as Republic Act No. 9160, as amended ("Anti-Money Laundering Act of 2001").

There are challenges that we face in the implementation of MLATs, one of which is the lack of rules on hearing via videoconference. Recently, a request for assistance submitted by way of letter rogatory was not implemented by a Philippine court because the procedure sought in taking the statement of the witness was to be done via videoconference. There are a lot of issues to be considered in taking a statement of a witness in the Philippines via videoconference. These include the costs, the laws and rules to be observed, rights to be invoked by the witness, etc. Perhaps this is one aspect of international legal cooperation that needs to be addressed.

We also filed a request for legal assistance with Indonesia to take the deposition of Mary Jane Veloso inside the Yogyakarta Jail in Indonesia in the presence of the judge hearing the case against Veloso's recruiters in Santo Domingo, Nueva Ecija, the recruiters Sergio and Lacanilao.

For ordinary Filipinos, the benefit of being able to request for legal assistance from other States, be it under a treaty or based on reciprocity, is that crimes committed against them need not necessarily be left without redress if the evidences for these crimes are found in other States. The Philippines can obtain this evidence from an MLAT treaty partner or based on reciprocity.

III. Transfer of Sentenced Persons Agreement (TSPA)

When all the frenzy and media hype has died down, with the conviction of the accused, it is now our responsibility to provide for the effective rehabilitation of the offender, so that he would go back to the fold of the law and he is prevented from committing further transgressions of the law.

Thus, transfer of sentenced persons or transfer of foreign prisoners is one of the measures of strengthening international legal cooperation in the field of crime prevention and criminal justice reform. It allows a person convicted and serving a final sentence in a foreign land to serve his remaining sentence in his or her country of nationality or residence, where his or her rehabilitation may be properly monitored and within the reach of his family and relatives.

The Philippines does not have a law on transfer of sentenced persons. In the absence of such domestic law, transfer of sentenced persons may be carried out through the bilateral agreements of the Philippines with other countries. The transfer of sentenced persons (TSPA) would serve as the legal framework for the transfer of sentenced persons to their countries of nationality in order to serve the remaining portion of their sentence.

At present, the Philippines has TSPAs with Canada, Hong Kong, Spain and Thailand. Only the TSPA with Hong Kong, Spain and Thailand are enforced, as the TSPA with Canada has yet to be given Senate concurrence.

The Philippines is not a party of the Strasbourg Convention on Transfer of Sentenced Persons, for the main reason that its accession thereto might violate the constitutional provision that only the Philippine President can grant pardon, amnesty and commutation of sentence. The Strasbourg Convention allows the State to which the Philippines has transferred a sentenced person to grant pardon, amnesty or commutation of sentence, contrary to the Constitution.

On December 6, 2010, the Department of Justice issued a Circular prescribing the rules on the implementation of the TSPA. The Circular serves as our guide in the implementation of our TSPAs.

The TSPAs and DOJ Circular provide conditions for the transfer, and these include dual criminality, nationality or residence of the sentenced person, finality of judgment, consents of the sentencing State, administering State, and the sentenced person or the so-called three-fold consent, minimum service of sentence, and payment of fines, court costs, and civil indemnities.

Overseas Filipino Workers (OFWs) may have brushes with the law of their host country and may land in jail. The rehabilitation of foreign prisoners may be more effective if done in their country of nationality or residence as they would be close to their families and friends, speak the same language and observe the same customs and traditions as the people working on their rehabilitation. Hence, for OFWs who are in prison abroad, TSPAs benefit them immensely in this regard.

I have to stress, however, that TSPA is not intended to give special treatment to foreign detainees. It is only intended to afford foreign prisoners the opportunity to serve their sentence in their country of nationality or residence.

Foreign prisoners may, in fact, choose not to serve their sentence in their country of nationality or residence.

IV. Recommendations

The following are my recommendations.

First, with ten percent (10%) of our population abroad in order to earn a living and being exposed to falling prey to criminal elements, I believe we should include in our criminal statutes provisions on their extra-territorial application, especially under the Passive Personality Principle, which recognizes that a sovereign can adopt laws that apply to foreign nationals who commit crimes against the sovereign's nationals outside the sovereign's territory. Our amended Anti-Trafficking Law has such extraterritorial application already. In doing so, we can resort to tools of international cooperation like extradition to extradite the accused to the Philippines for prosecution and service of sentence.

Second, our Extradition Law, P.D. No. 1069, is antiquated and outmoded. I suggest that it be amended or repealed and that we consider allowing extradition on the basis of reciprocity. However, I understand the pros and cons will have to be discussed first as what would work best because reciprocity may not be as strong a basis for extradition as under a treaty because the other party can give several reasons to refuse extradition on the basis of reciprocity.

Third, we should likewise retract our declaration in our accession to UNCAC and UNTOC and allow these multilateral conventions to serve as basis for extradition. The revocation of the declaration does not make it automatically obligatory on our part to extradite since we still have to be convinced that the human rights of the potential extraditee shall be respected much in the same way that we have laws which grant complimentary protection, similar to non-refoulement under the Anti-Torture and the Anti-Disappearance Acts. It is also to be noted that the full implementation of UNCAC would only be possible if the Philippine Extradition Law is amended to include all relevant provisions on extradition because both UNCAC and P.D. No. 1069 lack a lot of important provisions on extradition, such as when a requested State Party may consider a request seeking the extradition of its national. The alternative to this is to make our UNCAC declaration to include all the important provisions required for its full implementation.

Fourth, we should adopt our own law on mutual legal assistance to widen the scope of request for investigations and aid prosecution in cases.

And, finally, on TSPA, we have always encountered deadlocks in negotiations on the authority to grant pardon or executive clemency as we have to abide by the constitutional provision, which vests solely in the President the exercise of such power. To make our stand more palatable in the negotiating table, I suggest that we study a counter proposal of allowing the other State to grant pardon or executive clemency, provided that it be concurred in by the authority/ authorities of the Philippines. If the result of the study is to consider such a counter proposal, I would propose to the Office of the President such a course of action.

Well, this ends my presentation and thank you very much.

ATTY. WAHAB-MANANTAN: Thank you very much, Sir for that insightful presentation.

INTERNATIONAL JUDICIAL COOPERATION THROUGH THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (HCCH) CONVENTIONS

PROF. ELIZABETH AGUILING-PANGALANGAN

Our second presenter is well-known to many of us as our professor in Persons and Family Relations, Private International Law, Contracts, Agency, Partnership, Children's Rights and Legal Ethics at the U.P. College of Law. Currently, she is the Director of the U.P. Institute of Human Rights and she is the author several reference textbooks, namely: *Marriage and Unmarried Cohabitations: The Rights of Husbands, Wives and Lovers* and *Not Bone of My Bone But Still My Own: A Treatise on the Philippine Law on Adoption*, and the co-author of the *Conflict of Laws: Cases, Materials and Comments.*

Aside from being a prolific member of the academe, she has also been designated as the Philippine expert to the Experts' Group on Parentage/ Surrogacy Project for The Hague Conference on Private International Law and served as a Philippine delegate to the Special Commission on the Recognition and Enforcement of Foreign Judgments in 2016. She is also a member of the Philippine

delegation to the 56th Session of the Commission on the Status of Women in the United Nations in 2015.

Ladies and gentlemen, let us welcome Professor Elizabeth Aguiling-Pangalangan.

PROF. ELIZABETH AGUILING-PANGALANGAN: Ambassador Eduardo Malaya, Ambassador Claro Cristobal, Chief State Counsel Ricardo Paras, Retired Justice Adolf Azcuna, ladies and gentlemen, good morning.

Before I go to the meat of my topic, allow me to provide a brief background on private international law in order to establish the necessity of legal and judicial cooperation.

There is diversity in the legal systems of 195 sovereign states including the most recently independent nations, such as Kosovo and South Sudan. This number does not count the various territories like Hong Kong, Taiwan, Puerto Rico, Guam and Greenland, which though not sovereign states have their own laws and legal procedures.

Consider further that ten percent (10%) of the Philippine population are working and residing abroad. Data also show that four thousand five hundred (4,500) Filipinos travel daily, 33.6 million Filipinos are internet users, and 103 million are mobile phone subscribers. Given that international travel and communications are now relatively easy and within reach of many Filipinos, interactions among people across state lines are common. These situations have given rise to people entering into commercial and civil transactions, including that of marriage, and have thus increased the number of cases with a foreign element.

This is exactly what private international law is. Also called conflict of laws, it refers to that part of law where a foreign element, by way of a fact, event or transaction, is closely connected to more than one state or legal system. Conflict of laws gives rise to three separate but interrelated issues: jurisdiction, choice of law, and recognition and enforcement of a foreign judgment.

Jurisdiction and Choice of Law

Jurisdiction refers to the power of the court to try a case, issue a judgment and execute it in accordance with law. When the courts of a state have

adjudicatory jurisdiction and render the original decision by applying the law of the various relevant states, courts may either use the traditional approach to choice of law, which is anchored on the principle that choice of law rules that are simple and capable of easy administration will promote uniformity of results and enhance predictability. On the other hand, courts may use modern approaches which reject the rigidity of territorially-focused rules and instead look at policies or factual contacts between the state and each case and evaluate the contacts in relation to their relative importance. In deciding to hear the case and determining the governing law of the case these courts exercise direct jurisdiction as the rendering state.

Recognition and enforcement of a foreign judgment

The third issue in Conflict of Laws, and that which is most significant for us in this Colloquium, is the recognition and enforcement of a foreign judgment. A foreign judgment refers to all decisions rendered outside the forum and encompasses the judgments, decrees, and orders of courts of foreign countries whose recognition and enforcement are sought in another state. That other state, called the requested court, will not hear the case, much less issue a decree unless it concludes that the court that rendered the original decision was a court of competent jurisdiction.

The general rule is that Philippine courts do not take judicial notice of foreign judgments and laws. Laws have effect only in the country that enacted or issued them. If we look, for instance, at a divorce decree issued in one State which seeks recognition and enforcement in the Philippines, it will have to go through several steps, rather difficult and laborious.

The first step is to have the original divorce decree legalized at the State Chancery of the issuing court. Step 2 calls for submission of the legalized divorce decree together with the English translation if the original was not written in English to the Philippine Embassy or Philippine Consulate General for authentication. In step 3, the authenticated divorce decree document must be submitted to the authentication division of the Department of Foreign Affairs (DFA).

Step 4 requires the submission of this authenticated divorce decree to the Regional Trial Court (RTC) for civil action and judicial recognition to prove its validity. Here, we follow the requirements under Section 24, Rule 132 of the Rules

of Court with the submission of an official publication thereof, or a copy attested by the officer having the legal custody of the record, or by his deputy. If the record is not kept within the Philippines, there must be a certificate from the head of the embassy or consular office authenticating the certification with his/her office seal.

Under Step 5, the RTC judgment is submitted for registration at the local civil registry office of the city or municipality where said RTC functions and the affected civil registry documents are affected. In Step 6, after registration of the RTC judgment at the local or city civil register office, the latter will annotate the civil registry documents and several other certifications are required in annotating.

After annotation, the civil registry documents together with the above requirements are submitted to the Office of the Civil Registrar General in Manila and the National Statistics Office, this comprises Step 7.

Thus, we see that a foreign judgment to be recognized and enforced in the Philippines, must go through a rather tenuous process. Not only will it take time, but also money, since one has to secure the assistance of a lawyer in pursuing this legal route. We can imagine then that if these states impose roughly similar procedural steps in each of their jurisdictions, then international judicial cooperation is crucial to ease the legal burdens on the public.

International judicial cooperation is achieved through multilateral agreements and conventions that are initiated by international organizations such as the United Nations and The Hague Conference on Private International Law. A government agency in each of the contracting States is identified as the central authority whose main task is to coordinate with other States in terms of exchanging information and expediting administrative and judicial procedures that attend cross-border case in civil, commercial, or criminal matters.

International judicial cooperation is also facilitated through the creation of a judicial network. For instance, The Hague Conference has created the International Hague Network of Judges, with over a hundred judges coming from 72 member States. This network of judges acts as a channel of communication and liaison with their national central authorities, other judges within their jurisdiction, and judges from other contracting States. They facilitate communication and cooperation between judges at the international level, and assist and ensure the effective operation of various Hague Conventions, with the ultimate goal of expediting access to justice.

My talk this morning centers on the Conventions that we have signed or are before our government agencies for possible signing in order to facilitate international judicial cooperation.

Convention Abolishing the Requirement of Legalization for Foreign Public Documents

The Hague Apostille Convention aims to simplify the authentication of public documents with respect to the signature, the capacity in which the person signing the document has acted and where appropriate, the identity of the seal or stamp which it bears. As stated in its Preamble, its purpose is "to abolish the requirement of diplomatic or consular legalization of foreign public document."

Earlier I explained that authentication by Philippine consular officials is one of the immediate steps that must be taken for recognition of foreign laws and judgments that include those emanating from an authority of the State, administrative documents, notarial acts and official certificates signed by persons in their private capacity. In the Convention, the only formality required is a certificate that the public document was issued by the competent authority of the State from which the document emanates. Contracting States designate which authorities will be competent to issue such certificate.

Acceding to the Convention will require amending Rule 132, Section 19 of the Rules of Court. First, the definition or the enumeration of public documents in the Rules vary from those in the Convention. Second, there is likewise a difference in the authentication procedure under the Rules of Court and those under the Convention. I underscore that the clear advantage of acceding to the Apostille Convention is the simplification of the process of attestation, since the Convention requires only the certification issued by a competent authority.

This Convention is awaiting the signature of the President and we hope to hear good news soon.

Asec. Malaya: Very soon.

Prof. Pangalangan: Ambassador Malaya confirms this. I will next discuss the Evidence Convention.

The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters

The main feature of Evidence Convention is that, it allows for the taking of evidence for civil or commercial purposes by a judicial authority of a Contracting State via a request from a competent authority of another Contracting State.

The letter of request is similar to the Letters rogatory that are addressed to the judicial authority of a foreign state with respect to taking of depositions in that foreign state. The relevant provisions on Letters rogatory are found in Sections 11 and 12, Rule 23 of the Philippine Rules of Court. While a Letter rogatory is limited to testimonial evidence, the Letter of Request under the Convention covers a broader scope as it also includes the taking of documentary evidence.

For document discovery, the Convention requires that a Letter of Request is issued by the court where the action is pending. As I have mentioned earlier, the identification by each State of a competent authority or central authority is one of the first things that we see in all Hague Conventions. The central authority is important here in that the Letter of Request is transmitted to the Central Authority of the jurisdiction where the discovery is located and it reviews the letters of request to determine compliance with the requirements of the Convention. The Central Authority is then responsible for sending the request to the appropriate judicial body for a response.

The Convention allows parties the freedom to define the procedures for document discovery and dispositions and enter into an express agreement on these. In the absence of such, the Convention standardizes the discovery procedures which typically differ greatly between nations that either follow civil or common law. This is of importance given that as a general rule, the taking of evidence across borders for a Philippine court proceeding is governed by Philippine procedural rules as well as rules in the state where evidence is to be taken.

If both countries are contracting states which have accepted each other's accession to the Convention, then the procedure for evidence taking overseas is simplified. However, the task of checking whether the documents comply with the Convention will be an additional responsibility our courts will have to assume.

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

The Hague Service Convention focuses on the service of judicial and extrajudicial documents abroad in civil or commercial matters. It requires the designation of a Central Authority that will undertake to receive requests for service coming from other Contracting States. The Central Authority of State A shall serve the document by a method prescribed by its internal law or by a particular method requested by the applicant. Upon receiving the request, the Central Authority in State B arranges for service, usually through a court process, and then sends a certificate of service to the judicial officer from whom the request was received.

As Philippine law states, service of documents overseas must be by order of the Court directed to the Department of Foreign Affairs through its Office of Legal Affairs. It may be effected through our Consular Office in the respective country where the documents shall be served.

The main advantages of The Hague Service Convention over letters rogatory earlier discussed is that it entails a shorter turn around period and uses standardized forms, specifically the request for service, a summary of the proceedings and certificate of service- all of which are recognized in other member states. Finally, it is less financially onerous to the litigants because service can be done by a local lawyer and without the need for counsel from a foreign attorney on foreign service procedures.

The advantage to acceding to this Convention is that it will introduce a standardized and more efficient method of serving documents among states.

According to my research, the documents have already been prepared for Philippine accession to the Convention. So again, this is something exciting, Ambassador Malaya. Moreover, the Supreme Court has expressed willingness to be the Central Authority. There are still budgetary concerns pertaining to its implementation that have to be ironed out, but we are almost there.

Convention on the Civil Aspects of International Child Abduction

In April 2016, the Philippines acceded to the Child Abduction Convention thus taking our country out of the list of nine (9) remaining member countries that

had not signed, acceded or ratified the Convention.Among the Asia Pacific Hague Conference members, the Philippines joined New Zealand, Sri Lanka, and later Singapore, in acceding to the Convention, while only Australia, Hong Kong and Macao have ratified it. Thailand and Singapore, both non-members of the Hague Conference, have acceded to the Convention.

The goal of the Convention is to secure the prompt return of children wrongfully removed or retained in any Contracting State and to ensure that rights of custody are respected. These terms are defined in Article 5 of the Convention, as follows:

> Article 5. For the purposes of this Convention –
>
> a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
> b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

The role of judicial authorities is highlighted in several Articles, among them Article 11, the judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children. Article 12, where a child has been wrongfully removed or retained, and at the date of the commencement of the proceeding before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. Article 13 of the judicial or administrative authority may refuse to order the return of the child if it finds certain objectionable reasons. Under Article 18, the provisions of this chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

The role of the courts is central in The Hague Child Abduction Convention. It provides for a more expeditious means of returning a child by means of its standardized procedures. At present, Philippine domestic law provides mainly for the parent who was wrongfully deprived of custody or visitation rights to file a petition for the *Writ of Habeas Corpus*. The Convention however, gives the left-behind parent an additional remedy in order to recover his/her child.

Accession to the Convention enabled the Philippines to comply with its state obligations under the Convention on the Rights of the Child (CRC), one of which is the duty of state parties to "take measures to combat illicit transfer and non-return of children abroad[.] found in Article 11 of the CRC. Furthermore, Article 35 of the CRC mandates state parties to "take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form."

Convention on the International Recovery of Child Support and other Forms of Family Maintenance

Another significant Convention which the Philippines should examine closely is the Child Support Convention. The main feature of this Convention is the expedited proceedings with respect to ensuring recovery of child support and other forms of family maintenance. The role of the judiciary under this Convention is mainly with respect to recognition and enforcement of 'maintenance decisions' of other Contracting States.

The first obligation of the Contracting State is to establish a Central Authority which shall process the applications and requests for enforcement of judicial and/or administrative decisions. The Convention stipulates for an additional and expeditious remedy which will provide redress to the aggrieved party.

It shall be noted that the Philippines has signed the UN 1956 Convention on the Recovery Abroad of Maintenance where the Office of the Solicitor-General is the identified transmitting and receiving agency. However, The Hague Convention is more current. For instance, the Convention provides that the only allowable reason for not recognizing a foreign maintenance order is that such violates the public policy of the state whose recognition is being sought. The other usual grounds for refusal to recognize a foreign judgment such as the absence of reciprocity are not allowed. So the only ground for the Philippines not to recognize a foreign judgment compelling a Filipino husband who is living in the Philippines to pay for support of his child residing in another State is when recognizing such foreign judgment will violate Philippine public policy. This is an unlikely result considering the strongly-held policy of our country to protect the best interest of children.

Convention on Choice of Court Agreements

The *Choice of Court Convention* aims to advance international trade and investment by enabling parties in commercial contracts and international litigation to incorporate forum selection clauses and minimize, if not eradicate, obstacles in the subsequent recognition and enforcement of a judgment given by a court designated in a choice of court agreement.

The Choice of Court Agreement may identify either the courts of a Contracting State in general, or to one or more specific courts in the Contracting State. The Choice of Court Agreement is regarded as exclusive, even absent specificity of which the Court in the Contracting State will hear the proceedings and even in the absence of an express exclusion from the jurisdiction of courts of other states.

Recall that at the start of my talk I said that each court decides for itself whether it can and will acquire jurisdiction. However, consistent with the *lex loci intentionis* as the governing law for contracts, the parties are allowed to identify a particular court where the case will be heard should there be any dispute arising from contract. The Choice of Court Convention likewise gives the parties the power to clothe said court with exclusive jurisdiction over the case. Hence, once there is an agreement, other courts which by their own rules may exercise jurisdiction, will not.

The Rules of Court allow the parties to agree on an exclusive venue. However, our courts have consistently interpreted this choice of court stipulation as merely an agreement on an additional forum; not as limiting venue to the specified place. Signing the Convention means that the Philippines must abide by the three (3) basic rules which will give effect to the Choice of Court agreements: one, the chosen court must in principle hear the case. It cannot refuse to hear it and refer it to another court. Two, any court not chosen must, in principle, decline to hear the case. And three, any judgment rendered by the chosen court must be recognized and enforced in other Contracting States, except for specific grounds for refusal.

The chief advantage of accession to the Convention is the uniform procedure across contracting States. Review of the merits of the judgment irrespective of whether they relate to questions of fact or law is prohibited by the

Convention. This differs from extant Philippine law that allows some Courts to review questions of law.

Today, while it is claimed that several countries are interested in signing the Convention, only few have actually done so. The Hague Convention entered into force on 1 October 2016 as between all EU member states (except Denmark), Mexico and Singapore. Among these states, not all have enacted domestic measures to implement the Convention.

Thus, if what we expect is across-the-board recognition by other states of our choice of forum agreement, then there are very few of these, as of yet. But whenever I raise this argument before the Permanent Bureau of the HCCH, the response I get is: "Professor, if that is the logic, then nobody will sign, because everyone says that very few have signed." Thus, I encourage our DFA to examine the advantages and disadvantages of acceding to the Choice of Court Convention.

Conclusion

In sum, although some changes both in legislation and procedural rules will be indispensable, the Philippines' accession to these various Hague Conventions will be advantageous to us.

The chief idea behind these Conventions is that despite the different legal systems of The Hague Conference member states, a judgment rendered in one will be recognized in another member state. This will eliminate the necessity of filing a case anew, a practice that is time-consuming and expensive.

A basic principle in the rule of law is access to justice. Signing these Conventions will facilitate cooperation among states and empower people to have their voices heard, exercise their rights and overcome the systemic legal barriers faced by many Filipinos.

Thank you very much.

ATTY. WAHAB-MANANTAN: Thank you Prof. Pangalangan.

Our next speaker was appointed Associate Justice of the Supreme Court by President Gloria Macapagal-Arroyo in 2002. He retired from the Supreme Court in 2009 and was subsequently appointed as Chancellor of the Philippine Judicial

Academy, a post which he currently holds. He has also been elected by the International Commission of Jurists as one of its five new commissioners for a term of five years from August 12, 2014 to August 11, 2019.

