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CONTENTS

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INTRODUCTORY NOTE

The World Bulletin is a biannual publication of the Institute of International Legal Studies (IILS) of the University of the Philippines Law Center. It was initially a periodical of the International Studies of the Philippines (ISIP) of the U.P. Law Complex with its first issue, Volume 1, for March-April 1985. IILS took over the publication when ISIP was reorganized into IILS, which had its first issue with Volume VI, Number 1, for January-February 1990. The World Bulletin of IILS continued up to its Volume 23 issue for July-December 2004.

The present issue marks its revival.

MERLIN M. MAGALLONA

CONTENTS

AMERICAN CONTAINMENT PIVOT AND THE CHINESE TERRITORIALIZATION RESPONSE

MERLIN M. MAGALLONA*

I. Rebalancing to Asia of United States Strategic Forces

1. What the International Herald Tribune described as the "unusual appearance" of President Barack Obama at the Pentagon briefing room was his meeting with the Joint Chiefs of Staff of the U.S. Armed Forces on January 4, 2012. Apparently, it was the first time outside the White House that President Obama explained "a new U.S. defense strategy" in which he mentioned "a rising threat of China" as one of the three realities.

2. On January 3, 2012, President Obama as Commander-in-Chief issued a directive to review "our strategic interests and guide our defense priorities."

> He concluded his directive with the statement that: "there should be no doubt—here in the United States or around the world—we will keep our Armed Forces the best-trained, best-led, best-equipped

* Professorial Lecturer, University of the Philippines College of Law; Professorial Lecturer, San Beda Graduate School of Law; Chairman, Department of International and Human Rights Law, Philippine Judicial Academy, Supreme Court of the Philippines; Member, Panel of Arbitrators, Permanent Court of Arbitration, The Hague, Netherlands.

> fighting force in history. And in a changing world that demands our leadership, the United States of America will remain the greatest force for freedom and security that the world has ever known."

3. On January 5, 2012, Secretary of Defense Leon E. Panetta released a "new strategic guidance for the Department of Defense to articulate the President's strategic direction to the Department." The guidance states that "[i]t will have global presence emphasizing the Asia-Pacific…"

4. This guidance document is entitled *Sustaining U.S. Global Leadership: Priorities for 21st Century Defense.*[1] Foremost in the strategic focus of the document is what has been referred to as "Asia in Pivot." It describes the region, thus:

> U.S. economic and security interests are inextricably linked to developments in the arc extending from the Western Pacific and East Asia into the Indian Ocean region and South Asia, creating a mix of evolving challenges and opportunities. Accordingly, while the U.S. military will continue to contribute to security globally, *we will of necessity rebalance toward the Asia-Pacific region*.[2]

II. China as Anti-Access and Area Denial Environment to U.S.

5. In Asia-Pacific, the *Strategic Priorities* may have in mind China as a potential adversar

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[1] Herein referred to as *Strategic Priorities.*

[2] *Strategic Priorities*, p. 2.

> in which [U.S.] access and freedom to operate are challenged. In these areas, sophisticated adversaries will use asymmetric capabilities, to include electronic and cyber warfare, ballistic and cruise missiles, advanced air defenses, mining and other methods, to complicate our operational calculus. States such as China and Iran will continue to pursue asymmetric means to counter our power projection capabilities … *Accordingly, the U.S. military will invest as required to ensure its ability, to operate effectively in anti-access and area denial (A2/AD) environments.* This will include the Joint Operational Access Concept, sustaining our undersea capabilities, developing a new stealth bomber, improving missile defenses, and continuing efforts to enhance resiliency and effectiveness of critical space-based capabilities.[3]

III. Rebalancing to Asia of U.S. Forces Through Burden-Sharing with Partner Nations

6. On account of President Obama's recognition of reduction in defense spending under the Budget Control Act of 2011, the rebalancing to Asia of U.S. Forces is conceived, as emphasized in the *Strategic Priorities,* thus*:*

> Our relationship with Asian allies and key partners are critical to the future stability and growth of the region. We will emphasize our existing alliances, which provide a vital foundation for Asia-Pacific security. We will also expand our networks of cooperation with emerging partners throughout the

[3] *Strategic Priorities*, pp. 4-5.

> Asia-Pacific to ensure collective capability and capacity for securing common interests.[4]

7. U.S. security strategy appears to have developed deeper emphasis on the concept of partnership during the second term of President Obama, under the charge of Secretary of State John Kerry and Secretary of Defense Chuck Hagel in terms of strengthening U.S. strategic influence over partnership in regional operations. With the increased deployment of U.S. forces in Asia, the resulting activation of greater responsibilities on the part of the partner-nations may inevitably lead to militarization of the region, consequently intensifying tension with China.

IV. Toward Militarization of the Region and Containment of China

8. This trend was initiated by President Obama himself when he announced a new security agreement with Prime Minister Julia Gillard on November 16, 2011 in Australia, which was viewed by the Associated Press as "a response to China's growing aggressiveness." The agreement would expand the US military presence in Australia, "positioning more US equipment there, and increasing American access to bases."

9. While asserting that the U.S. does not fear China, Obama explained that the U.S. and the smaller Asian nations have grown increasingly concerned about China's claim of dominion over vast areas of the Pacific that the US considers international waters. They were likewise perturbed by how China's acts

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[4] *Strategic Priorities*, p. 2.

further reignited old territorial disputes, including confrontations over the South China Sea.[5]

10. Pursuant to the new U.S.-Australia security agreement, the first 180 U.S. marines out of 2,500 troops to be deployed in Australia by 2017 arrived in the northern city of Darwin. The International Herald Tribune described it as "a deal that will increase the U.S. military's presence in China's strategic back-yard." Further, the Herald explained: "The decision to deploy the marines to Australia, which prompted Beijing to accuse Mr. Obama of escalating military tension in the region, is part of the President's publicly stated strategy of shifting the U.S. military's long-term focus toward the Pacific and the increasingly assertive China."[6]

11. Following the strategic significance of his visit to Australia, President Obama made a tour of Southeast Asia, starting with Thailand and visiting Myanmar and Cambodia, which the International Herald Tribune interpreted as a way to "demonstrate that the US would draw together China's neighbors in a web of partnership." The Herald added that the Chinese government "interprets United States' attention to the region as an effort to encircle China."[7]

12. Cam Ranh Bay, the key logistic hub of the United States forces during the Vietnam War, was the focus of interest of U.S. Defense Secretary Leon Panetta in his visit to Vietnam, which

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[5] Associated Press, Manila Standard Today, 17 November 2011, p. B6, "Obama insists US does not fear China".

[6] Matt Siegel, "U.S. troops take their Station in Australia," International Herald Tribune, 5 April 2012, p. 4.

[7] Peter Baker, "Obama opens historic visit to Southeast Asia in Bangkok," International Herald Tribune, 19 November 2012, p. 3.

the Wall Street Journal described as intended to "promote a closer military partnership with the Vietnamese as part of the Pentagon's plan to shift the bulk of its naval assets to Asia within the next decade." Secretary Panetta indicated that the U.S. Navy's interest once more was to have regular access to Cam Ranh Bay. The Pentagon's plan of regular access would include, according to the Journal, shifting cruisers, destroyers, submarines and other warship so that 60% of them would be based in the Pacific by 2020. Currently, the U.S. Navy fleet of 285 ships is evenly split between the Atlantic and the Pacific.[8]

13. In applying burden-sharing with partner-nations for carrying out the rebalancing to Asia-Pacific of its naval and air forces, the United States succeeded in concluding a military base agreement with the Philippines[9] for basing its rotational forces whose missions are not known to the Philippine government. Disguised as "Agreed Locations," they are free of rental since they formally remain military bases of the Armed Forces of the Philippines, which by agreement are consigned for disposition by the United States forces. "Agreed Locations" are constituted as the base of operations of the United States forces, U.S. contractors, and vehicles, vessels and aircraft "operated by or for the United States forces [which] may conduct the following activities: training, transit, support and related activities; refueling of aircraft, bunkering of vessels, temporary maintenance of vehicles, vessels and aircraft; temporary accommodation of personnel; communication; prepositioning

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[8] Julian E. Barnes, "U.S. Heralds Navy's Shift Toward Asia," Wall Street Journal, 4 July 2012, p. 1.

[9] Entitled "Enhanced Defense Cooperation Agreement" between the Republic of the Philippines and the United States of America. Hereinafter referred to as EDCA.

of equipment, supplies, and materials, deploying forces and materials; and such other activities as the Parties may agree."[10]

14. Further, the United States forces have the authority under the EDCA "to preposition and store defense equipment, supplies, and materials … at Agreed Locations." Overall, EDCA ensures the United States that its "forces are authorized to exercise all rights within the Agreed Locations that are necessary for their operational control or defense."[11] Agreed Locations for this purpose are proposed to be established by the Armed Forces of the Philippines (AFP) for the operations of the United States forces in five areas in some of the biggest islands of the Philippine archipelago: Nueva Ecija; Sangley Point, Cavite; Cebu; Palawan and Cagayan de Oro in Mindanao. EDCA provides no limit to the number of Agreed Locations.

15. Disguised as a mutual security agreement between the parties, EDCA assumes its strategic importance as a partnership in the context of the *Strategic Priorities* through the presence of U.S. forces in Philippine territory. Under this strategic guidance as ordained by President Obama, the United States forces in the Philippines "will plan to operate whenever possible with allied and coalition forces,"[12] i.e., with other states with which the United States is in existing alliance such as Japan and South Korea, and together with partner-nations such as Australia. On the whole, U.S. forces in Philippine territory will enable them, in common purpose with other partner-nations in the region, "to project power in all areas *in which [their] … access and freedom to operate are challenged,*" especially in areas which China controls. As pointed out in the *Strategic Priorities:*

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[10] EDCA, Art. III, paragraph 1.
[11] EDCA, Art. VI, para. 3.
[12] *Strategic Priorities,* p. 4.

> In these areas, sophisticated adversaries, will use asymmetrical capacities, to include electronic and cyber warfare, ballistic and cruise missiles advanced air defenses, mining, and other methods, to complicate our operational calculus. States such as China and Iran will continue to pursue asymmetric means to counter our power projection capabilities, while the proliferation of sophisticated weapons and technology will extend to non-state sectors as well. *Accordingly, the U.S. military will invest as required to ensure its ability to operate effectively in anti-access and area denial (A2/AD) environment.* This will include implementing the Joint Operational Access Concept, sustaining our under-sea capabilities, developing a new stealth bomber, improving missile defenses, and continuing efforts to enhance to the resiliency and effectiveness of critical spaced-based capabilities.[13]

V. Preparation for War: China's Response

16. What becomes clear, as shown above, is that the *Strategic Priorities* is a preparation for war with China, which would be the result of sustained containment by the United States through the rebalancing to Asia of its forces. For this purpose, the Air Sea Battle (ASB) plan was developed by which new weapons and operation methods meet the challenges of A2/AD on the part of China. On the direction of U.S. Secretary of Defense Robert Gates, the Chiefs of Staffs of the U.S. military forces worked on the project; accordingly, in September 2009, Air Force Chief of Staff Gen. Norton Schwartz and Naval Chief of Naval Operations Adm. Gary Roughead executed a classified Memorandum of Agreement as an endorsement of the ASB

[13] *Strategic Prior*ities, pp. 4-5. Emphasis in the original document.

plan. In 2010, Secretary Gates approved the plan for the U.S. military to "develop a joint air-sea battle concept … [to] address how air and naval forces will integrate capabilities – air, sea, land, space, and cyberspace – to counter growing challenges to U.S. freedom of action."[14] Succeeding Gates, Secretary of Defense Leon Panetta also endorsed the ASB and created a new office, the Multi-Service Office to Air Sea Battle.[15]

17. More troops were scheduled to be deployed in the region in addition to the 2,500 U.S. Marines. By 2013, the first new littoral vessels would be deployed in Australia and Singapore to keep watch on the Chinese Navy. Proposed to be shifted from the Middle East were the B-1, B-52 long-range bombers and Global Hawk drones. Strengthening of relations with the militaries of Thailand, Malaysia, Indonesia and the Philippines has also been in progress.

18. The critical point of confrontation is in the South China Sea where, as against China, the latest estimate was as follows:

> Brunei claims a Southern reef of the Spratly Islands. Malaysia claims three islands in the Spratlys. The Philippines claims eight islands in the Spratlys and significant portions of the South China Sea. Vietnam, Taiwan, and China each claim much of the South China Sea, as well as all of the Spratly and Paracel island groups. [16]

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[14] As quoted in Amitai Etzioni, "who Authorized Preparations for War with China", Yale Journal of International Affairs, Summer 2013, pp. 37, 39.

[15] *Id.*

[16] ROBERT D. KAPLAN, ASIA'S COULDRON: THE SOUTH CHINA SEA AND THE END OF A STABLE PACIFIC, New York: Random Trade Paperbacks, 2015, p. 10.

19. By being partner-nations of the United States in its pivot to Asia and which are on course to militarization and use as bases of U.S. rotational forces these states which are in direct territorial conflict with China strengthen their hold against the latter.

20. Inevitably, the South China Sea becomes the focus of China's security in terms of anti-access/area denial (A2/AD) defense facilities. Under the concept of "nine-dash line" covering about 90% of the South China Sea, China claims historic rights which exceed its entitlement under the UN Convention on the Law of the Sea (UNCLOS). Thus, its claim extends beyond its own exclusive economic zone and continental shelf, and even in areas claimed by other littoral States. In the Spratly Islands, China began massive reclamation activities, such as in Mischief Reef, Subi Reef, Cuarteron Reef, Keenan Reef, Fiery Cross Reef, Gaven Reef, and Johnson Reef, indicating militarization features. In all these reefs, reclamation was followed by dredging, building of artificial islands, and construction activities.

In Mischief Reef, China constructed artificial islands and installations, located within the exclusive economic zone of the Philippines.

21. The U.S. Government is aware that China is building major military infrastructure in the artificial islands it has built. The Asia Maritime Transparency Policy Initiative, part of Washington's Center for Strategic and International Studies, has shown that this infrastructure includes three air bases in Spratlys, Woody Island and the Paracel chain. These findings also include advanced surveillance and early warning radar facilities installed in Fierry Cross, Subi and Cuarteron Reefs. Previously, U.S. officials disclosed to *Reuter*s that China had completed

structures in Subi, Mischief and Fiery Cross that appeared to be designed for long-range surface-to-air missiles.[17]

VI. Dilemmas and Prospects

22. The main geopolitical issue emerging from the events surveyed above concerns the relation between the United States and China. The dynamics of power projection by the United States involved in the rebalancing of its forces to Asia has activated the military establishments of Australia, Vietnam, the Philippines and other Southeast Asian nations as U.S. partners in what has resulted in an apparent containment of China.