He received his Bachelor's Degree with academic honors from the Ateneo de Manila in 1959 and the degree of Bachelor of Laws, *cum laude*, from the same institution in 1962. He was admitted to the Philippine Bar in 1963, placing 4th in the bar examinations.

He was a member of the 1971 Constitutional Convention and was subsequently appointed as a member of the 1986 Constitutional Commission. He has held several government posts, first, during the term of president Corazon Aquino as Presidential Legal Counsel, then as Press Secretary, and subsequently as Presidential Spokesperson.

Friends, let us welcome on the stage to share with us his thoughts on the earlier presentations, Justice Adolfo Azcuna.

COMMENTARY BY SUPREME COURT JUSTICE ADOLFO S. AZCUNA (Ret.)

JUSTICE ADOLFO S. AZCUNA: Thank you very much. Your honors, participants, my friends, good morning. I am tasked to react to the excellent presentations by our two panelists here, my good friend Chief State Counsel Paras and another good friend, Professor Beth Pangalangan. From what they have presented, I can surmise that these are all very useful and long-standing treaties that the Philippines should have signed a long time ago. We had a forum on this six years ago. I thought the Apostille Convention was already signed and effective but until now we are talking about adopting it. The Evidence Convention, Service Convention, Child Support, the Mutual Legal Assistance, Extradition, as well as the service of sentence abroad are non-controversial agreements that would benefit the country if adopted. So why are they not yet in force in the Philippines? I think it is because we tend to pay more attention to the more controversial events. So, I would suggest that a national summit be held in order to consider these pending treaties and proposed treaty agreements that are internationally useful and being implemented already by other countries.

In a national summit to be attended by all the branches of our government, we will have the executive there, the legislative, and the judiciary so that they can already thresh out what is needed from them. If it needs a law, then the representatives of Congress can come in, weigh in and discuss what law is needed. If it needs funding, the Supreme Court may be willing to be the focal person, but they cannot perform executive functions. There is Congress. All sectors can thresh out in the same way when the national summit on extrajudicial killing was held upon the initiative of the Supreme Court. Ten years ago, we had 12 tables, each presided by a Justice of the Supreme Court and you had representatives from the executive, legislative, and non-governmental organizations (NGOs). Even the military and the NDF sat down together and discussed what is supposed to be done in order to solve the problem. You can have this in one day or two days I think, then we can resolve, finally adopt these long standing very good agreements as presented by our panelists. But before we can do that, I think the DFA has to inventory. We need to inventory what are the agreements already existing. I think that is partly here already with the checklist of who are the present signatories and who are the target signatories and so forth. We should also inventory not just treaty law, but also customary international law. Many of these agreements or many of these activities are already covered by customary international law. For instance, we mentioned reciprocity as a basis for extradition, this is under customary international law and can be done without a treaty. Normally, extradition has to be pursuant to a treaty, but the practice nowadays is, if there is reciprocity, they can do it on their own on a country-to-country basis.

Aside from an inventory, we have to settle the question of the domestic application of international law. How is public international law applied by our courts? Can Philippine courts apply public international law, without a domestic legislation that implements that law? In the United States, the rule is "no". The US has adopted the rule that there is a need for a congressional legislation to implement a treaty and a treaty that has not been implemented by a local, congressional law, is not enforceable in the US. Is that the same rule in the Philippines? Or do we follow, as it would seem, Prof. Magallona is the expert on this – whether or not the Supreme Court, whether or not Philippine courts, can directly apply rules of public international law, even if there is no implementing legislation on the ground that a treaty stands on equal footing as a statute under our legal framework. So that has to be settled and really clarified. How are we going to implement and enforce in our jurisdiction international law?

The other interesting case I always refer to, is the case of *Republic v. Sandiganbayan*.[1] This referred to a situation where we had no Constitution. There was an interregnum in our history sometime after the 1973 Constitution fell to the ground after the successful EDSA Revolution. You know, the effect of a successful revolution is that all political laws fall to the ground and the Constitution is the most political of all laws, so it was the first to fall. The 1973 Constitution fell to the ground when the EDSA Revolution succeeded. We had no Constitution until President Cory Aquino as revolutionary president, adopted not the present Constitution but what is known as the Freedom Constitution. Hastily, we assembled a fundamental law based mostly on the Bill of Rights and the skeleton of a government – the three branches, we call it now the Freedom Constitution which was drafted by Joker Arroyo and Reynato Puno. It was promulgated by Cory under her powers under a revolutionary government as our Constitution on March 25, 1986.

So there was an interregnum between February 25 and March 25, where we had no Constitution. During that interregnum, there was a chain of events leading to seizure of personal properties. There was a search warrant but the search warrant did not include these properties. These were electronic equipment belonging to General Ramas, and they were left for his friend, Elizabeth Dimaano. And Elizabeth Dimaano filed a case to recover these properties on the ground that these were seized in violation of her fundamental rights. The response of the team of the government, this was the Cory government already, the government of freedom, democracy and all that, was there was no basis for claiming violation of fundamental human rights because there was no Constitution. Imagine that, these were the Cory people who said, we can seize anything at that time without a warrant because there was no Constitution. And this was presented as a case in the Supreme Court and how did the Supreme Court rule? It said that "it is not correct to say that absent a Constitution, there are no fundamental rights, because fundamental rights continue to be protected even without a Constitution by customary international law." That is a precedent, that is a warning to all those who seek to overthrow the government, that if they succeed, they are still obliged to observe fundamental human rights. That is the effect of that *Republic v. Sandiganbayan* case. That even during a constitutional interregnum, fundamental human rights continue to be protected. It is such a landmark decision that the

[1] *Republic of the Philippines vs. Sandiganbayan, Major General Josephus Q. Ramas and Elizabeth Dimaano*, G.R. No. 104768, July 21, 2003.

Venice Commission of Europe asked for a copy, and we gave them a copy of this decision because they were looking for an authority like this.

So we should assemble all these. What are the provisions that apply to our relations with other countries and how we can improve them? How can we adopt all these necessary treaties and agreements, as well as streamline our observance of customary international law, in order better to perform as one of the 195 sovereign States around the world today. The other thing I noticed, is that all these are just normal administrative matters. These are not controversial. But we are talking about shaping foreign policy. This is not foreign policy, this is day to day, ordinary humdrum activities. I would recommend to Ambassador Malaya to have the OLA shape a foreign policy that will truly respond to the dynamic forces occurring around the world today. Today, we are observing, we are witnessing the breakdown of the Westphalian world order which held sway since the Treaty of Westphalia until today. It has been challenged by Russia when it invaded Crimea. This is Westphalian world order based on sovereign states with fixed boundaries. When the boundaries are disturbed, when the freedom of the high seas for instance is challenged, these are breaking down boundaries, there is an attempt therefore to do away, as obsolete, with the Westphalian world order. What is the Philippine response to this? I think there is a need for us to be proactive, and to adopt, for the sake of national interest, to be ready to respond to these fast-changing occurrences in the world today.

There is also cybercrime, the field of computer hacking. Have you heard of the Shadow Brokers? The Shadow Brokers struck in April of this year. It is different from Snowden. Snowden just stole some files and the code names used by the National Security Agency (NSA). The Shadow Brokers stole the codes themselves. And so, the NSA or its hacking arm, the TAO, the Technical Access Operations Group, headed by Jake Williams, were devastated because they found out that not only did they lose files and code names, they lost the codes themselves. And after April the loss of the codes was announced. The Shadow Brokers, which is an unknown group up to now, tweeted Jake Williams and told him what they had. Since then there was that series of hacking including what they call ransomware that attack hospitals, attack international delivery groups showing their capability. What is the Philippine response to this very grave danger of the disturbance of the Internet which we are all dependent on? So I think this is a lot of work that OLA should be at the forefront of. Thank you.

ATTY. WAHAB-MANANTAN: Thank you Justice. At this point we proceed to our open forum. I would like to invite Atty. Celeste Cembrano-Mallari of the U.P. Institute of International Legal Studies to join our panelists on the stage as moderator.

OPEN FORUM

ATTY. CELESTE RUTH L. CEMBRANO-MALLARI: Thank you, Attorney Wahab- Manantan. We are now at the part where the participants can raise their questions or comments to the speakers that we have in front. May we request, for documentation purposes that you identify yourself and the institution, or the office where you come from. Since the proceedings of this colloquium will be included in the *Philippine Yearbook of International Law*. Due to time constraints, we only have five minutes for this open forum, so we request to make your questions and comments brief, and the answers to be likewise brief. So, shall we begin? Who is the first person to ask or make a comment? Yes, sir.

AMB. JAIME BAUTISTA: Jaime Bautista with the Philippine Ambassadors Foundation and the Philippine Foreign Service Council. Maybe to add some controversy. I heard Usec. Paras recommending that the Philippines should pass laws, where applying the passive nationality basis for jurisdiction, and maybe this is a good idea in the sense that this will prod our justice system to apply the constitutional provision for speedy justice. I would like also to mention that with respect to the case of the ex-President of Catalonia, Puigdemont, the Belgian court, I think from what I read, would be applying the principle of double criminality even with respect to the crimes of rebellion and sedition. So I would just like to be informed, what is now the law in the Philippines, with respect to political offenses, involving extradition. Thank you.

CHIEF STATE COUNSEL PARAS: Well, passive jurisdiction is defined as the sovereign right to prosecute crimes which are committed against their nationals who fall victims of the crime. I think that is already in our statute books in the Anti-Trafficking Law, but not in all. So maybe we have to explore. There are other principles of course. There is the Protective Principle, such that if an act is done outside of the territory of the Philippines but it has an effect on the security of the Philippines, then we can also assume jurisdiction. There is also the

Universality principle where the crime is against the law of nations. We have that in our Revised Penal Code, because piracy can be prosecuted in any of the States where the pirates would be found. But because of the number of our Overseas Filipino Workers who go abroad, ten percent (10%) of the population are abroad and they are vulnerable, so I think pursuing the Passive Jurisdiction principle would be the best solution, plus the fact that we should explore expanding the coverage of our extradition and mutual legal assistance treaties.

ATTY. CEMBRANO-MALLARI: Thank you very much, State Counsel Paras. Yes, the members of the panel may comment.

JUSTICE ADOLFO AZCUNA: I think that is precisely the need for legislation so that you will have a definite authority for other judges to follow, whether we subscribe to the passive personality principle or not. Because otherwise, there will be no uniformity and our own ten percent (10%) who are abroad may not be protected. I think this is the case of that collision between the Turkish vessel and French vessel. There was a claim whether or not the victims in the vessels could sue the State who owned the vessel that rammed them on the theory of the passive personality principle. And that was handed through a snap because there was no proof that there was customary international law establishing the passive personality principle. In fact, that is the authority for the definition of a customary international law, whether the person who failed to act did so because of a recognition that his non-action is required by law, or maybe just because he did not feel like acting. It has to be shown that it is because of a recognition that the action is dictated as a mandatory rule of law, that you can have a customary international law. So absent customary international law, there is need for legislation. I agree with Ambassador Bautista that we should recommend to Congress to adopt this principle to protect our citizens abroad.

PROF. AGUILING-PANGALANGAN: The basic principle that we follow is territoriality when it comes to crime. The only exceptions are extradition and those crimes committed under Article 2 of the Revised Penal Code, where though committed outside of the Philippines because they are an affront, these crimes are an affront to the laws of the Republic, then we can acquire jurisdiction over those cases. So I think it is high time also that we explicitly state that we will follow, we will acquire jurisdiction over certain cases, so expand Article 2, especially under

the circumstances where we have thousands or millions rather of OFWs abroad. Thank you.

ATTY. CEMBRANO-MALLARI: Thank you, Prof. Pangalangan.

DIR. SHEILA MONEDERO-ARNESTO: I'm Director Sheila Monedero-Arnesto from the Office of Legal Affairs of DFA. I would like to thank, of course, our distinguished presenters today. Thank you for your very informative and thought-provoking comments. Chief State Counsel Paras earlier mentioned about the Strasbourg Convention and I am pleased to inform everyone that the DFA is working with the DOJ on the possible accession of the Philippines to the Strasbourg Convention. Because if we accede to the Strasbourg Convention, it is in essence like entering into a TSPA agreement with a lot of countries, all in one. We don't have to negotiate separate TSPA agreements with different countries, like what we are doing now. The DOJ has some concerns on some provisions of the Strasbourg Convention, and we discussed with them the possibility that, perhaps, by putting in reservations to our accession, these concerns can be addressed.

The first concern of the DOJ is with regard to the power of our President to grant clemency or pardon to the transferred persons. Reservations have been similarly made by other countries, thus this particular power of our government can be protected. The second issue that concerns the DOJ pertains to the two modes of effecting the remaining sentence after the transfer: one, by continued enforcement of the remaining sentence in the other country, or, two, the conversion of the sentence into a local one. The Strasbourg Convention provides that we can choose either mode. It is thus possible for us to choose the first mode, the continued enforcement of remaining sentence which are already found in our bilateral TSPAs.

The DFA-OLA also assists the DOJ in handling other international legal cooperation agreements. With respect to extradition agreements, the preliminary assessment of the extradition requests from other countries is done by the DFA, as mandated by the Philippine Extradition Treaty to ensure that they comply with the requirements of our Philippine Extradition Law before we refer the request to the DOJ.

With respect to the Mutual Legal Assistance (MLAT), there are two types: one, MLAT with respect to criminal matters that was earlier discussed , and two, mutual legal assistance with respect to civil matters. For assistance in civil cases, the Philippines through DFA-OLA provides the assistance the service of processes, including judicial documents. The basis of the assistance is Article 5(j) of the Vienna Convention on Consular Relations, which authorizes consular officers to transmit judicial and extrajudicial documents. So even without an MLAT agreement, if it is a civil case, the Philippine Government can assist with respect to both inbound and outbound requests. As Prof. Beth Pangalangan earlier explained, if we accede to the Service Convention, the service of processes will be faster and more efficient, because it will be done through the designated Central Authorities, rather than through the current diplomatic channels.

And as to Mutual Legal Assistance in criminal cases, the general rule is that, if there is a bilateral agreement, it is obligatory for the Philippines to grant the assistance requested. But even in the absence of an MLAT Agreement, the Philippines can still assist. The latter request can be coursed through the DFA, and the DFA will refer the matter to the DOJ which can consider the request. It is discretionary on the DOJ whether or not to grant the assistance requested.

ATTY. CEMBRANO-MALLARI: Thank you very much for sharing your experiences at the DFA. I think there is room for one more quick comment from Dean Merlin Magallona, our distinguished scholar in international law.

DEAN MERLIN M. MAGALLONA: Good morning, I am glad that Justice Azcuna has reminded us of the decision of the Supreme Court with respect to the Bill of Rights. But in context, may I add that the provisions of the Philippine Constitution relating to international law may be seen to be derived from our international obligation under the United Nations Charter. Articles 55 and 56 of the United Nations Charter would require the Philippines to respect and recognize human rights and fundamental freedom, and this in particular, would refer to the Universal Declaration of Human Rights which is recognized by international commentators as making a litany of rights that were involved in the Sandigan case of the Supreme Court in the first place. In addition, it may be said that at the time of the decision of the Supreme Court in the Sandigan case, the Philippines was already a State party to the Statute of the International Court of Justice, which gives us an enumeration of what are the sources of law. This would include general legal principles and customary international law, in which case, we

can see that the incorporation clause of the Constitution and that the treaty clause of the Constitution may be said to have been derived from the statute, in particular Article 38 of the Statute of the International Court of Justice, which would impose upon the Philippines the international obligation to comply with the sources of law enumerated. Thank you.

ATTY. CEMBRANO-MALLARI: Thank you very much, Dean Magallona. I think we are ready to proceed with the next part of the program.

SESSION 2: TRADE AND INVESTMENT FACILITATION

ATTY. WAHAB-MANANTAN: Our main presenter for this session received his LL.M from Columbia University in 2010, where he earned the distinction of being a Harlan Fiske Stone Scholar, a *magna cum laude* equivalent, specializing in International Law, Climate Change Law, and Environmental Law. A member of the Order of the Purple Feather, U.P. College of Law's honor society, for all his years in law school, he graduated in the top ten of his class, receiving the Dean's Medal for Academic Excellence.

He has been teaching at U.P. College of Law since 2005 and became a full-time faculty member in 2008. He has taught subjects such as Public International Law, Obligations and Contracts, Torts and Damages, Credit Transactions, Transportation and Public Utilities, and Land Titles and Deeds. He has also published law treatises on Agency, Partnership, Damages and Torts. His latest book on Philippine Contract Law, "*The Law on Contracts*," is published by LexisNexis. He is currently the director of the Institute of International Legal Studies of the U.P. Law Center.

Ladies and gentlemen, let us welcome Professor Rommel Casis.

RATIFICATION OF TRADE TREATIES

PROF. ROMMEL J. CASIS

PROF. ROMMEL J. CASIS: Thank you very much, Johaira – my former student, who had a very high grade in my class. Honorable Justice Adolfo Azcuna, Honorable Chief State Counsel Ricardo Paras, Assistant Secretary Eduardo Malaya, Ambassador Claro Cristobal, Undersecretary Manuel Antonio Teehankee, deans, professors, lawyers, students of law, colleagues in government, and friends in the private sector, good morning.

As the third and definitely the least among our eminent speakers today, I have endeavored to keep this presentation short. In keeping with today's general theme of identifying opportunities and challenges for the advancement of Philippine foreign policy priorities, especially those that may often be overlooked, I have been tasked to speak on the topic of international law and trade and investment facilitation. What I will be presenting to you today is the result of preliminary research by the Institute of International Legal Studies of the U.P. Law Center. We will begin by explaining the methodology we employed in reviewing the Philippines' current, possible, and potential obligations under international agreements, which, in turn, became the starting point of our preliminary recommendations.

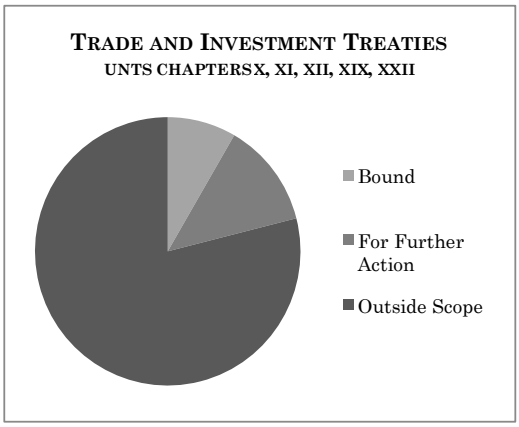
The first step was to review all 648 multilateral treaties deposited with the United Nations Secretary-General. From these treaties, we identified those falling under certain subject headings, which could potentially enhance trade and investment. These subject headings are *trade, transport and communication, navigation, commodities, commercial arbitration*. From these subject headings, we identified 347 treaties. These treaties, in turn, were checked to confirm which of them were signed and ratified, signed but not ratified, or not signed by the Philippines. For the treaties that have not been signed, we also determined whether they were still open for accession. From this group of treaties, we compiled a list of those that are recommended for further action by the Philippines.

List of Treaties Recommended for Further Action

TREATY OR AGREEMENT	SIGNED	RATIFIED
1. Convention on the Limitation Period in the International Sale of Goods, 1511 U.N.T.S. 3.	No	No
2. United Nations Convention on Contracts for the International Sale of Goods, 1489 U.N.T.S. 3	No	No
3. United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, 2169 U.N.T.S. 3.	No	No
4. Charter of the Asian and Pacific Development Centre, 1321 U.N.T.S. 203.	Yes (15 Dec 1982)	No
5. United Nations Convention on the Use of Electronic Communications in International Contracts, 2898 U.N.T.S.	Yes (25 Sep 2007)	No
6. Amendments to the Charter of the Asian and Pacific Development Centre.	No	No
7. United Nations Convention on International Bills of Exchange and International Promissory Notes.	No	No
8. United Nations Convention on the Liability of Operators of Transport Terminals in International Trade.	Yes	No
9. Framework Agreement on Facilitation of Cross-Border Paperless Trade in Asia and the Pacific.	No	No
10. International Convention to Facilitate the Importation of Commercial Samples and Advertising Material, 221 U.N.T.S. 255.	No	No
11. Customs Convention on the Temporary Importation of Commercial Road Vehicles, 327 U.N.T.S. 123.	No	No
12. Agreement on Special Equipment for the Transport of Perishable Foodstuffs and on the Use of such Equipment for the International Transport of some of those Foodstuffs.	No	No
13. Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (ATP), 1028 U.N.T.S. 121.	No	No

14. Convention on the contract for the international carriage of passengers and luggage by road (CVR), 1774 U.N.T.S. 109.	No	No
15. United Nations Convention on the Carriage of Goods by Sea, 1695 U.N.T.S. 3.	Yes (14 June 1978)	No
16. International Convention on Maritime Liens and Mortgages, 2276 U.N.T.S. 39	No	No
TREATY OR AGREEMENT	SIGNED	RATIFIED
17. Agreement establishing the International Pepper Community, 818 U.N.T.S. 89.	No	No
18. Agreement establishing the International Tea Promotion Association, 1128 U.N.T.S. 367.	No	No
19. Agreement establishing the Southeast Asia Tin Research and Development Centre, 1075 U.N.T.S. 3.	No	No
20. Terms of Reference of the International Copper Study Group, 1662 U.N.T.S. 229.	No (Signed 10 Sept. 1993, withdrew membership in 1996)	No
21. International Tropical Timber Agreement, 1393 U.N.T.S. 67.	Yes (29 Sept. 1995)	No
22. Grains Trade Convention, 1882 U.N.T.S. 195.	No	No
23. International Cocoa Agreement, 1245 U.N.T.S. 24. 221.	No	No
25. United Nations Convention on Transparency in Treaty-based Investor-State Arbitration.	No	No

If we look at this pie chart, we can see that of the 347 treaties under the said subject headings possibly related to trade and investment, 29 are agreements to which the Philippines is already bound, or those which it signed and ratified. On the other hand, 247 of these agreements are those to which the Philippines is not bound, not open for signing and accession, or unrelated to trade and investment. The remaining 44 agreements are those possibly open for signing or accession,



and relate to trade and investment facilitation. Of this latter group, 24 are recommended for possible action.

We were provided with a list of treaties or agreements submitted for concurrence by the Senate, as prepared by the 17th Congress. This was last updated on August 30, 2017. We can imply from this list the areas of priority for the government. Thus, the absence of a particular agreement in this list would show that such agreement is not a priority. We noted that none of the 24 agreements we have identified for possible action are in the Senate list. Therefore, our preliminary observation is that some important trade-related treaties might have been overlooked. But it is also entirely possible that the executive department, or the Senate, at some point, decided not to become a party to any of these treaties—maybe because these treaties are currently incompatible with current policy. There may be many reasons why these treaties have not been identified in the Senate list. Determining the exact reason for the inattention to these treaties would require further research and assistance from the government agencies concerned and is beyond the scope of this presentation.