23. In this context, what appears as a dominant problem on the part of the Philippines is determining the measure by which it can control or prevent the U.S. rotational forces in the disposition of its territory through the Agreed Locations. Since its territory in the AFP military bases are agreed to be used by the U.S. forces under the EDCA, the Philippines is likely to be implicated in the U.S. military operations that may involve an "act of aggression" or threat to international peace and security. In international law, aggression comprehends: "The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by the State for perpetuating an act of aggression against a third State;…"

This formulation is now encompassed in the definition of the "crime of aggression" in the jurisdiction of the International Criminal Court.[18]

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[17] *Reuters*, "China can deploy warplanes on artificial islands any time," Philippine Star, 29 March 2017, p. 1.

[18] Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, as Article 8*bis*, Crime of Aggression. These

24. Being the base of operation of the U.S. rotational forces, the Philippines becomes the logical target of the potential adversaries of the United States, including China. It is by reason of U.S. military presence in its territory that the conflict of the Philippines with China in the South China Sea has been aggravated.

25. The exchange of war-mongering declarations between the United States and North Korea involves high risks on the part of the Philippines as a target, likewise on account of the U.S. military presence. Following the U.S. missile attack on Syria in April this year, U.S. President Trump sent a strike group to the Korean peninsula led by an aircraft carrier, which North Korea interpreted as a warning over its refusal to abandon its nuclear weapons program. This comes in the wake of the following declaration from Commander Dave Benham of the U.S. Pacific Command: "The number one threat continues to be North Korea due to its reckless, irresponsible and destabilizing program of missile tests, and pursuit of a nuclear weapons capability."[19]

In response to Trump's sending an armada led by U.S. aircraft carrier *Carl Vinzon*, North Korea said it was prepared to fight "any mode of war" chosen by the U.S. and threatened a nuclear war against U.S. targets.[20] Described by AFP as showing an unprecedented range that brought U.S. bases in the

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amendments were adopted by the Assembly of States Parties at its 13th plenary meeting on June 11, 2010 by consensus.

[19] AFP, US Navy strike group leads toward Korea, Philippine Star, 10 April 2017, p. 15.

[20] AFP, Beijing, "Xi urges resolution of Nokor tensions," Philippine Star, 10 April 2017, p. 11.

Pacific within reach, North Korea had just launched a "new ground-to-ground long-range strategic ballistic rocket."[21]

26. Reinforcing the U.S. military alliance with South Korea and Japan, President Trump disclosed his intention to build a coalition among regional allies to isolate North Korea "diplomatically and economically." It is for this purpose that he extended an invitation to President Duterte to visit Washington. White House spokesman Sean Spicer said that Duterte could be helpful "as we move forward to prevent the threat that [North Korea] poses." Trump's Chief of Staff Reince Prebus explained that the purpose of inviting Duterte was to strengthen ties with the nations that could help the U.S. stand against North Korea, adding: "We need cooperation at some level with as many partners in the area as we can get."[22]

27. It would not be difficult for the Philippine leadership to realize the high risk involved in Trump's motivation against North Korea. But by itself, even as the Philippines is an apparent target of North Korea's attack as a base of operation of U.S. rotational forces, Trump's invitation would cast a higher risk of a disastrous conflict that would directly involve the Philippines.

28. The Philippines must now come to the decisive turn. Its main direction is fastened to the pole of the Pentagon. The season is ripe for cutting the Gordian knot.

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[21] Seoul, AFP, "Nokor missile can hit US targets," Philippine Star, 16 May 2017, p. 16.

[22] Jose Katigbak, "Trump has ulterior motive in inviting Duterte to White House," Philippine Star, 3 May 2017, p. 5.

ON THE PHILIPPINE WITHDRAWAL FROM THE INTERNATIONAL CRIMINAL COURT

MERLIN M. MAGALLONA*

Part I

1. The global parameter of the interests involved in the creation of the International Criminal Court in the Rome Statute extends to the history of international criminal justice as far back as the Nuremberg Judgment organized by the London Agreement of 1945. This had individual natural persons as subjects of international law in criminal liability — a feature characterizing the Rome Statute in Article 25, which provides in paragraph 1 that the Court "shall have jurisdiction over natural persons pursuant to this Statute."

2. The principles of the Nuremberg Charter have been absorbed by the process of codification of international law, following their recognition by the UN General Assembly.

3. Reinforcing the application of these principles as customary norms of international criminal justice was humanity's experience with Japanese military atrocities in the Second World War as confirmed by the Tokyo War Crimes Trial. The Tokyo Trial likewise involved the Japanese military

* Professorial Lecturer and former Dean, U.P. College of Law; Professorial Lecturer, San Beda Graduate School of Law; Chairman, Department of International and Human Rights Law, Philippine Judicial Academy, Supreme Court of the Philippines; Member, Panel of Arbitrators, Permanent Court of Arbitration, The Hague, Netherlands.

barbarities in the Philippines; significantly, the panel of judges included a Filipino judge — as in the current experience of the Philippines with the present ICC.

4. The principles of the Nuremberg Charter have been absorbed by the process of codification of international law, following their recognition by the UN General Assembly. To undertake the "progressive development of inter-national law, the UN General Assembly established the International Law Commission (ILC) in 1947.

5. In its 46th session in 1994, the ILC adopted the draft Statute for the International Criminal Court, with the recommendation to the General Assembly that an international diplomatic conference be held to study the draft statute and to conclude an international convention on the establishment of an international court.

6. Acting further on the issues arising from the reports of the ILC, the General Assembly in Resolution 50/46 of December 11, 1995 established the Preparatory Committee on the Establishment of the International Criminal Court, and on the work of the Preparatory Committee the General Assembly in Resolution 52/160 of December 15, 1997, decided to hold the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court at Rome from June 15 to July 17, 1998.

7. The Rome Conference met as scheduled. It was attended by 160 States, including the Philippines, and sixteen inter-governmental organizations.

8. On July 17, 1998, the Conference adopted the Rome Statute of the International Criminal Court. The Statute was

opened for signature on July 17, 1998 until October 17, 1998 at the Ministry of Foreign Affairs of Italy and until December 31, 2000 at the UN Headquarters in New York.

9. The Rome Statute entered into force on July 1, 2002. As of November 19, 2003, 92 States had ratified the Rome Statute.

10. The Philippines signed the Rome Statute in Rome on July 17, 1998.

11. The Philippine Delegation in Rome received a diplomatic note from the DFA in Manila, with the instruction that the Delegation should support the establishment of an international criminal court. The Philippine Delegation voted for the adoption of the Rome Statute when it was finally submitted to all the State Delegations.

12. The Faculty of the UP College of Law was represented in the Philippine Delegation of 4 members. The DFA sent a formal request to the UP President for Professors Raul Pangalangan and Merlin M. Magallona to be with the Delegation. In the Conference, Prof. Pangalangan was assigned to the Drafting Committee and Prof. Magallona to the Working Committee.