Treaties/Agreement Submitted for Concurrence by the Senate
(As of August 30, 2017[1])

TITLE	DATE SUBMITTED TO THE SENATE	DATE (ORDER OF BUSINESS)	COMMITTEE REFERRAL	DATE TRANSMITTED TO THE COMMITTEE	STATUS
1. Articles of Agreement of the Asian Infrastructure Investment Act	Oct. 20, 2016	Nov. 7, 2016	Foreign Relations	Nov. 10, 2016	SRN-241, Adopted as Res. No. 33 Dec. 5, 2016
2. Agreement between the Government of the United States of America and the Government of the Republic of the Philippines to Improve International Tax Compliance and to Implement the FATCA (Foreign Account Tax Compliance Act)	Dec. 7, 2016	Dec. 7, 2016	Foreign Relations	Jan. 10, 2017	Pending in the Committee
3. Convention on Cybercrime, which was signed on 23 November 2001 in Budapest, Hungary	Dec. 15, 2016	Jan. 16, 2017	Foreign Relations	Jan. 19, 2017	Pending in the Committee
4. Arms Trade Treaty (ATT), which was	Assembly Jan. 19, 2017	Jan. 23, 2017	Foreign Relations	Jan. 25, 2017	Pending in the

[1] Indexing, Monitoring, and Legislative Bills and Index Service Section, Treaties/Agreements Submitted for Concurrence by the Senate, 17th Cong., (Aug. 30, 2017), https://www.senate.gov.ph/17th_congress/treaties_17thcongress.asp.

adopted on 2 April 2013 at the United Nations General					Committee
5. Agreement between Japan and the Republic of the Philippines on Social Security, which was signed on 19 November 2015 in Manila	Jan. 19, 2017	Jan. 23, 2017	Foreign Relations	Jan. 25, 2017	SRN-283, Adopted as Res. No. 38 Feb. 13, 2017
6. Agreement Establishing ASEAN+3 Macroeconomic Research Office (AMRO), which was signed on 10 Oct. 2014, in Washington, D.C., United States of America	Jan. 12, 2017	Jan. 31, 2017	Foreign Relations	Feb. 1, 2017	Pending in the Committee
7. Convention between the Government of the Republic of the Philippines and the Government of the Kingdom of Thailand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, which was signed on 21 June 2013 in Manila, Philippines	Jan. 13, 2017	Jan. 31, 2017	Foreign Relations	Feb. 1, 2017	Pending in the Committee

8. Agreement between the Government of the Republic of the Philippines and the Government of the Republic of Indonesia concerning the Delimitation of the Exclusive Economic Zone Boundary	Feb. 23, 2017	Feb. 27, 2017	Foreign Relations	Feb. 28, 2017	Pending in the Committe e
9. Agreement on Social Security between the Republic of the Philippines and the Kingdom of Sweden	Mar. 1, 2017	Mar. 1, 2017	Foreign Relations	Mar. 7, 2017	Pending in the Committe e
10. Agreement between the Republic of the Philippines and the Federal Republic of Germany on Social Security	Mar. 1, 2017	Mar. 1, 2017	Foreign Relations	Mar. 7, 2017	Pending in the Committe e
11. Paris Agreement	Mar. 1, 2017	Mar. 1, 2017	Foreign Relations	Mar. 7, 2017	SRN-320, Adopted as Res. No. 42 Mar. 14, 2017
12. Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the One Part, and the Republic of the Philippines, of the Other Part	Mar. 13, 2017	Mar. 14, 2017	Foreign Relations	Mar. 14, 2017	Pending in the Committe e
13 . Convention between the	Mar. 15, 2017	May 2, 2017	Foreign Relations	Apr. 3, 2017	Pending in the

Government of the Republic of the Philippines and the Government of the Democratic Socialist Republic of Sri Lanka for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income					Committe e
14. Agreement between the Government of the Republic of the Philippines and the Government of the United Mexican States for the Avoidance of Double Taxation with Respect to Taxes on Income and the Prevention of Fiscal Evasion	Apr. 6, 2017	May 2, 2017	Foreign Relations	May 3, 2017	Pending in the Committe e
15. International Convention on the Control of Harmful Anti-Fouling Systems on Ships, 2001 (AFS 2001 Convention)	May 29, 2017	May 30, 2017	Foreign Relations	June 1, 2017	Pending in the Committe e
16. Convention Concerning Protection of the Right to Organise and Procedures for Determining Conditions of	May 31, 2017	May 31, 2017	Foreign Relations	June 7, 2017	SRN-454, Adopted as Res. No. 58 Aug. 14, 2017

Employment in the Public Service					
17. Protocol of 1988 relating to the International Convention for the Safety of Life at Sea, 1974 (SOLAS Protocol 88)	July 26, 2017	July 31, 2017	Foreign Relations	Aug. 7, 2017	Pending in the Committe e
18. Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships, 1973, as Modified by the Protocol of 1978 Relating Thereto	Aug. 22, 2017	Aug. 22, 2017	Foreign Relations	Aug. 23, 2017	Pending in the Committe e
19. Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, 1974 (SOLAS Protocol 78)	Aug. 23, 2017	Aug. 29, 2017	Foreign Relations	Aug. 30, 2017	Pending in the Committe e
20. Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas	Aug. 23, 2017	Aug. 29, 2017	Foreign Relations	Aug. 30, 2017	Pending in the Committe e
21. Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal,	Aug. 23, 2017	Aug. 29, 2017	Foreign Relations	Aug. 30, 2017	Pending in the Committe e

Unreported and Unregulated (IUU) Fishing					

Notwithstanding these considerations, we can, at this point, choose a sampling of some of these recommended treaties for initial analysis. We offer three agreements for your consideration. First, the United Nations Convention on Contracts for the International Sale of Goods, or the CISG. Second, the United Nations Convention on the Use of Electronic Communication in International Contracts, or ECC. Third, the Framework Agreement on the Facilitation of Cross-Border Paperless Trade in Asia and the Pacific, or the FA. We will analyze each of these agreements in the context of the following guide questions: First, "What is the background and the rationale for this agreement?" Second, "What issues related to trade and investment may it address?" Third, "What are the actions needed to comply with this particular agreement?" And fourth, "What are the policy considerations for the DFA in connection with these agreements?"

Let us take a look at the CISG. The CISG was prepared by the UNCITRAL, adopted in Vienna on April 11, 1980, and entered into force on January 1, 1988. As of June 16, 2017, the Convention has been signed by 87 countries,[2] the latest being Fiji in 2017, Azerbaijan in 2016, and Vietnam in 2015.

The Philippines is currently not a signatory. Among ASEAN Member States, only Singapore and Vietnam are parties to the Convention.

The purpose of the Convention is to provide a uniform framework for contracts of sale of goods between parties whose places of business are in different states. By doing so, it seeks to remove legal barriers in international trade

[2] The list of Contracting States, subject to declarations when applicable, are as follows: Albania, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Belarus, Belgium, Benin, Bosnia-Herzegovina, Brazil, Bulgaria, Burundi, Canada, Chile, China (PRC), Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Fiji, Finland, France, Gabon, Georgia, Germany, Greece, Guinea, Guyana, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Japan, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Lithuania, Luxembourg, Macedonia, Mauritania, Madagascar, Mexico, Moldova, Mongolia, Montenegro, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Republic of Congo, Republic of Korea, Romania, Russian Federation, Saint Vincent & Grenadines, San Marino, Serbia, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Turkey, Uganda, Ukraine, United States, Uruguay, Uzbekistan, Vietnam, Yugoslavia, Zambia. *See* United Nations Convention for the International Sale of Goods, *Status,* http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited June 16, 2017).

and promote predictability in international trade law, thus reducing transaction costs.[3] The CISG applies only to international sales contracts, and therefore the domestic laws still apply to domestic sales contracts. Under the treaty, international transactions are defined as "contracts of sale of goods, between parties, whose places of business are in different States: (a) when the States are contracting states; or (b) when the rules of private international law lead to the application of the law of a Contracting State."[4] It also applies only to sales of goods, subject to certain exceptions, and not to sales of services. Moreover, the CISG applies only to sales to businesses, not to sales to consumers. Under Article 2 of the CISG, it is inapplicable to the following: sale of goods for personal use, sale by auction, sale by execution or authority of law, sale of stocks, shares, securities, negotiable instruments and money, sale of ships, vessels, hovercraft or aircraft, and sale of electricity.[5]

Among the benefits of the CISG, as far as trade and investment is concerned, is the provision of a uniform set of rules for international sales of goods. A uniform set of rules may help alleviate some issues in conflict of laws. Given the uniformity, the enforcement of contracts will be easier as the governing law will generally be synchronized across jurisdictions. The CISG also allows parties to opt out of its stipulations in certain cases and specify other laws to govern, which allows it to be flexible.

Cross-border trade will likewise be aided, as transaction costs will be lessened, especially in markets where firms have not yet established experience and expertise. The TMF Group, a consulting body, stated that two of the top challenges of doing business in the Philippines are "trading across borders" and "enforcing contracts."[6] The CISG may help address these problems and business uncertainties for firms in new markets.

Moreover, the exporting industry believes that the CISG may reduce barriers to trade and boost exports.[7] This is because there are opportunities for

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[3] United Nations Commission on International Trade Law, *Introduction to the Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, at xi (2016 ed.), https://uncitral.un.org/sites/default/files/mediadocuments/uncitral/en/cisg_digest_2016.pdf

[4] Convention on Contracts for the International Sale of Goods, art. 1(1), Apr. 11, 1989, 1489 U.N.T.S. 3 [hereinafter CISG].

[5] *Id.* art. 2.

[6] *Top 10 challenges of doing business in the Philippines*, TMF GROUP, https://www.tmfgroup.com/en/news-insights/business-culture/top-challenges-philippines/.

[7] Raadee S. Sausa, *PH accession to UN Convention on CISG to boost exports* – PhilExport, MANILA TIMES (May 29, 2017), http://www.manilatimes.net/ph-accession-un-convention-cisg-boost-exports-philexport/329806/.

growth and expansion for global supply chain players that can adapt well to international trade rules. To note, the top destinations for Philippine exports – Japan, the United States, China, and Singapore – are parties to the CISG.[8]

Aside from these economic benefits, becoming a party to the CISG may also enrich contract law reform. I guess, as an academic, this is something that I find encouraging. Philippine contract law, even those not specifically related to the international sale of goods, may be informed by CISG provisions. On a personal note, I am part of a group of Asian contract law scholars. We meet biannually to come up with a harmonized set of rules for contract law in Asia. One of the things I have noticed is that our version of contract law is not in any way updated or consistent with these international rules, whereas my counterparts from other ASEAN countries are able to converse and compare their contract law provisions with the CISG. Unfortunately, when I speak of the Philippine law on the matter, I often have to admit that our rules have not yet been updated to comply with international standards. Furthermore, the CISG comes with a set of tools, such as commentaries and jurisprudence, which will also be available once the Philippines becomes a party to it.

Aside from ratifying the treaty, an option to incorporate the CISG in Philippine law is to amend the Civil Code provisions on sales. Another option is to create a special law or set of rules for transactions covered by the CISG since the Convention does not apply to all kinds of sales. However, we believe that an amendment to the Civil Code is not necessary since the CISG only applies to a specific set of transactions – international sales of goods by businesses. An implementing legislation may nonetheless be a good idea to avoid confusion. There is also no need for the creation of an implementing agency since the existing government agencies tasked to monitor foreign agreements and trade should suffice. Additionally, the provisions of the Convention do not require reporting obligations for its member states.

In light of the benefits and the fact that there are a large number of parties to the treaty, we recommend that the executive branch support the accession and ratification of the Philippines to the CISG. Moreover, in the signing and ratification process, further research should be done on the provisions to which the Philippines may submit a reservation to, as the CISG allows for reservations. Finally, since the agreement relates to international trade, it would be prudent to engage agencies, such as the Department of Trade and Industry, to assist in the policy-making, signing, and ratification process.

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[8] The top export destinations of the Philippines are Japan ($11.7B), the United States ($8.67B), Hong Kong ($6.58B), China ($6.19B) and Singapore ($3.7B). *See* Philippines Country Profile, ATLAS MEDIA, https://atlas.media.mit.edu/en/profile/country/phl/.

The second convention I will be discussing is the United Nations Convention on the Use of Electronic Communications in International Contracts, or ECC. It was adopted by the UN General Assembly in 2005. The Convention then entered into force eight years after, on March 1, 2013. The ECC applies to electronic communication in the formation or performance of a contract between parties whose respective places of business are in different states.[9] "Electronic communications" refer to any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, made by electronic, magnetic, optical, or similar means in connection with the formation or performance of a contract.[10] The treaty is intended to be applied broadly, even for arbitration and other legally binding agreements not traditionally considered as "contracts".[11] Moreover, it excludes certain contracts, such as those for personal purposes, foreign exchange transactions, interbank payment systems, promissory notes, and negotiable instruments, among others.[12] The ECC does not seek to prescribe a particular form, nor does it require everyone to use or accept electronic communications. It merely provides for rules in case such electronic communications are used in contracts. These provisions, however, may be subject to change by national legislation or by the contract itself. The rules embodied in the ECC are considered "neutral" rules based on the principle of technological neutrality. This means that they do not depend on or presuppose the use of particular types of technology and that they should be applied in the communication and storage of all types of information.

The Philippines signed the ECC on September 25, 2007, but it has yet to ratify it. The ECC recognizes the necessity to provide a legal framework for online contracts, considering the role of electronic communications in accelerated economic growth. Transactions done through the Internet relate to increased firm-level productivity,[13] increased Internet access, and facilitate small and medium-sized enterprises, or SMEs, creating more jobs, with digitization generating 2.6 million jobs annually.[14] The ECC seeks to address questions of

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[9] Convention on the Use of Electronic Communication in International Contracts, art. 1, Jan. 16, 2006, 2898 U.N.T.S. [hereinafter ECC].

[10] *Id.* art. 4(a)–(c).

[11] *Id.* art. 1(1).

[12] *Id.* art. 2.

[13] *The Development Dimension of E-Commerce in Asia: Opportunities and Challenges*, ASIAN DEVELOPMENT BANK (2016), https://www.adb.org/sites/default/files/publication/185050/adbi-pb2016-2.pdf.

[14] *Id.* citing Matthieu Pélissié du Rausas, James Manyika, Eric Hazan, Jacques Bughin, Michael Chui & Rémi Said, *Internet Matters: The Net's Sweeping Impact on Growth, Jobs, and Prosperity*, MCKINSEY GLOBAL INSTITUTE (2011), https://www.mckinsey.com/industries/technology-media-and-telecommunications/our-insights/internet-matters.

validity of electronic contracts under the principle of functional equivalence. It aims to facilitate paperless means of communication by offering criteria under which they can be functional equivalents of paper documents. It also provides for legislation on electronic communications to those states that have none, or have partial and insufficient provisions.

For the Philippines to comply with the ECC, it may be necessary to amend the current law, Republic Act No. 8792 or the Electronic Commerce Act. The amendments may include updating the rules on the time and place of dispatch of electronic documents, and take into consideration other provisions mentioned in the Convention—but not discussed in our law—such as invitation to make offers, availability of contract terms, and error in electronic communications. Aside from amending the law, it may also be possible to simply update its implementing rules, or issue a new Administrative Order to address the implementation of the ECC. This requires further study and should involve the agencies implementing the law, as well as other stakeholders. For the DFA, we recommend that it consider supporting the ratification of the ECC in order to update Philippine law on electronic commerce and other contracts created, perfected, and performed in cyberspace.

Finally, the third convention is the Framework Agreement on the Facilitation of Cross-border Paperless Trade in Asia or FA. This was developed as part of the implementation of ESCAP Resolution 68/3 entitled *Enabling Paperless Trade and Cross-border Recognition of Electronic Data and Documents for Inclusive and Sustainable Inter-Regional Trade Facilitation*. The United Nations Economic and Social Commission for Asia and the Pacific, or ESCAP, as the regional development arm of the United Nations for the Asia-Pacific Region, endeavors to overcome some of the greatest challenges in the region by providing results-oriented projects, technical assistance, and capacity building for its 53 Member States and 9 Associate Members.[15] The Framework Agreement is not yet enforced, but was open for signature from October 1, 2016 until 30 September 2017 to all ESCAP members. The objective of the Framework Agreement is to facilitate cross-border paperless trade among willing ESCAP member states by providing a dedicated intergovernmental framework to develop legal and technical solutions.

"Cross-border paperless trade" is trade in goods, including their import, export, transit, and related services, taking place on the basis of electronic communications, including the exchange of trade-related data and documents in

[15] *About ESCAP*, UN ESCAP, http://www.unescap.org/about.

electronic form.[16] Most of the provisions of the Framework Agreement center on measures for promoting cross-border paperless trade, not on detailed and specific mechanisms for engaging in cross-border paperless trade. The Framework Agreement covers government-to-government and government-to-business cross-border data exchange. To illustrate, the Framework Agreement encourages the State Parties to establish a national policy framework for paperless trade, to create an enabling law in their respective national legal systems, and to establish the respective national committees to promote a legally enabling domestic environment for exchange of trade-related data and documents in electronic form. It differs in its nature and coverage from other regional initiatives, such as those of ASEAN and APEC. Compared with ASEAN, which is focused on developing an ASEAN single window, a specific mechanism, the Framework Agreement provides a framework for States to follow through paperless trade, and not a single system. Moreover, ASEAN is limited to its 10 members, but the Framework Agreement is open to all 53 Member States of the ESCAP. As compared with APEC, whose activities are conducted on the basis of non-binding commitments, the Framework Agreement is a binding UN Treaty. APEC covers only 21 States, and there exists no initiative among them for a regional agreement for cross-border paperless trade.

	FA	**ASEAN Single Window**	**APEC**
Trade regulation sought to be implemented	Facilitation of paperless trade involving trade in goods and exchange of trade-related data	Facilitation of trade through electronic exchange of cargo clearance data in a synchronized environment	Various trade commitments
Nature of agreement	Binding UN Treaty	Binding only among ASEAN Member States	Non-binding
Area of implementation	53 Member States	10 Member States	21 Member States

On the other hand, the Framework Agreement is complementary to the WTO Agreement on Trade Facilitation (TFA). Implementing the Framework Agreement will support ESCAP Member States in easily meeting the requirements of many provisions of the WTO TFA, including those on formalities and trade of goods, release and clearance of goods, and border-agency cooperation. The Framework Agreement addresses the necessity for a bilateral or sub-regional intergovernmental approach since this encompasses all

[16] Duval, Yann & Kong Mengjing, *Paperless Trade in Regional Trade Agreements* (ESCAP Trade, Investment and Innovation Division Working Paper Series No. 02, 2016).

53 states of the region. It also provides a solution to high trade costs. According to implementation reports, the potential total direct cost savings across all trade would be approximately US$1 billion annually for partial reform and US$7 billion annually for full implementation.[17] It also aims to shorten the time consumed by facilitating trade and therefore boosts trade.

There have been issues regarding parties that have different implementation levels and levels of readiness for trade facilitation. The Framework Agreement affords flexibility according to the level of readiness while allowing its objectives to be met.

As recommended by the Framework Agreement, the Philippines will have to enact an enabling law that would allow cross-border paperless trade with other States. Once the international standards on trade have been identified, they must be adopted and incorporated in the enabling law. Most likely, these standards will refer to periods for data exchange, as well as the data that will have to be exchanged, and forms of contracts and documents evidencing such data. Since the Framework Agreement applies to both government-to-government and government-to-business transactions, cooperation between public and private sectors must also be developed.

For policy direction, we recommend that the DFA facilitate the signing and ratification of this agreement. To implement the FA will, however, entail a huge endeavor. It requires an enabling legislation and the formation of committees and other bodies. Pursuant to the process of ratification, we also recommend that all the relevant government agencies be involved.

In conclusion, our purpose here today is to make an initial assessment of trade-related treaties the Philippines may want to consider ratifying. We cannot offer at this time an in-depth discussion of these treaties. We merely provide a sampling of what may be available for consideration. It seems that there are a number of treaties that are currently being considered by the Government, possibly for a variety of reasons. We, at the Institute of International Legal Studies, believe that the situation merits further study to ensure that we are not missing out on opportunities for growth. Thank you very much for listening.

ATTY. WAHAB-MANANTAN: Thank you, Professor Casis. Our next speaker is a well-known expert on international economic and trade law. He is

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[17] *Estimating the Benefits of Cross-Border Paperless Trade*, UNITED NATIONS ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC, at 24 (2014), https://www.unescap.org/sites/default/files/Benefits%20of%20Cross-Border%20Paperless%20Trade.pdf.

currently the Undersecretary of Foreign Affairs for International Economic Relations. In 2012, he was awarded the DFA Distinguished Service Award for his diplomatic service as Permanent Representative of the Philippines to the World Trade Organization in Geneva from 2004 to 2011. He also served as Chair of the WTO's Committee on Trade and Environment from 2007 to 2011.

He served as Undersecretary of the Department of Justice and Acting Government Corporate Counsel. He has appeared before the Philippine Supreme Court, the WTO Dispute Settlement Body in Geneva, the Iran-US Claims Tribunal in The Hague, and several *ad hoc* tribunals governed by UNCITRAL, ICSID, ICC, and SIAC rules.

As a private practitioner, he has also represented clients as foreign counsel. He lectures as a Professor of Public and Private International Law at the Ateneo Law School, the Foreign Service Institute, and at various conferences and seminars. He ranked 1st among the 2,455 examinees in the 1984 Philippine Bar and was also admitted to the New York State Bar in 1987.

Colleagues, we are honored and pleased to have with us today Undersecretary Manuel Antonio Teehankee of the DFA Office for International Economic Relations.

COMMENTARY BY UNDERSECRETARY MANUEL ANTONIO J. TEEHANKEE

USEC. MANUEL ANTONIO TEEHANKEE: Justice Leonen: Justice Azcuna, my good friend from DOJ days; Chief Paras, of course, Asec. Ed, fellow traveler in this never-ending push for international law interest group in the Philippines; dear friends, magandang hapon sa inyong lahat.

Since we are trying to push forward the open forum, I do have some brief remarks and reports, but is Attorney Raul Angeles here already? Is there a representative from the Board of Investments (BOI)? Any volunteer for the BOI? Anyway, I will briefly report, and I thought we are following this forum style, so I will ask Professor Casis not to be so far away since there are only two of us in the open forum. Well, we are trying to follow international practice and make it very interactive, so with the absence of one speaker, we will have more time, especially with the presence of our justices here and all of you to interact.

Since I have been in OUIER, I am very pleased to report some developments in international economic law. I really am very, very pleased that I am speaking after Professor Casis, since this is one of our subjects to have an inventory of treaties pending ratification or pending signature. Since I am also very pleased to only be dealing with economic, I am also very happy that we are speaking after the excellent presentation of the political treaties and agreements in the first session.

So, definitely, one of our very positive experiences with OLA and OUIER in the DFA is really the importance of getting treaties in force. And this is the big issue: how to get the treaties in force, especially since a lot of legal time-billable hours if you were in private practice, but government bureaucratic time, which is also very important- is put into the negotiation process. And sometimes, negotiations can literally take years. And so when, after several years of work, the treaty is indeed signed, and so for it to be enforced, you have to proceed to having it ratified by the President and having it concurred in by the Senate. However, as pointed out by the main presenter, some treaties are sitting there for many years. So we do have a proposal that it is very, very important that the private – the international law interest group, such as the academe present here, government, and also the private practitioners- get into the picture. Because in order to get a treaty in force, it requires a whole set of departmental concurrences. You cannot imagine the amount of rush work we had to get for the very positive passage of the following. At least over the last year and a half of my time in OUIER, OUIER is just the acronym for the Office of the Undersecretary for International Economic Relations, and OLA is the acronym for Ed's department. And of course we are very, very happy that Ed is back because he is an academic scholar and actually, theoretically, should be permanently checking on OLA, with all due respect to our OLA colleagues here.

So, over the last year, through some personal and senatorial or departmental prodding and reminding, we did get completion of the ITA, that's the Information Technology Agreement Supplemental Protocol. So that's in the WTO. As pointed out, we did work on the ratification of the Trade Facilitation Agreement, which entered into force just this February this year. And so, I see, of course, the tight commission of friends. It really requires a whole set of governmental activation of the bureaucracy to get all these departmental concurrences, get them into a package care of OLA, then get them to the Office of the President. You must do the follow-up because, as what happened with the Paris Accord, it was already at the Office of the President, but without follow-up, the election happened and then, guess what? We had to redo all the Cabinet concurrences; you cannot imagine. So it was already ready in the Office of the President; they didn't, thanks to Senator Legarda, who you all know is an advocate, we got things done, and we had to follow up in each Department. So

that's the second one that was rushed and followed up: the Paris Accord. So the Philippines was caught up and is part of the Paris Accord.

Then we had also another economic treaty, the Asian Infrastructure Investment Bank (AIIB) Agreement, which was also, the impetus, of course, was that the President was going to China. We had a reservation subscription; we were given VIP treatment; we own one percent (1%) of AIIB. The money was all set: a hundred million dollars; it's all set. So can you imagine if we did not get the full ratification, the set-aside hundred million dollars will lapse because we offer it now on post-PDAF requirements of strict COA requirements, and that would have lapsed, and the money would have not been used, and then we would have to go through a whole appropriation process. So that was also good news, fast, and we are priority one percent (1%) owners of the AIIB, not in the World Bank and other financial institutions. We have very, very tiny optionalities but the good part is, because we sent the money in, we ratified; we are a major stockholder.

We also have this Apostille Convention, good news from OLA, because that is very important for our economic agreements, as pointed out per OLA. It is pending at the Office of the President already. Of course, it took Ed Malaya's attention and intergovernmental, because in government we all have to help each other, so it is a good collegiality of working with other government offices. Do not nag them; just friendly follow-up; eventually they will deliver. Because it is all really very collegial in the government service. We have signed the EFTA, which is the second free trade agreement of the Philippines, the first being with Japan. This one is technically a free trade agreement but with four non-EU countries- emphasis on non-EU- so it is not a controversy: Switzerland, Liechtenstein, Norway, and Iceland. So this is also almost done; again, thank you to OLA, because it's a whole legal process- you know how lawyers are- of assembling a package for Malacañang, and that is pending now for the President's ratification, similar to the Apostille Convention. And after that, you must follow up at the Senate and make sure that the Senate Foreign Relations Committee- that's its job- and you have contact with the Senators, and then the report must be put out for the full session concurrence. So we are watching out for two very positive developments – EFTA and Apostille for monitoring with the Senate. And of course, you know that the Senate operates in various sessions, and so you must make sure the ratification- I'm sorry, the concurrence- must occur within a certain time frame.

Going back to practicality, I think I can only give my 300% support to the idea of an annual Colloquium such as this because it gives the DFA the opportunity to interact with the academe, other government agencies, and private international law practitioners to push forward, indeed, what are very current events happening in the international law area, and which are time-sensitive,

especially in the international economic field. Most international economic agreement or treaties have the so-called momentum effect: once signed, it generates investments and trade, and new deals within a span of two to three years. And that's why, on the economic front, we work closely with DTI on ensuring ratification within a relatively short time, because in the international economic field, the momentum for new investment and new trade is very close to the date of the deal. Of course, the Apostille Convention, digital paper, and all that- we should push for more, but that is why we need it; it is not as time-sensitive, but it is important that the private sector does, and the other agencies in the academe.

So we do have a kind of rating proposal wherein the importance of the pending treaty should be scaled on a one-to-ten basis with three factors. The first factor is, of course, whether the Philippines has already signed, and the years pending. So if it is signed, like the 2007 ECC, signed and already pending for eight years, ten years- so ten years and already signed – of course, if there's any controversy, that's minus 5, okay. So on a scale of 1-10, assuming that it is noncontroversial, assuming this is non-controversial, it gets a ten or one-third, three, three point three (3.3).

Then, the second one is whether it is accepted already. There is an overall international consensus among international law practitioners. So I suppose there are two examples – one gets a really high priority, but on the digital one, which is only open for signature, of course, it gets already, it is not signed, so it does not get points in the A Level. But on the second one, one Convention is higher priority because of the consensus. For example, the Apostille Convention gets a very, very high score because it has reached an international level of acceptance. And of course, to the international law experts in the room, a level of customary international law: while there is instant custom, there is still the general acceptability of international acceptance of a custom.

The third factor that we would recommend for our monitoring during our Colloquium is the status of the endorsement and what sector is involved. And here, I think, while the government is sometimes behind, we have the A and B, but in C, it is very important that the treaty that is pending for signature, concurrence, or ratification receives the endorsement of the international law interest groups, which, of course, we are trying to make sure are the Philippine Society of International Law and all the international law centers, are more active, so we really need positive championing by the sector involved. And of course, this includes, for example, the DTI if it is a trade agreement; if it is intellectual property, we need the endorsement of the Intellectual Property Office and the DOST. So, in the third factor, we really need the private practitioner groups who are supporting that particular Convention. I can report the very, very positive influence of the Philippine Chamber of Commerce and Industry. They have been

following up on the Apostille Convention, so that is both the Chamber of Commerce and private practitioners. They are also following up on the Islamabad Convention. So very important to, kind of adopt, adopt your treaty or adopt your Convention, so that they can be put forward in the priority list. So without much further ado, I am very glad to give you that partial report in the economic area. So, congratulations, and I hope this will continue on an annual basis. Then we can have the University of the Philippines provide a clear matrix with some priorities. They gave us plenty of treaties right away to follow up on. I am sure that your office will be very upset given the amount of work your office has to do to compile documents for a treaty. Maraming salamat po.

OPEN FORUM

ATTY. WAHAB-MANANTAN: Thank you very much, Usec. Teehankee. Now we proceed to the Open Forum. As usual, we request you to please identify yourself and the office that you come from for the proceedings. Yes, sir?

COMMISSIONER ALBANO: To just follow through on Amb. Teehankee's presentation. I am Commissioner Albano of the Tariff Commission. I observed that we have so many things in the process, and my observation is that there has to be a personal champion of a certain treaty, like the IPA, where to because there is this person who really saw to it that it gets through the process. Like even this Convention on Intellectual Property. Is there somebody, a person, who is championing it? That's very important. As I observed, the way we got things done many times in the economic field is that there is a personal champion of this particular treaty that has to go through the bureaucracy. So that is just in addition to the comment that has been made by Amb. Teehankee. Thank you.

ATTY. CEMBRANO-MALLARI: Okay, so we can have two or three more questions and then the panel will answer them. Yes Ma'am?

MS. ROSARIO LABORTE-CUEVAS: Good morning. I'm Rosario Laborte-Cuevas from the Department of Justice. I would like to commend and thank Professor Casis for his in-depth presentation, especially on the CISG and the ECC. I am interested in these two Conventions because the Office of the Chief State Counsel is also working closely with the UNCITRAL Regional Center for Asia and the Pacific. And we have been pushing for the Philippines to sign the CISG. As early as 2009, the Department has already endorsed it to the DFA UNIO for the Philippines to sign the CISG.

PANELIST: Bakit sa UNIO (Why UNIO)?

MS. LABORTE-CUEVAS: Kasi po ang UNIO ang nag-request (Because it was UNIO that requested) for the Department to make a comment and its recommendations on the CISG. And in 2013, actually, the UNCITRAL Regional Center Representatives even came in and gave a seminar to the agencies of the Department. And the conclusion of that forum is that everybody is for the Philippines to sign the CISG. And we are only waiting for the DFA. Sorry for that information, Sir. But we are awaiting the action of UNIO on that. And because of our close coordination with the Department of Trade and Industry (DTI)- Export Management Bureau, during the last meeting with the UNCITRAL ARCAP at BPI this year, we were advised by DFA to revive the push for the CISG. With regard to ECC, because it is also an instrument under UNCITRAL, the DOJ is in close coordination with the DTI E-Commerce of DTI, and they have also been following up with the DFA for ratification. Because, yes, we have signed it in 2007, and as per the DTI E-Commerce Office, they have been following up with the DFA on the ratification. Apparently, because of the change of administration, I think the papers for the ratification are missing. So maybe we can just revive the process for its ratification.

ATTY. CEMBRANO-MALLARI: Thank you very much, Ma'am. One more question, please, or one more comment?

PROF. ROMMEL CASIS: Okay, just a quick response to the comments. I agree that we need champions to continue the follow-up. But I think instead of just having a person being the champion, I think we really need an institution that is continuous. Because we have expiration dates, it would be best to have an institutional memory and continuity. And I am sure the DFA-OLA under

Ambassador Malaya is committed to this. He has been very dynamic and energetic discussing with us. And also, I guess, to commit the Institute of International Legal Studies, also of the U.P. Law Center. Perhaps, also working with the IBP to continue working on this by coming up with, I guess, what Ambassador Teehankee also mentioned, a database, a list to make sure that no treaty falls through the cracks and by acting as a coordinating body or arm to help our already overworked colleagues in government service. Just to give them gentle reminders of certain things that remain pending. And we are glad to support our colleagues in government in that way.

USEC. TEEHANKEE: So, on the CISG, I still remember this from my law school days, that it was positively endorsed in so many legal articles. So I think

the colloquium today passes by acclamation of hands that we should sign it. Yes, can we hear a sound of yes?

AUDIENCE: Yes!

USEC. TEEHANKEE: Okay so the next question is, in all these treaties, there has to be a lead department. Is there a lead department? Baka DOJ? Anyway, that's the big question always in the ratification process. In climate change, DENR was head together with a senator, and they were reminding each other. But I think for CISG, do we have a lead? Is it DOJ? Chief Paras, DOJ ba 'yon? Okay, so all we will need is a joint signed letter from the two cabinets—secretaries addressed to Sec. Cayetano. Because this is a signature; it is not a ratification-CISG's signature. We need to sign it. So it is not a simple thing for OLA to receive. So, good news for OLA here, hindi kayo ang taya. Because for signature, you need special powers, and there has to be a lead cabinet minister who will sign the CISG. So we will expect that application for special powers to be sent to our office, and if that is done, we will definitely fully endorse. But that one process for signature is a slightly different process, and then for ratification and concurrence, we definitely will just need a follow-up endorsement together with the COC from the Department. Now, if the one following up is a private academe, they have to get the follow-up with the lead cabinet because, first and foremost, the certificate of concurrence of that lead cabinet department must be in place. Then we will send out requests for COCs from all other cabinets. So I think maybe as a project, since it is for signature and it is the initial colloquium of the DFA-OLA, maybe CISG could be the first project for a signature process because I think it is really overdue *ang* CISG, so I think that can be a benchmark. Thank you.

ASEC. EDUARDO MALAYA: Atty. Celeste, if I may just add something to what Usec. Dondi had mentioned. It was mentioned by our friend from the DOJ that the DOJ was working with DFA UNIO on the CISG, and so, just to have additional collaborators on this matter, I would recommend that when there are communications on international economic treaties, please rope in the office of Usec. Dondi Teehankee. It is their office which has the primary competence on the subject. And with respect to the Electronic Commerce Convention, when we signed it in 2007, there was already a consensus to join in. So it is a matter of doing the necessary follow-through.

And in fact, I am surprised that we have not done the follow-through, and I think that this matter underscores the value of our Colloquium. Most of us are meeting for the first time as a group and comparing notes and exchanging

recommendations. This validates the important role that this Colloquium is doing and can do moving forward.

I also would like to mention an update on the Apostille Convention, which Professor Beth, Justice Azcuna, and Usec. Dondi Teehankee referred to—very simple convention and yet so crucial in facilitating the recognition of foreign documents. DFA- OLA prepared the ratification papers and submitted them to the Office of the President months ago, and we are hopeful that the President would sign it soonest. We hope to see a lot more of these low-hanging fruits just by working together.

ATTY. CEMBRANO-MALLARI: Not only is this an opportunity for us to learn from our speakers on the state of international law in relation to our foreign policy priorities, but it is also a platform to widen and strengthen partnerships among law and foreign service practitioners who work on these issues. Thus, it is the organizers' hope that today's activity will spur continued engagements and perhaps even the institutionalization of such engagements in the future as a means to enforce the Philippines' position in shaping international law. To facilitate the attainment of this goal, we have asked key persons from various institutions and organizations engaged in international law and Philippine foreign policy issues to introduce their groups and discuss their work. We now invite them to the stage for their brief presentations. Kindly come up to the stage as your names are called. Atty. Romel Bagares of the Philippine Society of International Law, Atty. Andre Palacios of the newly established International Law and International Affairs Committee of the Integrated Bar of the Philippines, and Atty. Jeremy Gatdula from the University of Asia and the Pacific to discuss the work of the Philippine Council on Foreign Relations.

UPDATES:
PHILIPPINE YEARBOOK OF INTERNATIONAL LAW
(University of the Philippines Law Center)

ATTY. CEMBRANO-MALLARI: According to the program, the first presenter is myself, so please allow me to introduce myself. I am Celeste Cembrano-Mallari. I work as a law education specialist at the Institute of International Legal Studies of the U.P. Law Center. I am supposed to present to you updates on the *Philippine Yearbook of International Law*. But before I do so, please allow me to give you a brief information about the office where I come

from, the Institute of International Legal Studies. The Institute of International Legal Studies, or IILS, is one of the five institutes constituting the U.P. Law Center. The U.P. Law Center is the research and extension arm of the U.P. College of Law. The U.P. College of Law and the U.P. Law Center are collectively known as the U.P. Law Complex. The Institute of International Legal Studies has a specific mandate to undertake research and extension functions in international law, comparative law, international relations, and foreign policy, specifically in areas that affect the Philippines. Pursuant to this mandate, the Institute conducts regular research programs which can be undertaken either by an individual or by a group of international law experts to address a specific international issue that would affect the Philippines. With respect to our extension programs, we have conferences and seminars. We also issue regular publications, among which is the *Philippine Yearbook of International Law*.

To give you a brief background on the *Philippine Yearbook of International Law*, this was formerly known as the *Philippine International Law Journal*. And this was originally published by the Philippine Society of International Law, which Atty. Romel Bagares will discuss later on. In 1966, the first issue of the *Philippine Yearbook of International Law* as we know it now was released. And in 1975, the Law Center became its home through a joint undertaking of the Philippine Society of International Law and the U.P. Law Center to publish the *Yearbook*. This was intended to serve their common objectives of promoting studies, research, and discussions in the field of international affairs. However, as Asec. Malaya said earlier, more than twenty-five years have passed since its last publication, and indeed there is a need to restore the *Yearbook* for the following purposes: first, to provide information on Philippine foreign policy; and second, to serve as a source book for lawyers on developments in international law relevant to their respective practices. Upon the urging and encouragement of Asec. Malaya, with the cooperation of the Philippine Society of International Law, the Institute initiated movements to revive the *Yearbook* beginning in 2017.

The *Yearbook* will cover international agreements entered into by the Philippines, Philippine laws, DOJ opinions, and judicial decisions that have implications to Philippine foreign policy. Proceedings of national conventions, conferences on international law such as this one, the academic papers from international law experts, and other materials relevant to international law and Philippine foreign relations will also be included upon the discretion of the editorial committee. We have invited Dean Merlin M. Magallona as our editor-in-chief, and he gave us his commitment to be our editor-in-chief. Thank you, Dean. The associate editors will be the director of the Institute of International Legal Studies, Prof. Rommel Casis, and the President of the Philippine Society of International Law, Harry Roque.

For your queries, clarifications, or if you wish to contribute academic papers, or if you simply want to update us with the things that we need to know, or you consider that we need to include in the *Yearbook*, please do not hesitate to e-mail us at iils.uplaw@gmail.com with the subject heading: Philippine Yearbook. Thank you very much, and we hope to hear from you soon.

Now, may I proceed to the next speaker, Atty. Romel Bagares of the Philippine Society of International Law.

UPDATES: PHILIPPINE SOCIETY OF INTERNATIONAL LAW

ATTY. ROMEL BAGARES:[18**] Good afternoon to everyone. My presentation will be in two parts. The first one will be a brief historical note on the Philippine Society of International Law (PSIL), and the second will be about a major international conference that we will be hosting in Manila in 2019.

As to the latter, I am referring to the 7th biennial conference of the Asian Society of International Law (ASIANSIL), which the PSIL will co-sponsor with the Department of Foreign Affairs, among other key institutions in the country.

Justice Feliciano and the Founding of the Philippine Society of International Law

On to my first point. The Philippine Society of International Law was incorporated on September 27, 1961, under the leadership of an illustrious Filipino legal luminary we all know, the late Justice Florentino Feliciano. Its legal formation followed its inaugural meeting held some five months earlier, on May 24, 1961.

Justice Feliciano would lead the PSIL's Executive Council from 1961 to 1989, and serve as its President from 1975 to 1983.

We know about the founding of the PSIL because it was actually reported in a newsletter of the *American Society of International Law,* whose Executive Council

[18**] Mr. Bagares, a founding member of the revived Philippine Society of International Law, heads the secretariat of the National Planning Committee for the ASIANSIL Biennial Conference in 2019 in Manila. An alumnus of the UP College of Law and the *Vrije Universiteit* Amsterdam, he is a lecturer in public international law at the Lyceum of the Philippines University and Executive Director of the Center for international Law-Philippines. This is an edited version of his remarks at the DFA's inaugural colloquium.

also had Justice Feliciano as a member from 1987 to 1990. So the PSIL could very well be one of the very first professional associations established in the name of international law in the Asian region (India having established its own society of international law in 1959), and quite possibly, the first of its kind in the Association of Southeast Asian Nations (ASEAN).

The PSIL's crowning jewel was the *Philippine Yearbook of International Law,* an annual roundup of articles on international law from Philippine international law experts. The PYIL came out with its inaugural issue in 1966, according to archival data. The PSIL was the sole publisher from 1966 to 1974; in 1975, the UP Law Center became its co-publisher, and the latter's Institute of International Legal Studies as the institutional secretariat. The *Yearbook* would have a 15-volume run, with the last one published in 1989.

My archival research shows that in 1988, the PSIL held a meeting at the Presidential Palace, with President Corazon Aquino as host and guest speaker. It appears to be the last professional meeting organized by the PSIL.

Revival of the Philippine Society of International Law in 2014

Given its illustrious history and the contemporary challenges we face today as a nation, it seems fitting that we had been able to revive the PSIL, and along with it, the PYIL. A principal difficulty we faced was its lapsed registration with the Securities and Exchange Commission (SEC). As you know, the SEC has strict rules on this matter, but the leadership of Secretary Teresita Herbosa, seeing what the PSIL was about, allowed us to revive it in 2014 under the same name, although most, if not all, of its founders were no longer around.

Why do we need to revive the PSIL?

For one, for a long time, we did not have a functioning professional association of lawyers, judges, academics, and students dedicated to the field of international law. It's a crime that a country with important contributions to the development of international law in Asia has had no such venue for intellectual and professional engagement, not to mention that our top law schools have been given a good account of themselves by winning in various international law competitions abroad. We also now have a significant number of Filipino lawyers who have done graduate studies in international law from the world's top universities.

Too, international law has become more than a passing academic interest today, with raging issues like the Philippine claim over certain portions of the South China Sea hogging newspaper headlines in the country on a daily basis. Of course, there is also the increasing integration of our regional economies under

the ASEAN system – and it is one that will require greater familiarity with transnational and international legal processes from Filipino lawyers.

Another practical reason is that – and I will now move on to my next point – the ASIANSIL has been egging on its Filipino membership to host its biennial conference for the longest time.

But for that, we need to have a local chapter as principal host. That we cannot do that without a Philippine chapter already up and running. The practical thing to do was to re-establish an organization that historically has led professional and academic efforts in the country towards the promotion of the study of international law.

The Philippine Society of International Law and the Asian Society of International Law

As you know, during the founding meeting of ASIANSIL in Singapore in 2007, several Filipino academics were in attendance, and became members of its founding Executive Council. I'm talking here of Dean Merlin Magallona, Associate Justice Francis Jardeleza, International Criminal Court Judge Raul C. Pangalangan, and Prof. H. Harry L. Roque, Jr.

And so, at the 6th Biennial Conference in Seoul, South Korea, last August, Prof. Roque – now the spokesperson for the President of the Republic of the Philippines – was elected president of the ASIANSIL. In addition, Justice Jardeleza was elected Vice President for Southeast Asia while Judge Pangalangan was re-elected as a member of the Executive Council.

In May this year, the revived Philippine Society of International Law will have its annual membership meeting. We hope to see many of you join the ranks of its membership. Its inaugural Board of Trustees at its revival count among its members Ambassador Manuel Teehankee (who spoke earlier), Judge Pangalangan, Dean Sedfrey Candelaria, Dean Magallona, and Secretary Roque. We're happy to say the PSIL's inaugural meeting in 2014 also saw the attendance of professors of international law from outside Metro Manila, especially Dumaguete City and Cebu.

ASIANSIL's 7th Biennial Conference: Manila 2019

By tradition, the country holding the presidency of the Society also hosts the biennial conference. But we wouldn't be so bold as to accept the presidency

if we did not have the Department of Foreign Affairs' assurances that they will throw their full support behind the Philippines' bid to host the 7th biennial conference in Manila sometime in August 2019.

We are doubly grateful to the DFA, under the leadership of Assistant Secretary J. Eduardo Malaya of the Office of Legal Affairs, because it is also the prime mover behind the republication of the PYIL, with the UP Law Center as a partner institution.

ASIANSIL is now a well-established academic and professional organization, and certainly a force to reckon with – given that three members of the International Court of Justice are from the Asian region, and various international tribunals are either headed by Asians or have a marked Asian presence (as seen, for example, in the case of the International Criminal Court and the International Tribunal for the Law of the Sea).