Part II

13. Both as victim of crimes of international concern and advocate of international criminal justice, the Philippines must now engage in a retrospective survey as to the fundamental premises of its close association with the ideals of international criminal justice and its institutions. Together, it must measure the national scale of motivation behind the withdrawal from the ICC.

14. Before we look into the vulnerability of the Philippine withdrawal from the ICC, we may yet explore how the Rome Statute is in defense of President Duterte. Article 1 begins by emphasizing that the ICC is established to exercise "its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute." This jurisdictional limit is repeated in Article 5 of the Statute, as follows:

> The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.

15. The principle of complementarity may be invoked in defense. Article 1 of the Statute mandates that the jurisdiction of the ICC "shall be complementary to the national criminal jurisdiction." For the same reason, the case is inadmissible in the ICC, where, under Article 17 of the Statute:

> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to do so;
> (b) The case has been investigated by a State which has jurisdiction to it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability genuinely to prosecute;
> (c) The person concerned has already been tried for the conduct which is the subject of the complaint and a trial by the ICC is not permitted …;
> (d) The case is not of sufficient gravity to justify further action by the ICC.

16. With the intention of limiting the jurisdiction of the ICC "to the most serious crimes of concern to the international community," as required by Article 5 of the Statute, the crimes within the jurisdiction of the ICC may admit of defenses and

challenges of jurisdiction and of admissibility. In the case of the crime of genocide in Article 6 of the Statute, killing and other acts constituting genocide must be committed with knowledge and intent that the victims are "members of the national, ethical, racial or religious group, as such." *Mens rea* specific to genocidal intent is required.

17. In the case of crime against humanity as defined in Article 7 of the Statute, the crime comes within the jurisdiction of the ICC "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." Again, knowledge and intent or *mens rea* specific to the crime is a necessary element. Even in the crime of war crimes, defined in Article 8 of the Statute, it is essential that the criminal acts are committed with knowledge of the attack, "as part of a widespread or systematic attack against any civilian population".

Part III

18. In announcing the Philippine withdrawal from the Rome Statute, President Duterte stated "I therefore declare and forthwith give notice, as President of the Republic of the Philippines, that the Philippines is withdrawing its ratification of the Rome Statute effective immediately."

19. In withdrawing the Philippine ratification from the Statute, the President is applying Philippine law to justify the non-performance of the Philippine obligations under the Rome Statute, resulting in the violation of Article 27 of the Vienna Convention on the Law of Treaties, which provides:

> A party [to a treaty] may not invoke the provisions of its internal law as justification of the failure to perform a treaty.

The Philippines is a State Party to the Vienna Convention and is bound by it.

20. The President is of the belief that the Rome Statute is not binding on the Philippines. Yet, it is on the basis of Article 127 of the Rome Statute that he has declared the Philippine withdrawal from the Statute. Under this provision, a State Party may so withdraw by "a written notification addressed to the Secretary General of the United Nations." Accordingly, withdrawal by the President in pursuance of Article 127 of the Statute was accomplished by Philippine Ambassador to the UN, Teodoro L. Locsin, Jr., on March 16, 2018 when he submitted the written notification addressed to the UN Secretary General to Maria Luiza Ribino Viotto of the Office of the UN Secretary General.

21. All this leaves the impression that the President has withdrawn from the Rome Statute on the whole, with the exception of its Article 127.

22. In his demand that under Philippine law the Rome Statute requires publication to be binding, the President misses the first fundamental lesson under the international law of treaties; Article 2(a) of the Vienna Convention on the Law of Treaties informs us that "a treaty is an international agreement in written form and governed by international law," not by national law. It is a contract between States, violation of which constitutes "an internationally wrongful act."

23. Legislative enactments and executive orders mandated by the Philippine Government as published in the *Official Gazette* are meant for its own administration and are not intended to be binding on other States.

24. There is only one provision of the Constitution which transforms a treaty or international agreement into law by means of concurrence by the Senate with the President's ratification. Section 21, Article VII of the Constitution provides:

> No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.

25. By practice under the Constitution, ratification of a treaty by the President is done by his signing the instrument of ratification which he transmits to the Senate, together with the text of the treaty and with the request for concurrence.

26. If the Senate concurs, it signifies that it agrees with the President's ratification of the treaty. As a result, under Section 21, Article VII of the Constitution the treaty becomes "valid and effective law."

27. Under the proposal that the President may withdraw the ratification of a treaty with the approval of the Senate, it must be pointed out that the absurdity here lies in the absence of ratification transmitted to the Senate with which it may express its agreement by "concurrence."

28. In particular, the idea that the ratification of the Rome Statute as a treaty may be withdrawn by President Duterte is as well a play with absurdity. Why should he seek withdrawal of ratification of a treaty which he himself has determined to be not binding on the Philippines for lack of publication in the *Official Gazette*?

29. Even as the President has submitted to the UN Secretary General the written notification of Philippine withdrawal under

Article 127(1) of the Rome Statute, it shall not take effect until after one year after the date of receipt of such notification.

30. However, notwithstanding its withdrawal, the Philippines will continue to be charged with the following obligations under Article 127(2) of the Rome Statute:

1. It shall not be discharged by reason of withdrawal from the obligations arising while "it was a Party to the Statute."
2. Its withdrawal shall not affect any cooperation with the ICC "in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective."

31. Owing to the President's antagonism shown to the ICC, enforcement of these obligations by way of extending its jurisdiction into Philippine territory may become a crisis of authority in its relationship with one State Party, the Philippines. May the ICC exercise its authority under Article 87 of the Rome Statute by which the ICC may request the Philippines as a State Party for cooperation, including the authority of the ICC to transmit such request through the International Criminal Police Organization?

32. Request for cooperation as an authority of the ICC includes the following:

1. It may ask any intergovernmental organization to provide information or documents.
2. It may invite any State not a party to the Rome Statute to provide assistance.

33. If the Philippines fails to comply with the request for cooperation by the ICC, it will make a finding to that effect and refer the matter to the Assembly of States Parties, the policy-making body of the ICC.

34. Will the Assembly of States Parties recognize the existence of a dispute between the Philippines as a State Party and the Court upon the failure of the Philippines to cooperate, and how may the Assembly engage in the settlement of the dispute?

35. Prior to the request for cooperation by the Court, the Prosecutor may initiate an investigation *motu priorio* and may seek information from States, United Nations organs, inter-governmental or non-governmental organizations, or other appropriate sources.

36. Apparently, the facilities of power take the form of "request for cooperation" enforced upon States Parties when required. It is a power intermixed with the authority of the Assembly in resolving disputes. In the end, enforcement of cooperation may prevail as the supreme authority of the ICC.

THE ICRC STUDY ON CUSTOMARY IHL: A NEW MODEL FOR DEVELOPING CUSTOM?*

ROMMEL J. CASIS**

Introduction

In 2005, after extensive research and widespread consultation with experts, the International Committee of the Red Cross (ICRC) published its Study of Customary International Humanitarian Law (IHL) (ICRC Study).