It also publishes the *Asian Journal of International Law,* which has also acquired, in such a short time, a reputation as a top-of-the-mind academic and professional publication, published by the Oxford University Press no less.

Incidentally, at the 6th biennial conference of the ASIANSIL in Seoul, Korea last year, Justice Feliciano – along with Professor R.P. Anand (India), Judge Wang Tieya (China), and Judge C.G. Weeramantry (Sri Lanka) – was recognized by the Society for his pioneering contributions to international law as an Asian. His legacy and those of his fellow awardees were honored through the inaugural Paik Choong-Hyun Prize, established to honor the memory of Professor Paik Choong-Hyun (1938-2007), who was Professor of International Law at Seoul National University, Korea (1968-2004).

We hope to rally the support of other key government, professional, and business organizations in the country for this very important gathering. I am told by Dean Magallona, who is here with us, that the PSIL itself had corporate sponsorships for its activities. We need that for the 7th ASIANSIL Biennial Conference in Manila in 2019.

And the proposed theme is this – "Rethinking the Foundations of International Law, Finding Common Solutions to Civilizational Issues from an Asian Perspective." I understand it's very kilometric, but it was approved by the ASIANSIL Executive Council in Seoul, along with the Concept Note that we prepared with Dean Magallona. In any case, we have two years to find a good shorthand for the long title.

I will now read the Concept Note for your edification:

The past is always relevant to our common future/s. International law may very well have had a murky beginning in Asia – closely intertwined as it has been with the colonial project – there is no question that Asian societies have embraced it, even for purposes distinct and separate from its original impulses. As a platform for cooperation in many areas, it has proven its usefulness, the contentious aspects notwithstanding.

Contemporary developments in international relations, shifts in global, regional and national politics, as well as large-scale environmental and economic issues, now compel a reexamination of the foundational roots of international law, especially as these raise civilizational issues. For example, the horrific spectre raised by a new breed of radical terrorists in the mould of ISIS has raised a common issue to humanity and challenges exceptionalist notions of culture-based norms and rights on what it means to be human and to be a rights-bearer.

East and West, North and South, the question of human dignity has become front and center in the raging debate on the meaning and continuing relevance of human rights; this, in fact, should take us back to the discussions on the ontological or civilizational sources from which the drafters of the UN Charter drew in their difficult and gargantuan work.

And what of the UN in relation to Asia, the most diverse of regions in the world? As a leading, if dominant, feature of the international legal order, the UN and the different corollary international legal institutions it has spawned have demonstrated both vertical and horizontal features that have a bearing on an Asian embrace of international law.

In the global issue of environmental degradation – on many levels a real civilizational threat – Asia has moved forward, with China choosing to work with the European Union in implementing the Paris Protocol in the face of American retreat. And environmental problems are no abstract problem in many Asian societies.

The hegemony of Western-style business and investments also now find stiff competition in Chinese-led international banking and investments, and the new Silk Road economic highway proposed by China that makes inroads in areas traditionally occupied by state sovereignty and extant regional economic arrangements.

The Philippines has found itself at the crossroads of these developments with the election into office of President Rodrigo Roa Duterte, who has made as one of the cornerstones of his government an independent foreign policy that steers closer to

China and Russia as never before, without cutting ties with the traditional American hegemon, as well as a populist approach to governance that presents a counter-intuitive, if contrapuntal view to human rights commitments.

His friendly overtures to China has likewise disrupted what other stakeholders have hoped would be a singular and steady trajectory for the Philippines in connection with the Permanent Court of Arbitration's ruling in the South China Sea Arbitration initiated by his predecessor.

Uncertainties in the contemporary times may mean disabling perplexities. But it may also be embraced as a necessary search for common solutions to the common problems faced by diverse cultures and societies, by way of rethinking what international law had stood for from the beginning and how it may be made relevant to contemporary challenges.

So that's our Concept Note. That's very Dean Magallona, you agree?

As in Seoul, there will be a junior scholars' conference before the biennial meet itself, with junior academics from all over the world expected to participate in the sessions. We hope to match, if not exceed, the Seoul junior conference attendance, which drew at least 150 graduate and postgraduate students and junior academics.

In Seoul, there were a few Filipinos, including, if I recall correctly, a group from De La Salle University and four or five students from UP who read papers at the conference, plus a couple of Filipino graduate students from Hong Kong University. Anyway, Secretary Harry was very happy that it was just a small group, so he did not have to pay much when he hosted a dinner for us later – with the check amounting to only around a hundred thousand Korean won!

But I think that also underscores the need for more and more Filipino lawyers and academics taking part in such state-of-the-art conferences. We do need to keep abreast of the latest developments in international law. We intend to draw up a conference with many points of interest for Filipino lawyers, as the target conference attendance is at least 400 local and foreign delegates. We also intend to have a special panel in honor of the legacy of Justice Florentino Feliciano. We hope to tackle these and other matters when the academic committee of the National Planning Committee for the 7th Biennial Conference meets in the next week or so.

The conference proper will have at least 40 panels on various academic and professional topics. We would like to hold the opening session at the University of the Philippines, so we are considering nearby hotels like SEDA

Hotel at Vertis North or the Novotel at the Araneta Center, among other hotels of similar standards, as the main conference venue.

There is also an inter-sessional conference between the biennial conferences. This year's inter-sessional meet will be in Beijing at the Renmin University. Further details may be accessed through the ASIANSIL website, where you may also check out other details about the ASIANSIL's many activities.

I see that my time is up. Thank you very much.

ATTY. CEMBRANO-MALLARI: Thank you very much, Atty. Bagares. We now proceed to Atty. Andre Palacios of the International Law and International Affairs Committee of the Integrated Bar of the Philippines.

UPDATES: IBP INTERNATIONAL LAW AND INTERNATIONAL AFFAIRS COMMITTEE, INTEGRATED BAR OF THE PHILIPPINES

ATTY. ANDRE PALACIOS: A pleasant afternoon to our government officials and officers, to members of the academe, and to those in the private sector like myself. So, I am a member of the Integrated Bar of the Philippines (IBP), like I guess all of the lawyers in this room. A pleasant afternoon to you, especially to those in good standing. So recently there was a new committee formed in the IBP. It is a small committee composed of eleven members, and right now there are eight members, so I am very honored to lead the team of the IBP International Law and International Affairs Committee (ILIAC). With me here is also a member of the committee from Western Visayas, Dean Villasor. Please stand. We also have with us, we are very honored that he has accepted the position of advisor emeritus of the IBP committee, Dean Merlin Magallona. He already has prior information about his appointment. He was not surprised.

The IBP Committee is a new committee of the IBP. The idea really is to support IBP members. IBP members, in their practice of law, usually focus on applying Philippine Law. But we know that in their practice, more and more, they are confronting international law issues and foreign law issues. So the primary purpose really of the Committee is to support IBP members in their practice of law. The objective of IBP is to enhance the standard of the legal profession, so

we hope to assist the IBP in meeting that objective. The second purpose of the Committee is actually to help our Overseas Filipino Workers (OFWs). So that accounts for the international affairs portion of the Committee name. The Committee is named the International Law and International Affairs Committee. For international affairs, the purpose really is to assist OFWs in availing of legal aid by foreign lawyers.

What we are doing in the Committee is we are networking with foreign bar associations we are networking with international law organizations, trying to get them to agree to provide a special facility for OFWs in their home country. We know that the DFA has a special office for migrant workers and that they have consuls in the embassies who are really assisting nationals, but we also know that they are saddled with a lot of work, so we hope to complement the great work that the DFA is doing by tapping these foreign lawyers who are based in those countries to assist our OFWs.

The first task is really to assist IBP members in practice of law using international law and foreign law. Second, is to help OFWs avail of legal aid by foreign lawyers. The third purpose of the Committee is really to advocate for the public interest. I realize that we should also highlight this important aspect of the Committee based on my preliminary discussion with Asec. Ed. He attended the first activity of the Committee, and we had a meeting on the sidelines of the conference. And he shared the vision of DFA to engage, really, with the stakeholders in the Philippines.

So, on behalf of the Committee and the IBP, we are very happy to announce that we support the DFA in its efforts to create this body, this support group of stakeholders who will help advocate for the adoption of international agreements and the implementation of international agreements. We will take a close look at the list of international agreements that were mentioned previously by the panels, and we will determine which ones the IBP can support and advocate for adoption, either by the executive or by concurrence by the Senate and even in the implementation of these international agreements. We respond to this call by Ambassador Ed, and we will assure you of our continued support.

Now, what are the activities of the Committee? We are trying to do one activity per month, so it is a bit hectic for us. The first activity was the Philippines – Japan Law Conference. The topic was foreign law issues involving family law – Japanese divorce, recognition in the Philippines, and the establishment of paternity of Japanese-Filipino children. The second activity will be on December 11. It will be to commemorate Human Rights Day, and we have invited the Commission on Human Rights, as well as the Philippine Association of Law Schools, for this December 11 activity at IBP. In January, the committee will be assisting the IBP in its major activity called the meeting of the House of

Delegates. The topic will be the West Philippine Sea. And so the Committee will be assisting in forming panels for the House of Delegates. In February, the Committee will be supporting the annual Jessup Moot Court Competition hosted by the University of Santo Tomas (UST). In March, the idea is to have the Convention on the UN Convention Against Corruption, which was originally proposed by Dean Magallona. So the idea is to have it in March. No activity yet for April, but in May, we plan to offer a certification course for those interested in Public International Law, particularly those who are teaching Public International Law in the law schools. So it will be a certification course. It will be handled by Prof. Ricky dela Cruz of UST and Prof. Joan de Venecia of the University of the Philippines. There are other activities after May, and we will be announcing them on our Facebook.

So again, the purpose really is to introduce to you this revived Committee in the IBP, which aims to help IBP members use international law and foreign law in their private practice. Thank you very much.

ATTY. CEMBRANO-MALLARI: Next, we have Atty. Jeremy Gatdula from the University of Asia and the Pacific to discuss the work of the Philippine Council on Foreign Relations. If I may mention, he has a book that has just been published. It is called *The Outline Introduction to Public International Law*. This is co-authored with Justice Antonio Nachura.

UPDATES: PHILIPPINE COUNCIL FOR FOREIGN RELATIONS

ATTY. JEREMY GATDULA: I was not expecting the endorsement, but thank you very much.

It just occurred to me that we are coming at a time when there is a big interest as far as public international concern. The timing is actually quite, in a way, coincidental. So we have the Philippine Institute for International Law and then the revived Committee in the IBP. It is the same story with the Philippine Council for Foreign Relations (PCFR).

In the 80s, the Council had, amongst its members, Vice President Emanuel Pelaez; Justice Jorge Coquia was there as well; Teodoro Valencia was part of it; Ambassador Enrique Syquia; and a host of other people. Florentino Feliciano was also part of the group. And sometime in 2013/2014, Ambassador Jose Romero, formerly Ambassador for Rome, wanted to revive the PCFR, and with great energy, he did so. The idea about the PCFR is that, if you heard the names mentioned earlier, the members come from a variety of disciplines. You have

people who are from the academe, people from the military, people from business, and the practice of law. And so it gave, or it seeks to give, the sort of advice from different kinds of sources in the formulation of Philippine Policy.

And so that is what we have been doing right now for the past three years. We have defined our organization in trying to give to formal and informal channels, at least different kinds of insight to Philippine policy in national security, defense, and all those other issues that have become important for the Philippines.

Actually, as far as the PCFR is concerned, that is essentially all I could say. Ambassador Romero would be happy to discuss if invited for these things; Ambassador Bautista is also a member, and we have had our friends come over. Ambassador Teehankee before would come over and give us talks. The membership here tends to be on a by-invitation basis, but we do have events that are open to the public.

Having said that, and again thank you very much for inviting me here, I would like to, at least, veer away a little bit from the program and just give some of my personal insights on these things coming off from my own personal experience.

It is great that we are reviving interest in public international law, and I think it is great that we are encouraging more people to be thinking about public international law. But I think one thing that we also have to remember is that, like domestic law, Philippine international law has a philosophical component or angle. It is not a neutral thing.

People do make use of Public International Law to advance a policy agenda, whether you have gender issues, the economy, immigration, or national security. We should be aware of that. I am not saying it is a good thing; I am not saying it is a bad thing. The point is to be aware of the fact that there are ideological bents in the advancement of international law.

Which leads me to this one thing: I hope I am not overstaying my stay; I will not keep this long. Please do forgive me, but I think somebody has to say it. For lack of an elegant phrasing, not every treaty has to be signed.

Not every treaty has to be entered into by the Philippine government.

Perhaps there are instances when the treaty need not be signed.

Perhaps there are instances when the Philippines should step back and see that perhaps our own domestic law is far superior to international law.

And I have seen that actually. For example, in terms of human rights, and in terms of other areas wherein our own laws, if applied properly, are actually far more superior than what international law is.

There has always been an attempt by certain quarters, for example, to use international law as a way to circumvent Philippine democracy, rather than using Congress to implement policy measures. They enter the Philippines into a treaty to be able to get around the legislative difficulties of enacting a measure unacceptable to the Filipino or contradicts his values.

I think it is something that we need to be aware of, that perhaps instead of using an external tool like public international law to shape Philippine society, we ought to shape Philippine society itself internally and then very actively move to shape that external tool, not the other way around.

That's it, and I hope I have not offended too many people by that, but thank you very much indeed. It is something that I felt should be mentioned and something that I hope would be helpful in the years to come as far as our gatherings are concerned. Thank you very much.

ATTY. CEMBRANO-MALLARI: Thank you very much, Prof. Gatdula. Thank you very much, gentlemen, for introducing your respective institutions.

SESSION 3:
LUNCHEON ADDRESS

ATTY. CEMBRANO-MALLARI: We have now come to the last, but certainly not the least significant part of our program. We are honored to have with us an Associate Justice of the Supreme Court, a highly respected legal scholar, and advocate of civil liberties, Associate Justice Marvic Mario Victor F. Leonen. Let me introduce him to you briefly. Before joining the Supreme Court, Justice Leonen has had a long track record in public service, whether in or outside of government. Even before becoming a lawyer, this dedicated son of Baguio cofounded the Legal Rights and Natural Resources Center Inc. and *Kasama Sa Kalikasan*, a legal and policy research institution advocating the rights of long-term upland communities composed mostly of farmers and indigenous peoples. He has served on the boards of many other non-government organizations, including Health Justice Philippines, and has been a member of the Free Legal Assistance Group, or FLAG, a group of human rights lawyers since 1987. He was a member of the U.P. Law faculty and was later invited to act as General

Counsel for the U.P. System, as well as its first Vice-President for Legal Affairs in 2005. He became the Dean of the U.P. College of Law in 2008.

He first appeared before the Supreme Court, defending the constitutionality of the Indigenous Peoples Rights Act, arguing against former Supreme Court Justice Isagani Cruz. He also served as the lead counsel in the case of *La Bugal-B'Laan Tribal Association vs. Ramos*,[19] which questioned the Mining Act of 1995. While serving as Dean of U.P. College of Law, he was appointed by President Aquino as chief negotiator for the government in peace talks with the Moro Islamic Liberation Front in 2010, which led to the signing of the framework agreement on the Bangsamoro, a historic milestone in the peace negotiations with the rebel group. In November 2012, he was appointed to the Supreme Court by President Aquino, becoming the youngest Supreme Court justice to be appointed in this century, set to serve the Philippine Supreme Court for 21 years. Justice Leonen received his Bachelor's Degree in Economics, with *Magna Cum Laude* honors, and his Juris Doctor degree from the University of the Philippines. He received his Master's Degree in Law from Columbia University in New York. Ladies and gentlemen, colleagues, here to deliver the keynote address, please join us in welcoming Honorable Marvic Mario Victor F. Leonen, Associate Justice of the Supreme Court.

ADDRESS ON INVISIBLE PEOPLES IN INTERNATIONAL LAW: PROLEGOMENA TO DISCERN THE FUTURE OF INTERNATIONAL LAW

MARVIC M.V.F. LEONEN: Thank you again for the privilege to address your colloquium.

Partnerships between the Department of Foreign Affairs, through its many offices including the Foreign Service Institute, and the UP College of Law Complex through its Institute for International Legal Studies have always been, in the past, productive, creative and—on occasion—strategically provocative. This is rightly so since the world of practice exemplified by the diplomats of the Department of Foreign Affairs is always in a dialectical relationship with the academic community represented by the UP's IILS. I note that in this forum you have also gathered not only personalities that currently lead your institutions but

[19] G.R. No. 127882, Dec. 1, 2004.

also those who may—imminently—lead both our Department of Foreign Affairs and the UP College of Law in the near future.

The topic that I was assigned was initially interesting, until I found out that it was not an easy one. A summary of the state of international law in the Philippines is already an ambitious undertaking and one that is subject to so many narratives. The projection of the future of International Law is likewise ambiguous and one that may call upon a divinity that I am not blessed with and often refuse to possess. Both aspects of the topic are minefields. The combination of status and future invites exciting but deep, nuanced discussions among experts on selected topics in international law to the exclusion of all the rest. It does invite subjective choices that will reveal the speaker's view of whether we should be headed, making me vulnerable to a charge of making injudicious political statements.

I initially wrestled with the idea to find some standard and pretend the objectivity in such a rich note, but as Jeremy Gatdula pointed out, there can be none. Then, after realizing the difficulty, I reconsidered. I admit that I will not cover all of International Law, nor will I be able to present all the possible standpoints to describe the present and predict the future. This talk will be meant to provoke, in an academic fashion, conversations; in the light of human maturity, should always take the character of impermanence. My views and yours as well are hopefully open to evolution after conscious deliberation. After all, we are a country with so many complex issues and a hundred million ways to create solutions.

My title really is "Invisible Peoples and International Law." Its subtitle is: "Prolegomena to Discern the Future of International Law."

The subtitle admits to the limitations of the present presentation and invites you to work both in practice and in theory. That I chose the concept of Invisible Peoples reveals my bias. I think we should now start more consciously and more deliberately to think about the impact of international law not only for marginalized identities, groups, communities, and peoples. But I invite you to even go further and look at the sub-sector of these marginalized identities and how it impacts those in conditions of extreme poverty among all these sectors. So first, let me dispose of some of the basics, and in passing, refer to some recent decisions of the Supreme Court.

I

The classic discussion on the influence of International Law in the Philippines will inevitably engage the various provisions in the present Constitution. Basically, this includes Article II, Section 2, and Article VII, Section 21. Both provide the orthodox starting points that often shape our understanding of how international norms integrate into our own domestic legal order.

Article II, Section 2, as everyone knows in this room, provides:

> "Sec. 2. The Philippines pronounces 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, Article VII Section 21 states:

> "Sec. 21. No treaty or international agreement shall be valid and effective unless concurred by at least two-thirds of all the Members of the State."

The current canonical interpretations of these provisions are well known. So are their ambiguities.

Article II, Section 2 is a hybrid provision that provides for statements of policy as well as the incorporation of portions of international law into our legal system. The interpretative change in its language is classic for all international legal experts.

For example, fundamental to an understanding of international law is the ability to identify sources as defined within its own international legal dimension. At minimum, jurists point to the formulation in Article 38 of the Charter of the International Court of Justice, which enumerates, among others, customary law, conventions, general principles of law recognized by civil institutions, and, subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of various nations as subsidiary means for the determination of the rules of law.

Our Constitution, however, states, and I quote: "It adopts the generally accepted principles of international law as part of the law of the land." In spite of this text, a catena of cases decided by our Court impliedly seems to reject a strict reading that this incorporation clause only applies to what Article 38 of the ICJ refers to as only "general principles of law recognized by civilized nations." In many cases, our Court has applied not only general principles of international law, but international customary norms as well as treaty provisions to resolve cases

either directly or as a means to clarify the meanings of provisions in domestic statutes. This tendency, in my reckoning, knowing my colleagues, will perhaps be canonical for some time.

What exactly is meant by being "part of the law of the land" is still the subject of debate. I will just note some issues but decline to hazard a resolution. There are pending cases with the Court at present which I hope will crystallize these issues more.

For example, *Tañada v. Angara*[20] involves the resolution of the apparent conflict between provisions of our constitution with the ratification of the treaties which created the World Trade Organization, among others. A reading of the discourse of the *ponente* in that case seems to suggest that some international law norms may reside at the level of constitutional duty. On the other hand, jurisprudence is also replete with cases which suggest that treaty law resides at the same level with domestic statute, not constitutional provision. This view implies that both the foreign policy powers of the President can amend domestic statute passed by Congress and vice versa. And Congress, on the other hand, may amend a treaty.

Article II, Section 2 also elevates certain policies as constitutional norms. First, that we "renounce war as an instrument of national policy." And second, that we adhere to a "policy of peace, equality, justice, freedom, cooperation, and amity with all nations."

II

I am tempted to go for the second, but maybe more interesting, let me dwell a little on the concept of our obligations on the use of force, as this has come up in most recent cases.

War almost has a settled meaning in International Law. For instance, it is differentiated from "armed conflict," both of an international or non-international character, found in the basic treaties that form the corpus of the field called International Humanitarian Law. It is also clear that war is not an "instrument of international policy," but that perhaps under conditions allowed by the UN Charter on the use of force, our armed forces can be deployed externally.

[20] G.R. No. 118295, May 2, 1997.

Those among you who have the slightest imagination will know that the evolving situation in North Korea may have challenging legal consequences on the duty of the Philippines in relation to our treaty partners. For instance, recall that we are signatories of the 1951 Mutual Defense Treaty with the United States. This includes Article IV, which provides:

"ARTICLE IV.

> "Each party recognizes that an armed attack in the Pacific Area on either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional process."
>
> "Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations. Such measures shall be terminated when the Security Council has taken the measure necessary to restore and maintain international peace and security."

"Armed attack" is further clarified in Article V of the same treaty, which provides:

"ARTICLE V.

> "For the purposes of Article IV, an armed attack on either of the Parties is deemed to include an armed attack on the metropolitan territory of either of the Parties, or on the island territories under its jurisdiction in the Pacific or on its armed forces, public vessels or aircraft in the Pacific."

Of course, the interpretation of these provisions, and thus our obligations to our treaty partner, is further refined by Article I and VI of that same treaty.

Considering the latest posturing of some of the relevant heads of state in this conflict, I can only guess that these provisions are now the subject of study of a group within the Office of Legal Affairs of the DFA in the event that its provision may come to life. I am certain, however, that we may be in the thick of studying diplomatic options to prevent that abominable eventuality.

"Armed conflict" and our rules of engagement in situations of "armed conflict" as opposed to war, in its traditional sense, is another matter. It matters that we have adopted a new a statute where most of the disciplines required under most of the treaties in International Humanitarian Law now resides. However, in

the near future, this will be further tested by the problem of terrorism and the modalities through which we characterized acts committed by terrorists and the kinds of governmental action we use to prevent and interdict them.

This is because in the recent case of *Lagman v. Medialdea*,[21] often referred to as the 2017 Martial Law cases. Now, I note that it is still under motion for reconsideration, so I will limit my discussion to the publish opinions only. In those cases, I called attention to the necessity to make the power invoked by the executive very clear. Thus, if I may quote from the opinions so that I do not add anything anymore:

> "Martial law arises from necessity, when the civil government cannot maintain peace and order, and the powers to be exercised respond to that necessity. However, under his version of martial law, President Marcos placed all his actions beyond judicial review and vested in himself the power to "legally," by virtue of his General Orders, do anything, without limitation. It was clearly not necessary to make President Marcos a dictator to enable civil government to maintain peace and order. President Marcos also prohibited the expression of dissent, prohibiting "rallies, demonstrations... and other forms of group actions" in the premises not only of public utilities, but schools, colleges, and even companies engaged in the production of products of exports. Clearly, these powers were not necessary to enable the civil government to execute its functions and maintain peace and order, but rather, to enable him to continue as self-made dictator.
>
> President Marcos' implementation of martial law was a total abuse and bastardization of the concept of martial law. A reading of the powers President Marcos intended to exercise makes it abundantly clear that there was no public necessity that demanded the President be given those powers. Thus, the 1987 Constitution imposed safeguards in response to President Marcos' implementation of martial law, precisely to prevent similar abuses in the future and to ensure the focus on public safety requiring extraordinary powers be exercised under a state of martial law.
>
> Martial law under President Marcos was an aberration. We must return to the original concept of martial law, arising from necessity, declared because civil governance is no longer possible in any way. The

[21] G.R. No. 231658, July 4, 2017.

authority to place the Philippines or any part thereof under martial law is not a definition of a power, but a declaration of a status – that there exists a situation wherein there is no capability for civilian government to continue. It is a declaration of a condition on the ground, that there is a vacuum of government authority, and by virtue of such vacuum, military rule becomes necessity. Further, it is a temporary state, for military rule to be exercised until civil government may be restored.

This Court cannot dictate the parameters of what powers the President may exercise under a state of martial law to address a rebellion or invasion. For this Court to tell the President exactly how to govern under a state of martial law would be undue interference with the President's powers. There may be many different permutations of governance under a martial law regime. It takes many different forms, as may be necessary.

However, while this Court cannot state the parameters for the President's martial law, this Court's constitutional role implicitly requires that the President provide the parameters himself, upon declaring martial law. The proclamation must contain already the powers he intends to wield.

This Court has the power to determine the sufficiency of factual basis for determining that public safety requires the proclamation of martial law. The President evades review when he does not specify how martial law will be used.

It may be assumed that any rebellion or invasion will involve arms and hostility and, consequently, will pose some danger to civilians. It may also be assumed that, in any state of rebellion or invasion, the executive branch of government will have to take some action, exercise some power, to address the disturbance, via police or military force. For so long as the President does not declare martial law or suspend the privilege of the writ of habeas corpus to address a disturbance of the peace, this Court does not have the power to look at whether public safety needs that action.

But if the President does declare martial law or suspends the privilege, the Court does have the power to question whether public safety requires the declaration or suspension.

It is not sufficient to declare "there is martial law." Because martial law can only be declared when public safety requires it. It is the

> burden of the President to state what powers public safety requires be exercised

Not only should the powers invoked by the executive be clear for purposes of domestic law, it must be also so in order to avail of the entire infrastructure already in place of inter-state cooperation in cases of terrorism. A few of those have been mentioned, like mutual legal assistance. Likewise, it may also assist law enforcers to understand the parameters of their discretion in accordance with existing international human rights norms.

Even the problem to be addressed, in my view, must be labeled correctly. I have expressed the view that there is a difference between terrorism and armed conflict—as a matter of fact, not only domestically, but also under international law. I quote again from my opinion:

> Terrorism is a premeditated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents. It is motivated by political, religious, or ideological beliefs and is intended to instill fear and to coerce or intimidate governments or societies in the pursuit of goals that are usually political or ideological. Terrorists plan their attack to draw attention to their cause; thus, the mode and venue of attacks are deliberately chosen to generate the most publicity.

I also discussed the UN conventions in the opinion. But also, I said:

> On the other hand, rebellion is an act of armed resistance to an established government or leader. Conflicts between liberation movements and an established government present a unique form of conflict which would involve both guerrilla and regular armed warfare. International law distinguishes between 3 categories or stages of challenges to established state authority, on an ascending scale: (1) rebellion, then (2) insurgency, and (3) belligerency.

In that opinion, I called to the danger in international law regarding the failure to characterize the events correctly, and I quote:

> The danger of mischaracterizing the protagonists in the Marawi incident is that this Court will officially accord them with a status far from who they really are-—-—common local criminals.

Rebellion is a political crime with the ultimate objective of overthrowing or replacing the current government. The acts comprising rebellion, no matter how violent or depraved they might be, are not considered separately from the crime of rebellion.

Being a political crime, the law has adopted a relatively benign attitude when it comes to rebellion. Recall *People v. Hernandez*,[22] which remarked that the deliberate downgrading of the penalty or treatment of rebellion in the law can be chalked up to the recognition that rebels are usually created by the "social and economic evils" in our society.

Despite the law's benign attitude toward local terrorist groups, by characterizing them as rebels, we risk giving the impression that what are mere sporadic or isolated acts of violence during peacetime, which are considered law enforcement problems, have been transformed to a non-international armed conflict covered under International Humanitarian Law.

International Humanitarian Law applies during armed conflict. An armed conflict is defined as (1) any use of force or armed violence between the State (international armed conflict), or (2) a protracted armed violence between governmental authorities and organized armed groups, or between such groups and that State.

Rebellion may be considered (a) an international armed conflict if it is waged by a national liberation movement, (b) a non-international armed conflict if the fighting is protracted and it is committed by an additional armed group that has control of territory under Additional Protocol II, or (c) a law enforcement situation outside the contemplation of International Humanitarian Law if there is no armed conflict as defined by the Geneva Convention. Under Additional Protocol II, organized armed groups are those that under certain situations.

The situation we have in Mindanao is not one waged by a national liberation movement that would call into application rules during an international armed conflict. At present, the Philippines is not occupied by a foreign invader or colonist; neither is it being run by a regime that seeks to persecute an entire race. The combatant status applies only during international armed conflict. Because there is no international armed conflict there, those who take up arms against the

[22] G.R. Nos. L-6025-26, July 18, 1956.

> government are not considered combatants. As a consequence, they are not immune for acts of war and do not have prisoner-of-war status.
>
> The armed hostilities in Marawi, if any at all, may be considered a non-international armed conflict if the Maute group falls under the category of "organized armed group" and if the fighting may be considered "protracted" under Additional Protocol II.

The present challenge of terrorism involves comprehensive agreements domestically and internationally. International law with respect to human rights and humanitarian law will be shaped by the contingencies necessary to wage this long war.

III

Now let me go to another point recently decided. Responses to the question of domestic liability of foreign actors still constantly engage both international and domestic law. It draws the balance between our conception of the sovereign with the point of view of a sovereign immunity.

The case of *Arigo v. Swift*[23] is the most recent case wherein a naval vessel of the United States that ditched itself in the Tubbataha Reef. The case was filed, and the unanimous decision of the Court was to deny the petition on procedural grounds. However, in my concurring opinion in that case, I took a more expanded position of sovereign immunity, and I quote:

> It is my position that doctrine on relative jurisdictional immunity of foreign state or otherwise referred to as sovereign immunity should be further refined. I am of the view that immunity does not necessarily apply to all the foreign respondents should the case have been brought in a timely manner, with the proper remedy, and in the proper court. Those who have directly and actually committed culpable acts or acts resulting from gross negligence resulting in the grounding of a foreign warship in violation of our laws defining a tortious act or one that protects the environment which implement binding international obligations cannot claim sovereign immunity.

[23] G.R. No. 206510, September 16, 2014.

> Some clarification may be necessary to map the contours of relative jurisdictional immunity of foreign states, otherwise known as the doctrine of sovereign immunity.

In coming to that conclusion, I drew upon the case of San Fernando, and of course the international ICJ case of *Germany v. Italy*.[24]

IV

Let us proceed now to Article VII, Section 21 which has presented its own share of problems to the Court. Clearly, it makes a distinction between international treaties, on the other hand, and international agreements, on the other. And international agreements might be different from executive agreements. Thus, in *Saguisag v. Ochoa et al*[25] or the EDCA case, I had the opportunity to make this distinction:

> Article VII, Section 21 of the Constitution complements Article XVIII, Section 25, as it provides for the requisite Senate concurrence, thus:
>
> > Section 21. 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 provision covers both "treaty and international agreement." Treaties are traditionally understood as international agreements entered into between states or by states with international organizations with international legal personalities. The deliberate inclusion of the term "international agreement" is the subject of a number of academic discussions pertaining to foreign relations and international law. Its addition cannot be mere surplus.
>
> Clearly, Senate concurrence should cover more than treaties. The President may enter into international agreements as chief architect of the Philippines' foreign policy. However, whether an international agreement is to be regarded as a treaty or as an executive agreement depends on the subject matter covered by and the temporal nature of the agreement.

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[24] Judgment, I.C.J. Reports 2012.

[25] G.R. No. 212426, G.R. No. 212444, July 26, 2016.

Of course, I cited there, *Commissioner of Customs v. Eastern Sea Trading*:[26]

> Indeed, the distinction made in Commissioner of Customs in terms of international agreements must be clarified depending on whether it is viewed from an international law or domestic law perspective.

Dean Merlin M. Magallona summarizes the difference between the two perspectives. And I would like to report to my former professor that I have quoted him at length in order to support the conclusion that if the executive agreement's authority is uncontained, and if what may be the proper subject matter of a treaty may also be included within the scope of executive agreement power, the constitutional requirement of Senate concurrence could be rendered meaningless.

The difference between a mere executive agreement and an "international agreement" requiring concurrence other than a treaty came up again in the recent case of *Intellectual Property Association of the Philippines v. Ochoa*.[27] I concurred in the result only to dismiss the case because I believed, and the others also supported my concurrence, that the Intellectual Property Association of the Philippines was not a proper party like the IBP in *IBP v. Zamora*.[28] Yet, again, I had the opportunity to point out:

> The *ponencia* proposes to declare the President's accession to the Madrid Protocol a valid executive agreement that does not need to be ratified by the Senate.
>
> Respectfully, I disagree.
>
> I am not prepared to grant that the President can delegate to the Secretary of the Department of Foreign Affairs the prerogative to determine whether an international agreement is a treaty or an executive agreement. Nor should this case be the venue to declare that all executive agreements need not undergo Senate concurrence. Tracing the history of Article VII, Section 21 of the Constitution reveals, through the "[c]hanges of retention of language and syntax[,]"

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[26] G.R. No. L-14279, October 31, 1961.

[27] G.R. No. 204605, July 19, 2016.

[28] G.R. No.141284, August 15, 2000.

> its congealed meaning. The pertinent constitutional provision has evolved into its current broad formulation to ensure that the power to enter into a binding international agreement is not concentrated on a single government department.

And I went on to review the provisions in all our constitutions to show that the inclusion of international agreement indeed was deliberate in terms of the 1987 Constitution.

This is just one of some of the cases which interrogate the various instruments that are now in play to integrate our rules into the global economy. A few are still pending with the Court. Most of you will be familiar with the evolution of the 1947 General Agreement on Tariffs and Trade (GATT) into the WTO. The rules-based regime for trade in goods evolved and included services and intellectual property, among others.

Almost parallel to that evolution was the rise of international protection for foreign direct investments either through bilateral investment treaties or through the various guarantee systems within the World Bank Group. Post-war, the world saw the rise of international organizations not only in the form of the United Nations but likewise with those involved in the world's economy, like the International Monetary Fund, the World Bank Group, and regional formations like the Asian Development Bank. Today, I just learned of the ratification of the AIIB, also in our Philippine Center.

The late nineties and the early twenty-first century underscored the importance of regional trade agreements of various forms. Sooner or later, free trade agreements which incorporated more restrictive WTO-type disciplines as well as investment protection rose. The scope of these regional trade agreements expanded in scope. It is still expanding, notwithstanding the positions of the United States with respect to the Trans-Pacific Partnership (TPP).

Our past experience in various types of arbitration with respect to foreign investments and trade regimes in the Appellate Body of the WTO underscore the importance of both knowledge and experience in this field by Filipino Practitioners. Again, I am sure that our foreign affairs department is in the thick of preparing our diplomats to engage in these forums. A more extended treatment of this area of international law, of course, requires another full colloquium.

V

Ambiguities in legal provisions, especially those found in the Constitution, are not necessarily signs of weaknesses.

The current formulation of any law is not a permanent fixture. I view the content of law at any given historical conjuncture are truce lines between contending forces. Law is located in normative text. It is in a language that does not necessarily describe what is but proposes or mandates what should be. The language of the law, as well as its current canonical interpretation, for me, marks the extent of accommodation between competing interests, identities, groups or classes, on the one hand, as well as states and government on the other.

Viewed in another way, law is the normative manifestation of temporary truce lines between competing or antagonistic interests in a given society. Thus, it can be viewed in two ways. On the one hand, it can be viewed as an instrument of the status quo to maintain its hold through the power of the law and the coercive processes that are behind it. On the other, it can be seen as the evidence of a beachhead occupied by progressive forces: the incursion of identities, groups, and classes and developing countries into the domain of the privilege, evidencing the effectivity of organized movements given a point in history.

One view is pessimist. It entices a surrender to current power relations. Legal service to those at the margins of society, therefore, is mere palliative, a balm to provide temporary relieve against a social and economic structure that further rewards a class, encrusts patriarchy, or ensures a development paradigm that is inequitable and ecologically unsustainable.

The other view, I think, is more optimistic. It sees the reality of current power relations but does not accept them as they are. It knows of the travails of the many: the hunger and undernourishment, the rape of daughters, the continued incarceration despite innocence, and the lack of public ownership of the means of production in critical industries. Yet, this view does not stop there. It studies the accommodations in law already won through political movements, political alliances, and in the international stage, alliances by state actors, especially in international organizations.

It painstakingly examines the interstices that are available in these provisions. It deploys a professional attitude to the remedies invoked to win domestic and international cases not only for the client or community but to establish good precedents as well. It also clothes the diplomat with a positive and likewise professional attitude to engage in negotiations to craft new norms of international law.

We can read international law as it impacts on our domestic legal order; therefore, with a more encompassing lens. There are other provisions in the Constitution which should likewise be deployed even under the rubric of Public International Law and in our interpretation in various ways.

For example, Article II, Sections 9, 10, and 11 of the same Constitution provide:

> Sec. 9. The State shall promote a just and dynamic social order that will ensure the prosperity and independence of the nation and free the people from poverty through policies that provide adequate social services, promote full employment, a rising standard of living, and an improved quality of life for all.
>
> Sec. 10. The State shall promote social justice in all phases of national development.
>
> Sec. 11. The State values the dignity of every human person and guarantees full respect for human rights.

Not my words, but the words of your Constitution. Section 9 sets a standard of freeing "the people from poverty through policies that provide adequate social services, promote full employment, a rising standard of living, and an improved quality of life for all."

To me, this suggests that our Constitution regards economic, social, and cultural rights as peremptory. But this is only me, and that is only my opinion, and I hope to be able to convince you.

As if to add to the emphasize, Section 10 enjoins that "the state promotes social justice in all phases of national development." And in Section 11 it also requires that "the State values the dignity of every human person and guarantees full respect for human rights."

These statements, to me, are far from simply being hortatory. I have rejected the framework of executing, non-self-executing, and self-executing provisions. It is a challenge to find ways and means through which we are able to discern the differential impact of various policies on the poor and, therefore, to render the poor as truly visible. For at times, even in our academic discussion, those who are poor are invisible. Thus, I call them invisible peoples.

This is an evolving field. No less than the UN Special Rapporteur on Extreme Poverty and Human Rights bewailed in his 2017 Report to the United Nations the absence of conscious and systematic efforts to measure the differential impact of policies on the poor. Commenting even on other non-state organizations, he mentions, and let me quote:

> "It might be expected that the human rights community would adopt a different approach from that used by mainstream developmental actors. In some context it does, but for the most part the reality is that human rights experts and groups do not focus in any detail, either in their fact-finding or their assessments, specifically on the situation of persons living in poverty. As a result, neither the diagnosis of situations nor the resulting policy recommendations are tailored to address the distinctive ways in which people living in poverty are affected by police brutality and gender based sexual violence, left unprotected and open to property theft, deprived of their liberty in pretrial detention, confined in their freedom of movement by the criminalization of the homeless, or subjected to electoral fraud and manipulation, to mention just a few of the major violations."

That was Phillip Arson. His observations are familiar to many of us. Police actions in urban and rural poor settings are not the same as those conducted in gated communities or heeled subdivisions. Convictions for gender-based sexual violence that reach the Supreme Court are disproportionately coming only from poorer communities. Theft of property in poor communities are often underreported owing to their lack of resources. Legal assistance for those who are detained is provided by lawyers who are often overstretched and likewise lacking in resources. Vagrancy, which is a crime still defined in your statute books, is defined as "loitering around in public without any visible means of support." That is us when we walk through our malls. Electoral manipulation and fraud, as all of us know, often involve short-sighted politicians taking advantage of the vulnerability of the poor.

There are a few other cases which I would have wanted to discuss with you. *SPARK v. Quezon City*[29] was a decision on the curfew ordinances of three municipalities where there was a spirited debate between the *ponencia* and those that throw separate opinions. *Republic v. Cantor*[30] looked at the doctrine of presumptive death as it applied to a poor OFW that was returning. *People v. Holgado*[31] bewailed the fact that [the drug seized] is always below one gram. In

[29] G.R. No. 225442, August 8, 2017.

[30] G.R. No. 184621, December 10, 2013.

[31] G.R. No. 207992, August 11, 2014.

People v. Holgado, it was 0.06 grams of shabu for which he was caught. You know how much 0.6 grams is? In that decision, the Supreme Court weighed it vis-à-vis a one centavo coin. 0.06 grams is lighter than a one centavo coin.

Speaking on the marginalization of Economic and Social Rights, again the Special Rapporteur on Extreme Poverty and Human Rights during the 32nd Session of the Human Rights Council in 2016 argued:

> "Does this marginalization really matter? Absolutely. Inequality will not be tackled meaningfully without the sustained focus on ESR. Counter-terrorism programs require attention to the ESC rights of those who are excluded or marginalized in the societies in which they live. Right-wing populism is driven in part by appealing to those who have a sense of being excluded from the benefits of economic growth. The legitimacy of the human rights enterprise is threatened if a narrow and unbalanced set of priorities is reflected. And the bulk of the population who are expected to embrace and demand human rights will remain unmotivated and unmobilized by a conception of rights that fail to address the issues that are often of overriding concern to them."

I will try to stop here. But I have more about the West Philippine Sea, technology, inequality, net neutrality and privacy, and international organizations. All that I can say is, in the absence of a strong navy, in the absence of a strong external use of force that we can deploy, we have in the past deployed our lawyers and diplomats to win their important cases such as the West Philippine Sea in the ITLOS arbitration. In order to further shape international law, our hope now, apart from the Israeli jets that have come, our real hope is with diplomats and lawyers that come together in order to be able to bring forth our national interest. Probably, before they are deployed, colloquiums such as this will be convened in order to inform them more strategically in order that they can provoke more alliances so that in our national interest, more beneficial international law norms can come into being.

Again, thank you, and this is a journey worth it. Congratulations to the DFA and the UP College of Law for staging this conference. Maraming salamat.

TREATIES & AGREEMENTS

SUMMARY OF TREATIES AND AGREEMENTS

MEMORANDUM OF COOPERATION BETWEEN THE REPUBLIC OF THE PHILIPPINES AND JAPAN ON LOW CARBON GROWTH PARTNERSHIP

Objective/s

To achieve low carbon growth in the Philippines through the promotion of investment and the use of technologies, products, systems, services and infrastructure by creating a Joint Crediting Mechanism (JCM).

Obligation/s of the Parties

The Parties must endeavour to create the Joint Committee to constitute procedures, guidelines and methodologies, including criteria, processes and means of measurements.

Both Parties will work together to facilitate the financial and technical support for the project, as well as abide by the guidelines of the JCM once it has been properly constituted.

Status of Ratification and Effectivity

Upon signature on January 12, 2017, the Memorandum of Cooperation commenced on that date and will be in effect until 2030.

MEMORANDUM OF UNDERSTANDING BETWEEN THE REPUBLIC OF THE PHILIPPINES AND THE REPUBLIC OF KOREA UNDER THE EMPLOYMENT PERMIT SYSTEM

Objective/s

The Parties shall adopt the Employment Permit System for Foreign Workers for the sending and receiving of Filipino workers to the Republic of Korea, to ensure transparency of payments. It outlines the tasks to be conducted

by each Party, the qualifications of Filipino job seekers, processes of visa issuance, entry and placement of workers, and other similar requirements and procedures.

Obligation/s of the Parties

The Philippine Overseas Employment Agency (POEA) shall provide the Ministry of Employment and Labor (MOEL) with information on the total amount of the sending fee imposed on each worker, as well as detailed expenditures.

The MOEL shall head the assessment and implementation of the Agreement, with the POEA providing assistance and support, including distributing and receiving application forms, providing sites for their receipt, exemption from taxation of such activities, and other forms of assistance as requested.

Status of Ratification and Effectivity

The MOU took effect on March 24, 2017, with an initial 2-year validity, but it remains effective until the signing of a new MOU.

AGREEMENT BETWEEN JAPAN AND THE REPUBLIC OF THE PHILIPPINES ON SOCIAL SECURITY

Objective/s

To properly regulate relations between the Republic of the Philippines and Japan in the field of social security.

To provide a unitary system of rules for pension which will be applicable not only to residents of the Contracting State where they worked, but also if the person resides in the other Contracting State or even a third State as the applicable case may be.

Obligation/s of the Parties

The Parties agree on administrative measures, designate liaison agencies and effect changes in legislation in order to properly implement the Agreement. It may also establish a Joint Committee to monitor adherence to the Agreement.

Status of Ratification and Effectivity

It was signed on November 19, 2015, concurred in by the Senate Resolution No. 38 on February 13, 2017, ratified by the President on January 12, 2017, and took effect on August 01, 2018.

AGREEMENT ON BILATERAL COOPERATION ON LABOUR MIGRATION BETWEEN THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES AND THE GOVERNMENT OF THE ITALIAN REPUBLIC

Objective/s

To promote a coordinated and efficient management of migration flows, as well as cooperation mechanisms, towards improving seasonal and circular migration, particularly in favour of Philippine citizens in the Italian labour market in case of shortage of local manpower.