Ordinarily, custom is identified by international courts and tribunals or codified in treaties. But the ICRC study offers a unique model for identifying customary law. First, the identification of custom was undertaken by an international organization, the ICRC, and not by states or courts. Second, the specific methodology employed by the ICRC is different from the codification process of treaties and the adjudication process of international courts. Thus, three questions can be raised: (1) Did the ICRC Study employ a valid mode of identifying custom such that it is an authoritative material source of international

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** Full-time tenured professor, University of the Philippines College of Law; Director of the Institute for International Legal Studies, UP Law Center; Executive Director of the Philippine Society of International Law; Editor, Philippine Yearbook of International Law; LL.M., Columbia Law School; LL.B., UP College of Law; and B.A. Political Science, University of the Philippines.

law which states can invoke in case of claims or disputes? (2) Are all the rules in ICRC Study now part of customary IHL? (3) Is the process which resulted in the ICRC study viable in other regimes?

To answer these questions, the first part of the paper analyzes the methodology employed by the ICRC in producing the study. How exactly did the ICRC identify custom? What was the evidence used for state practice and *opinio juris*? Did the process comply with the state of law on the determination of custom? The second part of the paper scrutinizes the status of the rules identified by the ICRC study. Are all the rules or only some of the rules identified in the ICRC study customary in nature? The third part of the paper considers the possibility of using the ICRC study as a model for international environmental law. Is the ICRC study unique to IHL? Can the role of the ICRC be performed by another international organization? In answering these questions, this paper hopes to contribute to legal scholarship pertaining to how international law develops.

This paper however does not go into the content of individual customs identified by the ICRC study nor does it evaluate the status of each individual custom. The main focus of this paper is the *process* undertaken by the ICRC Study and not the substance of the individual rules.

I. The ICRC Study

A. What Led to the Study?

In January 1995, the Intergovernmental Group of Experts for the Protection of War Victims "adopted a series of recommendations aimed at enhancing respect for international humanitarian law, in particular by means of preventive measures that would ensure

better knowledge and more effective implementation of the law."[1]

This Experts Group proposed that:

> The ICRC be invited to prepare, with the assistance of experts in IHL [international humanitarian law] representing various geographical regions and different legal systems, and in consultation with experts from governments and international organizations, a report on customary rules of IHL applicable in international and non-international armed conflicts, and to circulate the report to States and competent international bodies.[2]

This recommendation was endorsed during the 26th International Conference of the Red Cross and Red Crescent, held at Geneva and the ICRC was officially mandated to prepare a report on customary rules of international humanitarian law applicable in international and non-international armed conflicts.[3]

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[1] Jean-Marie Henckaerts. Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict, International Review of the Red Cross 176, Volume 87, Number 857, March 2005 [hereinafter "Henckaerts Article"].

[2] Meeting of the Intergovernmental Group of Experts for the Protection of War Victims, Geneva, 23-27 January 1995, Recommendation II, *International Review of the Red Cross*, No. 310, p. 84, 1996, cited in Henckaerts, Article 176.

[3] 26th International Conference of the Red Cross and Red Crescent, Geneva, 3-7 December 1995, Resolution 1, International Humanitarian Law: From Law to Action; Report on the follow-up to the International Conference for the Protection of War Victims, *International Review of the Red Cross,* No. 310, p. 58. 1996.

In 2005, after extensive research and widespread consultation with experts, the ICRC report was published.[4] Volume I of the ICRC Study "set out in a transparent manner the methodology followed and lists a total of 161 rules that were assessed to be of a customary law nature" while "Volume II contains the practice on which the conclusions in Volume I are based."[5]

B. What was the Purpose of the Study?

According to *Jean-Marie Henckaerts*, "[t]he purpose of the study on customary international humanitarian law was to overcome some of the problems related to the application of international humanitarian treaty law."[6]

While treaty law may cover many aspects of international humanitarian law it was believed that there are serious impediments to the application of these treaties in current armed conflicts.[7]

The first impediment identified was that treaties apply only to the States that have ratified them which meant that "different treaties of international humanitarian law apply in different armed conflicts depending on which treaties the States involved have ratified."[8] This will result in insufficient legal protection for war victims and affects coalition warfare when different coalition partners have not subscribed to the same treaties.[9]

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[4] *Supra* note 1.

[5] Jean-Marie Henckaerts and Els Debuf, The ICRC and the Clarification of Customary International Humanitarian Law, in REEXAMINING CUSTOMARY INTERNATIONAL LAW, Brian Lepard (ed.) 162 (2017).

[6] *Supra* note 1, at 177.

[7] *Id*.

[8] *Id*.

[9] *Supra* note 5, at 164.

Henckaerts further expounds on this:

> While the four Geneva Conventions of 1949 have been universally ratified, the same is not true for other treaties of humanitarian law, for example the Additional Protocols. Even though Additional Protocol I has been ratified by more than 160 States, its efficacy today is limited because several States that have been involved in international armed conflicts are not party to it. Similarly, while nearly 160 States have ratified Additional Protocol II, several States in which non-international armed conflicts are taking place have not done so. In these non-international armed conflicts, common Article 3 of the four Geneva Conventions often remains the only applicable humanitarian treaty provision. The first purpose of the study was therefore to determine which rules of international humanitarian law are part of customary international law and therefore applicable to all parties to a conflict, regardless of whether or not they have ratified the treaties containing the same or similar rules.[10]

The second impediment identified was that treaty law did not regulate in sufficient detail non-international armed conflicts which cover a large proportion of today's armed conflicts.[11] IHL treaties "offer only a rudimentary framework."[12]

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[10] *Supra* note 1, at 177.
[11] *Supra* note 1, at 178.
[12] *Supra* note 5, at 166.

Henckaerts explains:

> Only a limited number of treaties apply to non-international armed conflicts, namely the Convention on Certain Conventional Weapons as amended, the Statute of the International Criminal Court, the Ottawa Convention on the Prohibition of Anti-personnel Mines, the Chemical Weapons Convention, the Hague Convention for the Protection of Cultural Property and its Second Protocol and, as already mentioned, Additional Protocol II and Article 3 common to the four Geneva Conventions. While common Article 3 is of fundamental importance, it only provides a rudimentary framework of minimum standards. Additional Protocol II usefully supplements common Article 3, but it is still less detailed than the rules governing international armed conflicts in the Geneva Conventions and Additional Protocol I… The second purpose of the study was therefore to determine whether customary international law regulates non-international armed conflict in more detail than does treaty law and if so, to what extent.[13]

Thus, customary IHL provides additional protection that international humanitarian treaty law may not be able to provide.

MacLaren and *Schwendimann* write:

> Customary law may 'intervene' for the sake of the rule of law in armed conflict where States (or non-

[13] *Supra* note 1, at 178.

> state actors *qua definitione)* are not party to the relevant treaty, or where the States are party but the customary provision is more extensive in its coverage than the conventional.[14]

They add:

> Perhaps more importantly, customary IHL binds not just States but also armed opposition groups who, as non-state actors, are not party to IHL conventions. Customary law thereby extends – in theory, if not in practice – the reach of law into NIAC.[15]

It has also been argued that customary IHL has inherent advantages over IHL Treaty Law. *Henckaerts* and *Debuf* write:

> The adoption, ratification, and entry into force of treaties are regulated by strict formal procedures, which makes the treaty process at time lengthy and cumbersome, including the process for amending treaties. Treaties tend therefore to be more static than customary law, which is by nature based on a dynamic process. Thus, the formation of customary international law can be a more flexible process, and can at times adapt international law more easily to new realities on the ground.[16]

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[14] Malcolm MacLaren and Felix Schwendimann, An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law, 6 German L.J. 1217, 1220 (2005).