The Parties, through its various labor instrumentalities, will exchange information and facilitate the matching between labour demand and supply, monitoring employment offers available in the two countries. In case of shortage of local manpower, Italy shall favour the recruitment and insertion of Philippine citizens, implementing a preferential entry quota for both professionals and skilled workers. Linguistic and vocational training, as well as internships, will be provided free of charge to qualified Filipino candidates.

Obligation/s of the Parties

The Philippines shall assist Italy in establishing a Joint Working Group to hold regular consultations in the monitoring and evaluation of the implementation of the present Agreement, in line with providing recommendations on how to improve the labor migration mechanism between the two countries. It shall disseminate information on labour opportunities, facilitate the overall selection process and provide the necessary training for qualified candidates.

Status of Ratification and Effectivity

The Agreement took effect on 08 May 2017, is valid for an initial period of three (3) years, and will be automatically renewed for similar periods of three (3) years until terminated.

MEMORANDUM OF COOPERATION BETWEEN THE PHILIPPINE COAST GUARD AND THE JAPAN COAST GUARD

Objective/s

To promote maritime safety and security, and the protection of the marine environment between the Parties.

Obligation/s of the Parties

The Parties shall conduct regular consultation meetings, information sharing and exchange, joint exercises, capacity enhancement and provisions of support.

Japan promises to grant the Philippines monetary support for counter-terrorism equipment, including high-speed boats, for the Philippine Coast Guard (PCG), as well as encourage more joint drills on maritime safety, aerial surveillance and reconnaissance, environmental pollution and anti-piracy.

Status of Ratification and Effectivity

The MOC became effective on July 11, 2017. It will be valid for a period of five years upon signature, and renewable for a similar period.

MEMORANDUM OF UNDERSTANDING BETWEEN THE REPUBLIC OF THE PHILIPPINES AND THE REPUBLIC OF SEYCHELLES (AIR SERVICES)

Objective/s

To establish and operate air services between the respective territories.

Obligation/s of the Parties

The Agreement delineates the grant of rights that each Party enjoys, including to make stops and to fly without landing across the territory of the other Party, as well as ensure best efforts to facilitate continued operations through appropriate rearrangements in case of armed conflict, natural calamities or other

disruptive developments. Each Party shall have the power to designate the airlines providing air services possessing such rights. It also allows mutual recognition of airworthiness, certificates of competency and licenses. There are also certain items which are exempt from customs duties and other charges, with specific rules applying.

Status of Ratification and Effectivity

The Agreement was signed on August 23, 2017 and took effect on the same day.

MEMORANDUM OF COOPERATION BETWEEN THE PRESIDENT COMMUNICATIONS OPERATIONS OFFICE OF THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES (PCOO), THE PEOPLE'S TELEVISION NETWORK INC. UNDER THE SUPERVISION OF THE PCOO AND THE MINISTRY OF INTERNAL AFFAIRS AND COMMUNICATIONS OF THE GOVERNMENT OF JAPAN FOR THE DELIVERY OF DISASTER INFORMATION THROUGH EMERGENCY WARNING BROADCASTING SYSTEM AND DATA BROADCASTING OF DIGITAL TERRESTRIAL TELEVISION BROADCASTING

Objective/s

To verify the effectiveness of ISDB-T (Sistema Brasileiro de Televisão Digital), such as the delivery of disaster information through EWBS (Emergency Warning Broadcasting System) and data broadcasting, and applying such in the Philippine context.

Obligation/s of the Parties

Japan will provide a capacity-building program through supporting companies, including technical training on EWBS and data broadcasting.

The Philippines, through the President Communications Operations Office (PCOO) shall provide the implementation and information-dissemination of the project. In addition, the People's Television Network Inc. (PTV, Inc.) shall

provide facilities for the installation of the ISDB-T devices, as well as promote public education on digital migration. Both agencies shall strive to utilize the outcome of the Joint Project for commercial use.

Status of Ratification and Effectivity

The treaty took effect on September 9, 2017 and will last for 36 months.

AGREEMENT ON SOCIAL SECURITY BETWEEN THE REPUBLIC OF THE PHILIPPINES AND THE PORTUGUESE REPUBLIC

Objective/s

To properly regulate relations between the Republic of the Philippines and the Portuguese Republic in the field of social security.

To provide a unitary system of rules for pension which will be applicable not only to residents of the Contracting State where they worked, but also if the person resides in the other Contracting State or even a third State as the applicable case may be.

Obligation/s of the Parties

Each Party shall conclude administrative agreements that are necessary to implement the Agreement. With regard to its implementation, the Parties shall lend to each other the necessary technical and administrative assistance, free of charge. This shall apply also when a Party is liable for benefits to a national of a third State.

Status of Ratification and Effectivity

The Agreement became effective on 01 October 2017.

AGREEMENT BETWEEN THE DEPARTMENT OF NATIONAL DEFENSE OF THE REPUBLIC OF THE PHILIPPINES AND THE MINISTRY OF DEFENCE OF THE CZECH REPUBLIC ON DEFENCE COOPERATION

Objective/s

The Agreement aims to develop co-operation in the field of defense and military.

Obligation/s of the Parties

The forms of cooperation between the Parties shall be developed through the meetings of the officials authorized by the Parties, exchange of experiences between their respective experts, organization and implementation of cross-training activities and exercises, participation of observers in military exercises, contacts between similar military institutions, discussions, consultations, meetings and participations in symposiums, conferences and courses, visit to military ships, aircraft and other structures, and exchange of information and educational publications.

The Parties shall fund the cooperation activities. In the case of personnel being sent to the other Party, the sending Party shall cover and pay its own expenses due to its personnel under its laws and regulations. On the part of the receiving Party, it shall pay for the local transportation from the established point of entry into its own State, the room and board expenses, and the planned activities in connection with the official visits covered by this Agreement. Urgent medical treatment shall be provided by the receiving Party.

Status of Ratification and Effectivity

The Agreement was signed on 29 May 2017 and took effect on 27 October 2017. The validity of the Agreement shall be for five (5) years, renewable upon the same periods.

AGREEMENT BETWEEN THE DEPARTMENT OF NATIONAL DEFENSE OF THE REPUBLIC OF THE PHILIPPINES AND THE MINISTRY OF DEFENSE OF THE RUSSIAN FEDERATION ON DEFENSE COOPERATION

Objective/s

The Agreement aims to "develop bilateral defense cooperation between the Parties in order to strengthen mutual trust and international security."

Obligation/s of the Parties

The Parties agree on cooperation in the following areas: exchange of views and information on defense affairs, development of relations in the field of military education, military medicine, military history, sport and culture, exchange of experience of peacekeeping activities and cooperation in peacekeeping operations under the authority of the United Nations.

The Parties may agree to establish a Joint Working Group (JWG), aimed at organizing dialogues on "strategic issues on defense, planning and monitoring of the implementation of cooperative activities of the Parties, and consideration of other issues related to the cooperative activities of the Parties."

Status of Ratification and Effectivity

The Agreement was signed on May 29, 2017 and took effect on October 27, 2017 and will be in force for five (5) years, renewable upon the same periods.

AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES AND THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA ON THE WAIVER OF VISA REQUIREMENTS FOR HOLDERS OF DIPLOMATIC AND OFFICIAL PASSPORTS

Objective/s

The Agreement aims to facilitate the travel of the Parties' nationals who are on official mission for their respective Governments.

Obligation/s of the Parties

In order to facilitate the travel of Parties' nationals on official mission, each Party shall exempt them from the obligation to obtain visas for entry and stay in the territory of the other Party. Their stay must not exceed thirty (30) days from the first date of entry or when transiting through that territory on their way to a third state.

Each Party shall have the right to refuse entry or terminate the stay of any person entitled to visa exemption under this Agreement on the ground of national security, public order or public health.

Status of Ratification and Effectivity

The Philippines signed the Agreement on 07 October 2016, and the Agreement took effect on 17 November 2017.

MEMORANDUM OF UNDERSTANDING ON DEFENSE COOPERATION BETWEEN THE DEPARTMENT OF NATIONAL DEFENSE OF THE PHILIPPINES AND THE MINISTRY OF DEFENSE OF THE KINGDOM OF CAMBODIA

Objective/s

The Agreement aims to provide a framework of cooperation between the Philippines and Cambodia in the field of defense on the basis of reciprocity and mutual benefit.

Obligation/s of the Parties

The Parties will exchange delegations, personnel whether or not for on-the-job trainings, subject matter expertise, information, documentation and materials. The Parties shall also participate in seminars, workshops and other activities organized by the other Party, defense and security activities, combined training activities, and other forms of cooperation as mutually decided.

They shall form a Joint Committee that will plan and recommend on the areas of cooperation, and will be responsible for other matters as may be mutually

decided. As a general rule, they will each be responsible for their own costs of implementation.

They shall also keep any information arising out of this Memorandum confidential and respect each other's intellectual property rights over said information.

When sending military personnel to the territory of the other Party, the sending Party shall take steps to ensure that the personnel shall respect the laws of the Party.

Status of Ratification and Effectivity

The Memorandum took effect upon signature of the Parties on 6 December 2017.

MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENT OF TOURISM OF THE PHILIPPINES AND THE SECRETARIAT OF TOURISM OF THE UNITED MEXICAN STATES ON TOURISM COOPERATION

Objective/s

The Memorandum aims to promote cooperation between the Participants in order to enhance the development of activities in the tourism sector.

Obligation/s of the Parties

The Parties will encourage mutual visits by their respective nationals and residents, healthy growth of the tourism, arrangement of study tours, and investment in the development of tourism program.

They shall exchange experiences on matters relating to tourism activities and on topics related to official standards and certifications on tourism, publications, research studies and other information, experts and information or technology, training personnel.

The Parties shall also develop tour packages, produce, distribute, and exchange brochures and other collateral materials, and promote closer cooperation between tourism organizations.

The Parties shall carry out the activities with absolute respect to their respective competencies, institutional guidelines and applicable legislation, and will exert best efforts in implementing the Memorandum.

Status of Ratification and Effectivity

The Memorandum was signed on 17 November 2015 and became effective on 28 December 2017.

MEMORANDUM OF UNDERSTANDING BETWEEN THE NATIONAL SECURITY COUNCIL SECRETARIAT OF THE REPUBLIC OF THE PHILIPPINES AND THE SECURITY COUNCIL OF THE RUSSIAN FEDERATION ON COOPERATION IN THE FIELD OF SECURITY

Objective/s

This Memorandum provides a framework for cooperation in the field of security between the Republic of the Philippines and the Russian Federation. This Memorandum seeks to develop cooperation on security issues, and promote regional peace, security, and stability. It also seeks to promote mutual cooperation in countering new security challenges and threats.

Obligation/s of the Parties

The Participants shall cooperate through the following:

a. Mutual exchange of information on issues pertaining to the activities of the Participants;
b. Consultations on a wide range of national security issues of mutual interests;
c. Organizing working trips, meetings, and other activities that are deemed beneficial to international, regional, and national security;
d. Other forms of cooperation as may be mutually decided.

The Participants shall consult with each other on the following:

a. Strategic priorities of the Republic of the Philippines and the Russian Federation;
b. Consultations in security issues in the Asia Pacific Region;
c. Problems in the field of non-proliferation of weapons of mass destruction and the means of their delivery.

Status of Ratification and Effectivity

The Agreement was signed on 23 May 2017 and took effect as of December 28, 2017.

AGREEMENT ON THE PRIVILEGES AND IMMUNITIES OF THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS

Objective/s

This Agreement seeks to implement Articles 3, 17, 18 and 19 of the ASEAN Charter conferring legal personality on ASEAN as an inter-governmental organization and providing for privileges and immunities to the ASEAN, the Secretary-General of the ASEAN, staff of the ASEAN Secretariat, Permanent Representatives of the Member States to ASEAN, and officials of the Member States and officials on ASEAN duties, as necessary for the exercise of their functions.

Obligation/s of the Parties

Member States are obligated to recognize these privileges and immunities granted to the entities specified in the Agreement, which are: the ASEAN, Secretary-General of ASEAN and Staff of the ASEAN Secretariat, Experts on Missions for ASEAN, Permanent Representatives and Officials on ASEAN Duties, Staff of the Permanent Mission, and Officials of the Member States.

Member States shall ensure that the persons whom they have appointed or employed who are accorded privileges and immunities under this Agreement, respect the laws and regulations of the Member State in whose territory they are in, in a manner that is consistent with the privileges and immunities enjoyed by them.

Status of Ratification and Effectivity

The Agreement was signed on 25 October 2009 and entered into force with respect to the Philippines on 20 April 2017.

PARIS AGREEMENT ON CLIMATE CHANGE

Objective/s

Acknowledging that climate change is a common concern of humankind, the Paris Agreement on Climate Change (Paris Agreement) seeks to implement an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge.

It seeks to hold the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels. It also aims to increase the ability of Parties to adapt to the impact of climate change and foster climate resilience and low greenhouse gas emissions, without threatening food production. It also aims to make finance flows consistent towards low greenhouse gas emissions and climate-resilient development.

The Paris Agreement seeks to attain these objectives using nationally determined contributions that are based on equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

Obligation/s of the Parties

The Parties shall prepare, communicate and maintain successive nationally determined contributions (NDCs), reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances, and shall pursue domestic mitigation measures to achieve such contributions. The level of obligation undertaken by Parties depend on whether they are classified as a developed country Party, developing country Party, or least developed countries and small island developing States. For developed country Parties, they should continue taking the lead by undertaking economy-wide absolute emission reduction targets. For developing country Parties, they should

continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances. For the least developed countries and small island developing States, they may prepare and communicate strategies, plans and actions for low greenhouse gas emissions development reflecting their special circumstances. These NDCs are recorded in a public registry maintained by the secretariat. The Parties shall likewise account for the NDCs.

Parties are also mandated to conserve and enhance, as appropriate, sinks and reservoirs of greenhouse gases, including forests.

Parties also undertake to enhance understanding, action and support on loss and damage associated with the adverse effects of climate change.

Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention. On the other hand, other parties, are encouraged to voluntarily provide such support.

Developed country Parties shall also communicate indicative quantitative and qualitative information relating to this Agreement biennially. Developed country Parties shall likewise provide transparent and consistent information on support for developing country Parties.

Parties shall cooperate in measures relating to climate change education, training, public awareness, public participation and public access to information.

Parties shall regularly provide the following information: (a) A national inventory report of anthropogenic emissions by sources and removals by sinks of greenhouse gases, prepared using good practice methodologies accepted by the Intergovernmental Panel on Climate Change and agreed upon by the Conference of the Parties serving as the meeting of the Parties to this Agreement; (b) Information necessary to track progress made in implementing and achieving its NDC, and (c) information related to climate change impacts and adaptation.

Status of Ratification and Effectivity

As of April 2018, 175 of 197 Parties have ratified the Paris Agreement. It entered into force on 4 November 2016. With respect to the Philippines, it entered into force on 22 April 2017.

PROTOCOL TO THE ASEAN CHARTER ON DISPUTE SETTLEMENT MECHANISMS

Objective/s

This Protocol seeks to implement Article 22 of the ASEAN Charter requiring ASEAN to maintain and establish dispute settlement mechanisms in all fields of ASEAN Cooperation, to prevent festering conflicts and confrontation, preserve cooperative atmosphere for concerted efforts towards building a peaceful and prosperous ASEAN Community.

It shall apply to issues on the interpretation or application of the following: (a) the ASEAN Charter; (b) other ASEAN instruments unless specific means of settling such disputes have already been provided for; or (c) other ASEAN instruments which expressly provide that this Protocol or part of this Protocol shall apply.

Obligation/s of the Parties

If a request for consultation by a Complaining Party is made, the Responding Party shall reply within thirty (30) days from the date of its receipt and shall enter into consultation within sixty (60) days from the date of receipt of the request for consultation, with a view to reaching a mutually agreed solution. The consultation shall be completed within ninety (90) days, or any other period mutually agreed by the Parties to the dispute, from the date of receipt of the request for consultation.

Resort may be made to good offices, mediation, conciliation, or arbitration in case the Parties fail to settle the dispute, or the Responding Party fails to reply to the request for consultation or does not enter into consultation. A written settlement shall put an end to the dispute and is binding upon the Parties thereto. An arbitral award shall be final and binding on the Parties and shall be fully complied with.

Status of Ratification and Effectivity

The Protocol was signed on 08 April 2010. It entered into force with respect to the Philippines on 28 July 2017.

PROTOCOL ON THE LEGAL FRAMEWORK TO IMPLEMENT THE ASEAN SINGLE WINDOW

Objective/s

To establish the ASEAN Single Window (ASW) as well as the National Single Window (NSW), and to establish an enabling legal framework for customs and trade using international standards and best practices.

This Protocol provides a legal framework for the operations, interactions, and electronic processing of transactions between NSWs within the ASW environment, taking into account the relevant international standards and best practices recommended by international agreements and conventions concerning trade facilitation and modernization of customs techniques and practices.

Obligation/s of the Parties

As to transmission and exchange of data and information:

1. Member States shall establish and maintain national laws and regulations that enable the operation of their NSWs and permit cross-border transmission and exchange of trade and customs-related data and information between NSWs that Member States have specifically agreed to for the purposes of the ASW.

2. Member States shall establish policies and regulations for the transmission and exchange, use, and dissemination of NSW data and information for domestic government usage that are consistent with the provisions of this Protocol.

3. Member States shall recognize trade and customs-related data and information transmitted and exchanged within the ASW for customs clearance and release, to be agreed by Member States.

As to service level requirements:

1. Any service level requirement related to ASW regional services shall be agreed among Member States and set out in SLAs to be entered into between an entity that is responsible for the governance of the

ASW pursuant to Article 18 and service providers involved in ASW regional services.

2. Each Member State shall establish service level requirements for its NSW to carry out transactions in a timely manner.

As to standardized data and information, member States shall comply with the World Customs Organization Data Model or, where appropriate, any other data model or parameters that may be agreed by Member States.

Status of Ratification and Effectivity

The ten (10) ASEAN Member States are the parties to this Protocol. It entered into force as of 01 August 2017.

MEMORANDUM OF UNDERSTANDING BETWEEN THE AUTHORITIES IN CHARGE OF AIRCRAFT ACCIDENT INVESTIGATION OF ASEAN MEMBER STATES AND THE CIVIL AVIATION ADMINISTRATION OF CHINA ON COOPERATION RELATING TO AIRCRAFT ACCIDENT AND INCIDENT INVESTIGATION

Objective/s

The Memorandum of Understanding (MOU) aims to "enhance aviation safety between the Participating Parties on the basis of equality and mutual benefit."

Obligation/s of the Parties

The Parties shall cooperate on aviation safety in the following areas: use of air safety investigation facilities and equipment and expertise therein, invitation to attend each Party's investigation courses and training, facilitation of other Parties' investigators as observers to its investigation of aircraft accidents and incidents, regular contact and organization of visits or meetings, sharing of information regarding investigations, and other matters agreed upon by the Parties.

Status of Ratification and Effectivity

The MOU was signed and took effect on 13 October 2017.

CONVENTION CONCERNING PROTECTION OF THE RIGHT TO ORGANIZE AND PROCEDURES FOR DETERMINING CONDITIONS OF EMPLOYMENT IN THE PUBLIC SERVICE

Objective/s

The Convention aims to address issues with respect to the applicability of some provisions of the Right to Organize and Collective Bargaining Convention (1949) to public servants and to prescribe freedom of association and procedures for determining conditions of employment in the public service.

Obligation/s of the Parties

In particular, the Convention states that public employees shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment, particularly to acts which (a) make the employment of public employees subject to the condition that they shall not join or shall relinquish membership of a public employees' organization; and (b) cause the dismissal of or otherwise prejudice a public employee by reason of membership of a public employees' organization or because of participation in the normal activities of such an organization.

Moreover, public employees' organizations shall enjoy complete independence from and shall enjoy adequate protection against any acts of interference by a public authority in their establishment, functioning or administration.

The Convention binds State-Parties to recognize the above rights of public employees with respect to the freedom of organization.

Status of Ratification and Effectivity

The Convention entered into force on February 25, 1981, and currently has 54 ratifications. The Philippines deposited its Instrument of Ratification on October 10, 2017, and the Convention took effect for the Philippines on October 10, 2018.

JUDICIAL DECISIONS

JUDICIAL DECISIONS

KNIGHTS OF RIZAL *VS.* DMCI HOMES, INC.

EN BANC

G.R. No. 213948 April 18, 2017

KNIGHTS OF RIZAL, Petitioner
vs.
DMCI HOMES, INC., DMCI PROJECT DEVELOPERS, INC., CITY OF MANILA, NATIONAL COMMISSION FOR CULTURE AND THE ARTS, NATIONAL HISTORICAL COMMISSION OF THE PHILIPPINES, Respondents

D E C I S I O N

CARPIO, *J.:*

Facts

This case is a Petition for Injunction filed by Petitioner Knights of Rizal seeking to enjoin the construction of Torre de Manila, a condominium development project by Respondent DMCI Homes. The Supreme Court later treated the petition as one for writ of mandamus. Among its various arguments, Petitioner claims that the project violated "the International Charter for the Conservation and Restoration of Monuments and Sites, otherwise known as the Venice Charter." The Supreme Court ruled in the negative on this issue and the others raised by Petitioner, and dismissed the petition for lack of merit.

Ruling

"The Venice Charter is merely a codification of guiding principles for the preservation and restoration of ancient monuments, sites, and buildings. It brings together principles in the field of historical conservation and restoration that have

been developed, agreed upon, and laid down by experts over the years. Each country, however, remains 'responsible for applying the plan within the framework of its own culture and traditions.'

The Venice Charter is not a treaty and therefore does not become enforceable as law. The Philippines is not legally bound to follow its directive, as in fact, these are not directives but mere guidelines – a set of the best practices and techniques that have been proven over the years to be the most effective in preserving and restoring historical monuments, sites and buildings.

xxx

WHEREFORE, the petition for mandamus is DISMISSED for lack of merit. The Temporary Restraining Order issued by the Court on 16 June 2015 is LIFTED effective immediately."

MITSUBISHI CORPORATION-MANILA BRANCH *VS.* COMMISSIONER OF INTERNAL REVENUE

FIRST DIVISION

G.R. No. 175772 June 5, 2017

MITSUBISHI CORPORATION - MANILA BRANCH, Petitioner
vs.
COMMISSIONER OF INTERNAL REVENUE, Respondent

D E C I S I O N

PERLAS-BERNABE, *J.:*

Facts

On 11 June 1987, the governments of Japan and the Philippines executed an Exchange of Notes, where the former, through the Overseas Economic Cooperation Fund (OECF), extended a ¥40,400,000,000 loan to the latter for the Calaca II Coal-Fired Thermal Power Plant Project. Under Paragraph 5(2) of the said agreement, "the Philippine Government, by itself or through its executing

agency, undertook to assume all taxes imposed by the Philippines on Japanese contractors engaged in the Project:

> (2) The Government of the Republic of the Philippines will, itself or through its executing agencies or instrumentalities, assume all fiscal levies or taxes imposed in the Republic of the Philippines on Japanese firms and nationals operating as suppliers, contractors or consultants on and/or in connection with any income that may accrue from the supply of products of Japan and services of Japanese nationals to be provided under the Loan."

The National Power Corporation (NPC), as executing agency of the Philippines, contracted with Mitsubishi Corporation, the head office in Japan, for engineering, supply, and construction works for the project, among others. The contract included an undertaking by the NPC "to pay any and all forms of taxes that are directly imposable under the Contract:

> Article VIII (B)(1)
>
> B. FOR ONSHORE PORTION.
>
> 1.) [The] CORPORATION (NPC) shall, subject to the provisions under the Contract [Document] on Taxes, pay any and all forms of taxes which are directly imposable under the Contract including VAT, that may be imposed by the Philippine Government, or any of its agencies and political subdivisions"

Petitioner filed an administrative claim for refund with the Respondent Commissioner of Internal Revenue for ₱52,612,812.00, ₱44,288,712.00 representing erroneously paid income tax and ₱8,324,100.00 representing branch profit remittance tax (BPRT). A petition for review was thereafter filed with the CTA. The CTA division granted the petition and ordered the refund of the income tax and BPRT, holding that in the Exchange of Notes, the Philippine Government bound itself to assume tax obligations of the petitioner. The CTA en banc reversed the said ruling, holding that the Exchange of Notes cannot be read as granting tax exemption and further, that it was not concurred in by the Senate as required in Art. VII, Sec. 21 of the Constitution. The Supreme Court reversed the CTA en banc and held that the refund is proper.

Ruling

"In this case, it is fairly apparent that the subject taxes in the amount of ₱52,612,812.00 was erroneously collected from petitioner, considering that the obligation to pay the same had already been assumed by the Philippine Government by virtue of its Exchange of Notes with the Japanese Government. Case law explains that an exchange of notes is considered as an executive agreement, which is binding on the State even without Senate concurrence. In *Abaya v. Ebdane*:

> An "exchange of notes" is a record of a routine agreement that has many similarities with the private law contract. The agreement consists of the exchange of two documents, each of the parties being in the possession of the one signed by the representative of the other. Under the usual procedure, the accepting State repeats the text of the offering State to record its assent. The signatories of the letters may be government Ministers, diplomats or departmental heads. The technique of exchange of notes is frequently resorted to, either because of its speedy procedure, or, sometimes, to avoid the process of legislative approval.
>
> It is stated that "treaties, agreements, conventions, charters, protocols, declarations, memoranda of understanding, *modus vivendi* and exchange of notes" all refer to "international instruments binding at international law."
>
> xxxx
>
> Significantly, an exchange of notes is considered a form of an executive agreement, which becomes binding through executive action without the need of a vote by the Senate or Congress.

Paragraph 5(2) of the Exchange of Notes provides for a **tax assumption provision** whereby:

> (2) The **Government of the Republic of the Philippines will**, ***itself* or *through its executing agencies*** or instrumentalities, **assume all fiscal levies or taxes** imposed in the Republic of the Philippines on *Japanese firms and nationals operating as suppliers, contractors or consultants* on and/or in connection with

> *any income* that may accrue from the supply of products of Japan and services of Japanese nationals to be provided under the Loan. (Emphases and underscoring supplied)

To "assume" means "[t]o take on, become bound as another is bound, or put oneself in place of another as to an obligation or liability." This means that the obligation or liability remains, although the same is merely passed on to a different person. In this light, the concept of an assumption is therefore different from an exemption, the latter being the "[f]reedom from a duty, liability or other requirement" or "[a] privilege given to a judgment debtor by law, allowing the debtor to retain [a] certain property without liability." Thus, contrary to the CTA En Banc's opinion, the constitutional provisions on tax exemptions would not apply.

xxx

WHEREFORE, the petition is GRANTED. The Decision dated May 24, 2006 and the Resolution dated December 4, 2006 of the Court of Tax Appeals (CTA) En Banc in C.T.A. EB No. 5 are hereby REVERSED and SET ASIDE. The Decision dated December 17, 2003 of the CTA in C.T.A. Case No. 6139 is REINSTATED."

OCAMPO *VS.* ENRIQUEZ

EN BANC

G.R. No. 225973 August 8, 2017

SATURNINO C. OCAMPO, TRINIDAD H. REPUNO, BIENVENIDO LUMBERA BONIFACIO P. ILAGAN, NERI JAVIER COLMENARES, MARIA CAROLINA P. ARAULLO, M.D., SAMAHAN NG EX-DETAINEES LABAN SA DETENSYON AT ARESTO (SELDA), represented by DIONITO CABILLAS, CARMENCITA M. FLORENTINO, RODOLFO DEL E ROSARIO, FELIX C. DALISAY, and DANILO M. DELA FUENTE, Petitioners

vs.

REAR ADMIRAL ERNESTO C. ENRIQUEZ (in his capacity as the Deputy Chief of Staff for Reservist and Retiree Affairs, Armed Forces of the Philippines), The Grave Services Unit (Philippine Army), and GENERAL RICARDO R.

VISAYA (in his capacity as the Chief of Staff, Armed Forces of the Philippines), DEFENSE SECRETARY DELFIN LORENZANA, and HEIRS OF FERDINAND E. MARCOS, represented by his surviving spouse Imelda Romualdez Marcos, Respondents

RENE A.V. SAGUISAG, SR., RENE A.Q. SAGUISAG, JR., RENE A.C. SAGUISAG III, Intervenors.

G.R. No. 225984 August 8, 2017

REP. EDCEL C. LAGMAN, in his personal and official capacities and as a member of Congress and as the Honorary Chairperson of the Families of Victims of Involuntary Disappearance (FIND); FAMILIES OF VICTIMS OF INVOLUNTARY DISAPPEARANCE (FIND), represented by its Co-Chairperson, NILDA L. SEVILLA; REP. TEDDY BRAWNER BAGUILAT, JR.; REP. TOMASITO S. VILLARIN; REP. EDGAR R. ERICE; and REP. EMMANUEL A. BILLONES, Petitioners
vs.
EXECUTIVE SECRETARY SALVADOR C. MEDIALDEA; DEFENSE SECRETARY DELFIN N. LORENZANA; AFP CHIEF OF STAFF LT. GEN. RICARDO R. VISAYA; AFP DEPUTY CHIEF OF STAFF REAR ADMIRAL ERNESTO C. ENRIQUEZ; and PHILIPPINE VETERANS AFFAIRS OFFICE (PVAO) ADMINISTRATOR LT. GEN. ERNESTO G. CAROLINA (Ret.), Respondents

G.R. No. 226097 August 8, 2017

LORETTA ANN PARGAS-ROSALES, HILDA B. NARCISO, AIDA F. SANTOS-MARANAN, JO-ANN Q. MAGLIPON, ZENAIDA S. MIQUE, FE B. MANGAHAS, MA. CRISTINA P. BAWAGAN, MILA D. AGUILAR, MINERVA G. GONZALES, MA. CRISTINA V. RODRIGUEZ, LOUIE G. CRISMO, FRANCISCO E. RODRIGO, JR., LIWAYWAY D. ARCE, and ABDULMARI DE LEON IMAO, JR., Petitioners
vs.
EXECUTIVE SECRETARY SALVADOR C. MEDIALDEA, DEFENSE SECRETARY DELFIN LORENZANA, AFP DEPUTY CHIEF OF STAFF REAR ADMIRAL ERNESTO C. ENRIQUEZ, AFP CHIEF OF STAFF LT. GEN. RICARDO R. VISAYA, and HEIRS OF FERDINAND E. MARCOS,

represented by his surviving spouse IMELDA ROMUALDEZ MARCOS, Respondents

G.R. No. 226116 August 8, 2017

HEHERSON T. ALVAREZ, JOEL C. LAMANGAN, FRANCIS X. MANGLAPUS, EDILBERTO C. DE JESUS, BELINDA O. CUNANAN, CECILIA GUIDOTE ALVAREZ, REX DEGRACIA LORES, SR., ARNOLD MARIE NOEL, CARLOS MANUEL, EDMUND S. TAYAO, DANILO P. OLIVARES, NOEL F. TRINIDAD, JESUS DELA FUENTE, REBECCA M. QUIJANO, FR. BENIGNO BELTRAN, SVD, ROBERTO S. VERZOLA, O AUGUSTO A. LEGASTO, JR., and JULIA KRISTINA P. LEGASTO, Petitioners
vs.
EXECUTIVE SECRETARY SALVADOR C. MEDIALDEA, DEFENSE SECRETARY DELFIN LORENZANA, AFP CHIEF OF STAFF LT. GEN. RICARDO R. VISAYA, AFP DEPUTY CHIEF OF STAFF REAR ADMIRAL ERNESTO C. ENRIQUEZ, and PHILIPPINE VETERANS AFFAIRS OFFICE (PVAO) of the DND, Respondents

G.R. No. 226117 August 8, 2017

ZAIRA PATRICIA B. BANIAGA, JOHN ARVIN BUENAAGUA, JOANNE ROSE SACE LIM, JUAN ANTONIO RAROGAL MAGALANG, Petitioners
vs.
SECRETARY OF NATIONAL DEFENSE DELFIN N. LORENZANA, AFP CHIEF OF STAFF RICARDO R. VISAYA, ADMINISTRATOR OF THE PHILIPPINE VETERANS AFFAIRS OFFICE ERNESTO G. CAROLINA, Respondents

G.R. No. 226120 August 8, 2017

ALGAMAR A. LATIPH, Petitioner
vs.
SECRETARY DELFIN N. LORENZANA, sued in his capacity as Secretary of National Defense, LT. GEN. RICARDO R. VISAYA, in his capacity as Chief of

Staff of the Armed Forces of the Philippines and LT. GEN. ERNESTO G. CAROLINA (ret.), in his capacity as Administrator, Philippine Veterans Affairs Office (PVAO), Respondents.

G.R. No. 226294 August 8, 2017

LEILA M. DE LIMA, in her capacity as SENATOR OF THE REPUBLIC and as TAXPAYER, Petitioner
vs.
HON. SALVADOR C. MEDIALDEA, DEFENSE SECRETARY DELFIN LORENZANA, AFP CHIEF OF STAFF LT. GEN. RICARDO R. VISAYA, UNDERSECRETARY ERNESTO G. CAROLINA, in his capacity as PHILIPPINE VETERANS AFFAIRS OFFICE (PVAO) ADMINISTRATOR and B/GEN. RESTITUTO L. AGUILAR, in his capacity as SHRINE CURATOR AND CHIEF, VETERANS MEMORIAL AND HISTORICAL DIVISION and HEIRS OF FERDINAND EDRALIN MARCOS, Respondents

G.R. No. 228186 August 8, 2017

SATURNINO C. OCAMPO, TRINIDAD H. REPUNO, BONIFACIO P. ILAGAN, MARIA CAROLINA P. ARAULLO, M.D., SAMAHAN NG EX-DETAINEES LABAB SA DETENSYON AT ARESTO (SELDA) represented by ANGELINA BISUNA, CARMENCITA M. FLORENTINO, RODOLFO DEL ROSARIO, FELIX C. DALISAY, DANILO M. DELA FUENTE, Petitioners
vs.
REAR ADMIRAL ERNESTO C. ENRIQUEZ (in his capacity as the Deputy Chief of Staff for Reservist and Retiree Affairs, Armed Forces of the Philippines), The Grave Services Unit (Philippine Army) and GENERAL RICARDO R. VISAYA (in his capacity as the Chief of Staff, Armed Forces of the Philippines), DEFENSE SECRETARY DELFIN LORENZANA, and HEIRS OF FERDINAND E. MARCOS, SR., represented by his surviving spouse IMELDA ROMUALDEZ MARCOS and legitimate children IMEE, IRENE and FERDINAND, JR., Respondents

G.R. No. 228245 August 8, 2017

LORETTA ANN PARGAS-ROSALES, HILDA B. NARCISO, AIDA F. SANTOS-MARANAN, JO-ANN Q. MAGLIPON, ZENAIDA S. MIQUE, FE B. MANGAHAS, MA. CRISTINA P. BAWAGAN, MILA D. AGUILAR, MINERVA G. GONZALES, MA. CRISTINA V. RODRIGUEZ, LOUIE G. CRISMO, FRANCISCO E. RODRIGO, JR., LIWAYWAY D. ARCE, and ABDULMARI DE LEON IMAO, JR., Petitioners
vs.
EXECUTIVE SECRETARY SALVADOR MEDIALDEA, DEFENSE SECRETARY DELFIN LORENZANA, REAR ADMIRAL ERNESTO C. ENRIQUEZ (in his capacity as the Deputy Chief of Staff for reservist and Retiree Affairs, Armed Forces of the Philippines), GENERAL RICARDO R. VISAYA (in his capacity as Chief of Staff, Armed Forces of the Philippines), and HEIRS OF FERDINAND E. MARCOS, represented by IMELDA ROMUALDEZ MARCOS, Respondents

R E S O L U T I O N

PERALTA, *J.:*

Facts

This case involves Motions for Reconsideration and Motion or Petition for Exhumation filed by petitioners challenging the decision of the court allowing the burial of former President Ferdinand E. Marcos at the Libingan ng mga Bayani. Among the grounds raised here is compliance with International Human Rights Law and International Humanitarian Law, particularly the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("Basic Principles and Guidelines")* and *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity ("UN Principles on Impunity").* Here, ruling against the grounds raised by petitioners, the Court, in a nine (9) to five (5) decision, denied with finality the aforesaid motions and petitions.

Ruling

"Rosales *et al.* propound that mere existence of human rights laws, administrative rules, and judicial issuance in the Philippines is not equivalent to

full compliance with international law standards. It is contended that if the State is to ensure its commitment to the principles of international human rights law, HRVVs must be given full satisfaction and guarantees of non-repetition as defined by Principles 22 and 23 of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("Basic Principles and Guidelines")*. Similarly, Ocampo et al. hold that the HRVVs are entitled to restitution, compensation, rehabilitation, and satisfaction as contemplated in Sections 19 to 22 of the *Basic Principles and Guidelines*. Essentially, as the Chief Justice expressed in her dissent, there must holistic reparation – financial and symbolic.

The *Basic Principles and Guidelines* and the *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity ("UN Principles on Impunity")* are neither a treaty nor have attained the status of generally accepted principles of international law and/or international customs. Justice Arturo D. Brion fittingly observed in his Separate Concurring Opinion that they do not create legally binding obligations because they are not international agreements but are considered as "soft law" that cannot be interpreted as constraints on the exercise of presidential prerogative. Consistent with *Pharmaceutical and Health Care Assoc. of the Phils. v. Health Sec. Duque III*, the *Basic Principles and Guidelines* and the UN *Principles on Impunity* are merely expressions of non-binding norms, principles, and practices that influence state behavior; therefore, they cannot be validly considered as sources of international law that is binding upon the Philippines under Art. 38(1), Chapter II of the Statute of the International Court of Justice.

It is evident from the plain text of the *Basic Principles and Guidelines* and the UN *Principles on Impunity* that they are recommendatory in character. The Resolution of the General Assembly adopting the *Basic Principles and Guidelines* states:

> 2. Recommends that States take the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of members of the executive bodies of government, in particular law enforcement officials and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general; (Underscoring ours)

As to the UN *Principles on Impunity*, the concluding portion of its Preamble reads:

> Pursuant to the Vienna Declaration and Programme of Action, the following principles are intended as guidelines to assist States in developing effective measures for combating impunity. (Underscoring ours)

Had the Congress intended to incorporate the provisions of the *Basic Principles and Guidelines* and the UN *Principles on Impunity*, which was already adopted by the United Nations as early as 2005, it could have done so by expressly mentioning them in the Declaration of Policy under Sec. 2 of R.A. No. 10368. During the consideration of S.B. No. 3334 and H.B. No. 5990, petitioners-movants should have petitioned the Commission on Human Rights to make the necessary recommendations to the Congress or otherwise directly lobbied to the lawmakers to include the *Basic Principles and Guidelines* and the UN *Principles on Impunity* in the proposed law. They did not. Nonetheless, they can do so for the enactment of amendatory laws.

While the States have a duty to repair violations of human rights and international humanitarian law, the modalities of the reparation vary according to the right violated, the gravity of the violation, the harm done, or the persons affected. The *Basic Principles and Guidelines* recognizes that the different forms of reparation may be awarded depending on the facts of each case and whenever applicable.

Even if the *Basic Principles and Guidelines* and the UN *Principles on Impunity* are treated as binding international laws, they do not prohibit Marcos' burial at the LNMB. We already noted in the Decision that they do not derogate against the right to due process of the alleged human rights violator. Aside from Art. 14, Part III of the ICCPR, XIII (27) of the *Basic Principles and Guidelines* and Principle 9 of the UN Principles on Impunity are clear and unequivocal. Certainly, observance of due process must not be sacrificed in pursuing the HRVVs' right to full and effective remedy under the international human rights law. The recognition and protection of a person's human rights and dignity must not trample upon that of another who we do not like or those who are perceived to be against us. Justice and equity demands that there be a balancing of interests in the enforcement of both. For the Constitution is a law for all classes of men at all times and there is only one Bill of Rights with the same interpretation for both

unloved and despised persons on one hand and the rest who are not so stigmatized on the other.

xxx

WHEREFORE, the motions for reconsideration, as well as the motion/petition to exhume Marcos' remains at the *Libingan ng mga Bayani*, are DENIED WITH FINALITY. The petitions for indirect contempt in G.R. No. 228186 and G.R. No. 228245 are DISMISSED for lack of merit."

DEPARTMENT OF PUBLIC WORKS AND HIGHWAYS *VS.* CMC/MONARK/PACIFIC/HI-TRI JOINT VENTURE

THIRD DIVISION

G.R. No. 179732 September 13, 2017

DEPARTMENT OF PUBLIC WORKS AND HIGHWAYS, Petitioner
vs.
CMC/MONARK/PACIFIC/HI-TRI JOINT VENTURE, Respondent

D E C I S I O N

LEONEN, *J.:*

Facts

The Department of Public Works and Highways (DPWH), and CMC/Monark/Pacific/Hi-Tri Joint Venture executed a "Contract Agreement for the Construction of Contract Package 6MI-9, Pagadian-Buug Section, Zamboanga del Sur, Sixth Road Project, Road Improvement Component Loan No. 1473-PHI" for a total contract amount of P713,330,885.28. While the project was ongoing, the Joint Venture's truck and equipment were set on fire and a bomb exploded at the Joint Venture's hatching plant. The Joint Venture made several written demands for extension and payment of the foreign component of the Contract.

The Joint Venture filed a Complaint against DPWH before the Construction Industry Arbitration Commission (CIAC). Among the claims of the Joint Venture was for price adjustment due to the delay in the issuance of a Notice to Proceed under Presidential Decree No. 1594 or the "Policies, Guidelines, Rules, and Regulations for Government Infrastructure Contracts."

The CIAC directed DPWH to pay the Joint Venture its money claims but denied the Joint Venture's claim for price adjustment. The Court of Appeals held that the CIAC did not commit reversible error in not awarding the price adjustment sought by the Joint Venture under PD No. 1594 since it was the Asian Development Bank's Guidelines on procurement that was applicable and not Presidential Decree No. 1594. The Supreme Court affirmed the decision of the Court of Appeals on this aspect.

Ruling

"This Court has held that a foreign loan agreement with international financial institutions, such as a multilateral lending agency organized by governments like the Asian Development Bank, is an executive or international agreement contemplated by our government procurement system.

In *Abaya v. Ebdane, Jr.*, this Court upheld the applicability of the Japan Bank for International Cooperation's Procurement Guidelines to the implementation of the projects to be undertaken pursuant to the loan agreement between the Republic of the Philippines and Japan Bank for International Cooperation.

While the Implementing Rules and Regulations of Presidential Decree No. 1594 provide the formula for price adjustment in case of delay in the issuance of a notice to proceed, the law does not proscribe parties from making certain contractual stipulations.

xxx

WHEREFORE, the Petition is DENIED. The Court of Appeals Decision dated September 20, 2007 in CA-G.R. SP Nos. 88953 and 88911 is AFFIRMED with MODIFICATION as follows: (1) that the order remanding the case to the Construction Industry Arbitration Commission for proper disposition is REVERSED for being moot and academic; and (2) that the legal interest rate is

pegged at twelve percent (12%) per annum until June 30, 2013, and then at six percent (6%) per annum until full satisfaction."

GOVERNMENT OF HONG KONG SPECIAL ADMINISTRATIVE REGION *VS.* MUÑOZ

EN BANC

G.R. No. 207342 November 7, 2017

GOVERNMENT OF HONGKONG SPECIAL ADMINISTRATIVE REGION, represented by the PHILIPPINE DEPARTMENT OF JUSTICE,
Petitioner
vs.
JUAN ANTONIO MUÑOZ, Respondent

R E S O L U T I O N

BERSAMIN, *J.:*

Facts

In an earlier decision, the Supreme Court denied the Petitioner Government of Hong Kong's petition for certiorari and ruled that "respondent Juan Antonio Muñoz could only be extradited to and tried by the HKSAR for seven (7) counts of conspiracy to defraud, but not for the other crime of accepting an advantage as an agent. This, because conspiracy to defraud was a public sector offense, but accepting an advantage as an agent dealt with private sector bribery; hence, the dual criminality rule embodied in the treaty of extradition has not been met." Petitioners filed this Motion for Reconsideration to have the court rule that the extradition for the crime of accepting advantage as an agent be also allowed, citing *B v. The Commissioner of the Independent Commission Against Corruption*, a ruling of the Court of Final Appeal of the HKSAR. The Supreme Court ruled that it cannot take judicial notice of the ruling of the foreign court, and the same was not alleged and proved. Thus, the Supreme Court denied the Motion for Reconsideration.

Ruling

"Under the rule of specialty in international law, a Requested State shall surrender to a Requesting State a person to be tried only for a criminal offense specified in their treaty of extradition. Conformably with the dual criminality rule embodied in the extradition treaty between the Philippines and the Hong Kong Special Administrative Region (HKSAR), however, the Philippines as the Requested State is not bound to extradite the respondent to the jurisdiction of the HKSAR as the Requesting State for the offense of accepting an advantage as an agent considering that the extradition treaty is forthright in providing that surrender shall only be granted for an offense coming within the descriptions of offenses in its Article 2 insofar as the offenses are punishable by imprisonment or other form of detention for more than one year, or by a more severe penalty according to the laws of both parties.

xxx

The Court DENIES the petitioner's motion for reconsideration for its lack of merit considering that the basic issues being thereby raised were already passed upon and no substantial arguments were presented to warrant the reversal of the decision promulgated on August 16, 2016.

xxx

ACCORDINGLY, the Court DENIES the motion for reconsideration with finality."