[15] *Id.* at 1221.

[16] *Supra* note 5, at 165.

C. What was the Process?

1. The Steering Committee

A group of academic experts in international humanitarian law formed the Steering Committee of the ICRC study. These experts were Professors Georges Abi-Saab, Salah El-Din Amer, Ove Bring, Eric David, John Dugard, Florentino Feliciano, Horst Fischer, Françoise Hampson, Theodor Meron, Djamchid Momtaz, Milan Šahović and Raúl Emilio Vinuesa.[17]

This committee adopted a plan of action, and research was conducted using both national and international sources reflecting State practice focused on the six parts of the study identified in the plan of action:[18]

- Principle of distinction;
- Specifically protected persons and objects;
- Specific methods of warfare;
- Weapons;
- Treatment of civilians and persons *hors de combat;* and
- Implementation.

2. Research Process

The ICRC adopted a three-pronged approach.

a. National sources

A group of national researchers were identified in nearly 50 States[19] selected on the basis of geographic representation and

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[17] *Supra* note 1, at 184.

[18] *Id*.

[19] Africa: Algeria, Angola, Botswana, Egypt, Ethiopia, Nigeria, Rwanda, South Africa and Zimbabwe; Americas: Argentina, Brazil, Canada, Chile,

experience of different kinds of armed conflict in which a variety of methods of warfare had been used.[20] These researchers were asked to produce a report on their respective State's practice.[21]

> In addition:
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> The military manuals and national legislation of countries not covered by the reports on State practice were also researched and collected. This work was facilitated by the network of ICRC delegations around the world and the extensive collection of national legislation gathered by the ICRC Advisory Service on International Humanitarian Law.[22]

b. International sources

As for international sources, State practice was collected by six teams, concentrating on one part of the study.[23]

These teams researched practice in the framework of the United Nations and other international organizations, including the African Union (formerly the Organization of African Unity), the Council of Europe, the Gulf Cooperation Council, the European Union, the League of Arab States, the Organization of American States, the Organization of the Islamic Conference

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Colombia, Cuba, El Salvador, Nicaragua, Peru, United States of America and Uruguay; Asia: China, India, Indonesia, Iran, Iraq, Israel, Japan, Jordan, Republic of Korea, Kuwait, Lebanon, Malaysia, Pakistan, Philippines and Syria; Australasia: Australia; Europe: Belgium, Bosnia and Herzegovina, Croatia, France, Germany, Italy, Netherlands, Russian Federation, Spain, United Kingdom and Yugoslavia.

[20] *Supra* note 1, at 184-185.

[21] *Id*.

[22] *Supra* note 1, at 185.

[23] *Id*.

and the Organization for Security and Co-operation in Europe. International case-law was also collected to the extent that it provides evidence of the existence of rules of customary international law.[24]

c. ICRC archives

The ICRC relied on its archives to complement the research carried out in national and international sources. At that time, these related to nearly 40 recent armed conflicts which were selected so that countries and conflicts not dealt with by a report on State practice would also be covered.[25]

The result of this three-pronged approach – research in national, international and ICRC sources – is that practice from all parts of the world is cited. In the nature of things, however, this research cannot purport to be complete. The study focused in particular on practice from the last 30 years to ensure that the result would be a restatement of contemporary customary international law, but, where still relevant, older practice was also cited.[26]

3. Expert Consultations

On the basis of the practice collected, ICRC conducted consultations and invited the international research teams to produce an executive summary containing a preliminary assessment of customary international humanitarian law.[27] After being discussed within the Steering Committee these were revised and later "submitted to a group of academic and

[24] *Id*.
[25] *Supra* note 1, at 185-186.
[26] *Id.* at 186.
[27] *Id*.

governmental experts from all regions of the world… invited in their personal capacity by the ICRC to attend two meetings with the Steering Committee in Geneva in 1999, during which they helped to evaluate the practice collected and indicated particular practice that had been missed."[28]

4. Writing of the Report

The final report was based on the assessment by the Steering Committee, as reviewed by the group of academic and governmental experts.

The authors of the study re-examined the practice, reassessed the existence of custom, reviewed the formulation and the order of the rules and drafted the commentaries. These draft texts were submitted to the Steering Committee, the group of academic and governmental experts, and the ICRC Legal Division for comment. The text was further updated and finalized, taking into account the comments received.[29]

D. What was the Evidence Used for State Practice and *Opinio Juris*?

According to Henckaerts, "[t]he approach taken in the study to determine whether a rule of general customary international law exists was a classic one, set out by the International Court of Justice, in particular in the *North Sea Continental Shelf cases*."[30]

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[28] *Id.*
[29] *Id.*
[30] *Id.* at 178.

1. State Practice

The ICRC Study looked at State practice from two angles:

- what practice contributes to the creation of customary international law (selection of State practice); and
- whether this practice establishes a rule of customary international law (assessment of State practice).[31]

a. Selection of State Practice

The ICRC Study considered "physical acts" as including:

- battlefield behavior;
- use of certain weapons; and
- treatment afforded to different categories of persons.[32]

On the other hand, "verbal acts" included:

- military manuals;
- national legislation;
- national case-law;
- instructions to armed and security forces;
- military communiqués during war;
- diplomatic protests;
- opinions of official legal advisers;
- comments by governments on draft treaties;
- executive decisions and regulations;
- pleadings before international tribunals;
- statements in international fora; and

[31] *Id.* at 179.
[32] *Id*.

- government positions on resolutions adopted by international organizations.[33]

As regards resolution of international organizations and conferences, the ICRC Study considered the negotiation and adoption of the same, together with the explanations of vote, as acts of the States involved.[34] *Henckaerts* explains:

> It is recognized that, with a few exceptions, resolutions are normally not binding in themselves and therefore the value accorded to any particular resolution in the assessment of the formation of a rule of customary international law depends on its content, its degree of acceptance and the consistency of related State practice. The greater the support for the resolution, the more importance it is to be accorded.[35]

The ICRC Study did not consider decisions of international courts as State practice because, unlike national courts, inter-national courts are not State organs.[36] But it still considered such decisions significant because:

- a finding by an international court that a rule of customary international law exists constitutes persuasive evidence to that effect; and
- they contribute to the emergence of a rule of customary international law by influencing the

[33] *Id*.
[34] *Id.*
[35] *Id.*
[36] *Id.*

> subsequent practice of States and international organizations.[37]

In addition, the ICRC Study also did not consider the practice of armed opposition groups, such as codes of conduct, commitments made to observe certain rules of international humanitarian law and other statements.[38] It found that "[w]hile such practice may contain evidence of the acceptance of certain rules in non-international armed conflicts, its legal significance is unclear and, as a result, was not relied upon to prove the existence of customary international law."[39] The examples of such practice were listed under "other practice" in Volume II of the study. [40]

b. Assessment of State Practice

The ICRC Study believed that State practice had to be weighed to assess whether it is sufficiently "dense" to create a rule of customary international law.[41]

i. Virtually uniform

This means that for State practice to create a rule of customary international law, it must be *virtually uniform* or that different States must not have engaged in substantially different conduct.[42]

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[37] *Id.*
[38] *Id.*
[39] *Id.* at 179-180.
[40] *Id.*
[41] *Id.* at 180.
[42] *Id*.

Regarding contrary practice *Henckaerts* writes:

> The jurisprudence of the International Court of Justice shows that contrary practice which, at first sight, appears to undermine the uniformity of the practice concerned, does not prevent the formation of a rule of customary international law as long as this contrary practice is condemned by other States or denied by the government itself. Through such condemnation or denial, the rule in question is actually confirmed.[43]

This is particularly relevant for a number of rules of international humanitarian law for which there is overwhelming evidence of State practice in support of a rule, alongside repeated evidence of violations of that rule. Where violations have been accompanied by excuses or justifications by the party concerned and/or condemnation by other States, they are not of a nature to challenge the existence of the rule in question. States wishing to change an existing rule of customary international law have to do so through their official practice and claim to be acting as of right.[44]

ii. Extensive and representative

For a rule of general customary international law to come into existence, the State practice concerned must be both *extensive and representative* but it does not need to be universal.[45] A "general" practice suffices because no precise number or percentage of States is required.[46] *Henckaerts* explains:

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[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*

> One reason it is impossible to put an exact figure on the extent of participation required is that the criterion is in a sense *qualitative* rather than quantitative that is to say, it is not simply a question of how many States participate in the practice, but also which States. In the words of the International Court of Justice in the *North Sea Continental Shelf cases*, the practice must "include that of States whose interests are specially affected."[47]
>
> This consideration has two implications: (1) if all "specially affected States" are represented, it is not essential for a majority of States to have actively participated, but they must have at least acquiesced in the practice of "specially affected States;" and (2) if "specially affected States" do not accept the practice, it cannot mature into a rule of customary international law, even though unanimity is not required as explained.[48]

The ICRC Study noted that "specially affected" States under international humanitarian law may vary according to circumstances.[49] *Henckaerts* explains:

> Concerning the legality of the use of blinding laser weapons, for example, "specially affected States" include those identified as having been in the process of developing such weapons, even though other States could potentially suffer from their use. Similarly, States whose population is in need of

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[47] *Id.*
[48] *Id.* at 181.
[49] *Id.*

> humanitarian aid are "specially affected" just as are States which frequently provide such aid. With respect to any rule of international humanitarian law, countries that participated in an armed conflict are "specially affected" when their practice examined for a certain rule was relevant to that armed conflict. Although there may be specially affected States in certain areas of international humanitarian law, it is also true that all States have a legal interest in requiring respect for international humanitarian law by other States, even if they are not a party to the conflict. In addition, all States can suffer from means or methods of warfare deployed by other States. As a result, the practice of all States must be considered, whether or not they are "specially affected" in the strict sense of that term.[50]

The ICRC Study "took no view on whether it is legally possible to be a 'persistent objector' in relation to customary rules of international humanitarian law."[51]

2. Opinio Juris

The ICRC Study defined *opinio juris* as the legal conviction that a particular practice is carried out "as of right."[52] *Henckaerts* explains:

> The form in which the practice and the legal conviction are expressed may well differ depending on whether the rule concerned contains a prohibition,

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[50] *Id.*
[51] *Id.*
[52] *Id.* at 181-182.

> an obligation or merely a right to behave in a certain manner.[53]

a. Difficulty of distinguishing *opinio juris* from State practice

According to *Henckaerts* it proved very difficult and largely theoretical to strictly separate elements of practice and legal conviction because often, the same act reflects both practice and legal conviction.[54] Furthermore:

> As the International Law Association pointed out, the International Court of Justice "has not in fact said in so many words that just because there are (allegedly) distinct elements in customary law the same conduct cannot manifest both. It is in fact often difficult or even impossible to disentangle the two elements." This is particularly so because verbal acts, such as military manuals, count as State practice and often reflect the legal conviction of the State involved at the same time.[55]

b. Difficulty posed by omissions

Because many rules in international humanitarian law require abstention from certain conduct, omissions posed a particular problem in the ICRC Study in the assessment of *opinio juris* because it has to be proved that the abstention is not a coinci-

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[53] *Id.*
[54] *Id.* at 182.
[55] *Id.*

dence but based on a legitimate expectation.[56] *Henckaerts* explains:

> When such a requirement of abstention is indicated in international instruments and official statements, the existence of a legal requirement to abstain from the conduct in question can usually be proved. In addition, such abstentions may occur after the behaviour in question created a certain controversy, which also helps to show that the abstention was not coincidental, although it is not always easy to prove that the abstention occurred out of a sense of legal obligation.[57]

3. Role of Treaties

In the ICRC Study, treaties were relevant in determining the existence of customary international law because they help shed light on how States view certain rules of international law:[58]

> Hence, the ratification, interpretation and implementation of a treaty, including reservations and statements of interpretation made upon ratification, were included in the study.[59]

Henckaerts explained that the International Court of Justice (ICJ) has considered the degree of ratification of a treaty to be relevant to the assessment of customary international law[60] and further argued that:

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[56] *Id.*
[57] *Id.*
[58] *Id.* at 182-183.
[59] *Id.*
[60] *Id.* at 183.

> It can even be the case that a treaty provision reflects customary law, even though the treaty is not yet in force, provided that there is sufficiently similar practice, including by specially affected States, so that there remains little likelihood of significant opposition to the rule in question.[61]

The ICRC Study took the cautious approach that widespread ratification is only an indication and has to be assessed in relation to other elements of practice, in particular the practice of States not party to the treaty in question.[62] Furthermore:

> Consistent practice of States not party was considered as important positive evidence. Contrary practice of States not party, however, was considered as important negative evidence. The practice of States party to a treaty vis-à-vis States not party is also particularly relevant.[63]

Thus, the study did not limit itself to the practice of States not party to the relevant treaties of IHL.[64]

E. Did the Process Comply with the State of Law on the Determination of Custom?

The following discussion outlines the supportive and critical comments on the process followed by the ICRC Study.

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[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.* at 184.

1. Methodology in General

John Bellinger, legal adviser of the U.S. Department of State, and William Haynes, general counsel of the U.S. Department of Defense, commented extensively[65] on the ICRC Study. These comments by two of the most prominent U.S. government lawyers, were the first formal comments to be received by the ICRC at governmental level.[66]

Belinger writes:

> …[W]e are concerned about the methodology used to ascertain rules and about whether the authors have proffered sufficient facts and evidence to support those rules. Accordingly, the United States is not in a position to accept without further analysis the Study's conclusions that particular rules related to the laws and customs of war in fact reflect customary international law.[67]

Erakat notes that "[t]he discord between the U.S. and the ICRC reflects a methodological divergence in approaches to the formation of customary international law."[68]

> Whereas traditional custom – reliant on state operational practice – represents the law's descriptive

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[65] United States Response to ICRC Study on Customary International Law 101 Am. J. Int'l L. 639, July 2007.

[66] Jean-Marie Henckaerts, Customary International Humanitarian Law: A Response to US comments. *International Review of the Red Cross,* Volume 89, No. 866, June 2007.

[67] *Supra* note 65.

[68] Noura Erakat, *The US v. The Red Cross:* Customary International Humanitarian Law and Universal Jurisdiction 41 Denv. J. Int'l L. & Pol'y 225 (2013).

accuracy, the modern approach – which looks to the trajectory of the collective will of states – reflects its prescriptive appeal. The U.S. vividly demonstrates this divergence in its examination of four customary rules proffered by the ICRC.[69]

In response to U.S. arguments, *Erakat* writes:

The U.S. approach to establishing customary law is rigid and inadequate. It does not consider the proper approach to the formation of custom with distinct consideration for the nature of human rights and humanitarian law. In contrast, the ICRC approach, which leans towards, but is not necessarily modern, is more appropriate. It has the capacity to interpret developing customary norms based on a balance of *opinio juris* and state practice. The ICRC avoids paralysis in its approach by not affording undue weight to operational state practice and by deriving *opinio juris* and state practice from the same incident or act. In the words of Jean-Marie Henckaerts, co-author of the ICRC Study, there is no mathematical standard to establish customary law.[70]

Nicholls comments*:*

It is clear that the ICRC did not carry out this study in conformity with the traditional methods of assessing what state practice is customary. Whether the ICRC ought to have been more conservative in its approach is a different question. From a legal perspective, the ICRC has upturned the basis upon

[69] *Id.*
[70] *Id.* at 245.

> which customary law rests and its methodology reflects a radical departure from canonical law.[71]
>
> But adds:
>
> If one's goal is to create a tool that increases compliance with humanitarian principles, as was the purpose of this study, that goal cannot be realized by using only a traditional assessment of customary law; in order to pursue its stated goals, the ICRC had to take a non-traditional approach.[72]

2. Two Element Requirement

> *Erakat* points out that "the ICRC used a classic approach developed by the International Court of Justice (ICJ) to determine the existence of a general customary international law… which generally requires the presence of two elements, state practice and *opinio juris*, or the belief that such practice is a legal obligation, as opposed to one reflecting morality, reciprocity, courtesy, or otherwise."[73]
>
> *Erakat* adds that:
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> Though classical in its approach to establishing that a rule is of customary nature, the ICRC did not require that *opinio juris* be demonstrated as a distinct and separate element. Instead, it found that "more often than not, one and the same act reflects practice

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[71] Leah M. Nicholls, The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and Its 161 Rules of Customary International Humanitarian Law 17 Duke J. Comp. & Int'l L. 223-243.

[72] *Id.*

[73] *Supra* note 68, at 227.

> and legal conviction." So long as the practice is sufficiently dense, *opinio juris* can be found within that practice and therefore its existence did not need to be demonstrated separately."[74]

3. State Practice

Nicholls believes that contrary to its claims of utilizing classical customary law analysis, ICRC actually adopted a broader view of state practice.[75]

Noura Erakat notes that "[t]he ICRC also held that state practice must be sufficiently similar among states, but not necessarily identical."[76]

a. Density of state practice

Bellinger argues that the state practice for many rules proffered was insufficiently dense to meet the extensive and virtually uniform standard.

In response to this, *Henckaerts* writes:

> While it is agreed that practice has to be ''extensive and virtually uniform'' in order to establish a rule of customary international law, there is no specific mathematical threshold for how extensive practice has to be. This is because the density of practice depends primarily on the subject-matter. Some issues arise more often than others and generate more practice.[77]

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[74] *Id.*
[75] *Supra* note 71, at 238.
[76] *Supra* note 68, at 229.
[77] *Supra* note 66, at 475.

> Furthermore, in order to correctly quantify the density of practice it is necessary to determine the correct value of each element of practice. While some elements of practice may constitute single precedents, other elements may reflect numerous precedents. This is particularly the case of military orders, instructions and manuals, which reflect what armed forces are trained and instructed to do and what they end up doing most of the time. Hence, a single military manual may represent numerous precedents and thus a substantial quantum of practice.[78]

Henckaerts and *Debuf* explain however that "[t]he ICRC Study was not intended to be, and cannot be expected to be, exhaustive, both in terms of areas covered as well as in terms of scope and extent of practice collected. The same holds true for the ICRC's Customary IHL Database."[79]

b. *Verbal v. Physical Acts*

Bellinger believes that there was too much emphasis on written materials, such as military manuals and other guidelines published by States, as opposed to actual operational practice by States during armed conflict and reliance on General Assembly resolutions and that undue weight was given to statements by non-governmental organizations and the ICRC itself.

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[78] *Id.*

[79] *Supra* note 5, at 162.

W. Hays Parks[80] writes:

> Although the [ICRC] Study acknowledges the importance of state practice, it focuses on statements to the exclusion of acts and relies only on a government's words rather than deeds. Yet, war is the ultimate test of law. Government-authorized actions in war speak louder than peacetime government statements.[81]

Nicholls writes*:*

> In its study, the ICRC claims to be utilizing classical customary law analysis, but actually adopts a broader view of state practice. The ICRC includes verbal practice as part of state practice. The organization cites profusely for this analytical decision, however, the sources cited take a more narrow view of what constitutes verbal practice than the ICRC, which includes statements made at the meetings of international organizations and conferences in its definition of state practice. Common sense dictates that a state's declarations at such meetings tend to be more aspirational than practical because they are often tailored to meet a political goal.[82]

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[80] While Mr. Parks was with the International Affairs Division, Office of General Counsel, Department of Defense, the paper from which the quote is taken stated that the "views expressed herein are the personal views of the author, and may not necessarily reflect an official position of the Department of Defense or any other agency of the US government."

[81] W.H. Parks, The ICRC Customary Law Study: A Preliminary Assessment 99 Am. Soc'y Int'l L. Proc. 208.

[82] *Supra* note 71, at 238.

Noura Erakat noted that:

> Significantly, the ICRC afforded great weight to verbal state practice even in the face of repeated violations. In the case that a state wished to change an existing rule of customary international law, it would "have to do so through [its] official practice and claim to be acting as of right."[83]

Henckaerts admits that:

> A study on customary international law, therefore, has to look at the combined effect of what States say (verbal acts) and what they actually do (physical acts). An examination of operational practice (physical acts) alone would not be enough.[84]

Related to this is the criticism that the ICRC was more of an academic endeavor rather than the product of observation of actual military conduct. *Nicholls* writes:

> When the ICRC did consider actual state practice, it did so by calling on research teams from forty-seven states to submit reports concerning their states' practice, as well as teams charged with researching international sources, such as treaties, international tribunal decisions, and international organization activities. The states selected appear to reflect geographical and economic diversity, but tend toward military passivity, and the teams were primarily comprised of professors and lawyers. Thus, like American-style restatements, the study is

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[83] *Supra* note 68, at 229.

[84] Jean-Marie Henckaerts, Customary International Humanitarian Law: Taking Stock of the ICRC Study, 78 Nordic J. Int'l L. 444 (2010).

> ostensibly an academic endeavor and not the product of direct observers of military conduct.[85]

But as a counter-argument to this is *Erakat's* argument that:

> Strict operational state practice is an unreliable source of customary law for at least two reasons. First, operational practices are neither widely available nor plainly known. Second, in cases where a global value is at stake, consistent practice alone cannot undermine a rule's customary nature.[86]

Erakat noted the International Criminal Tribunal on Yugoslavia (ICTY) largely ignored battlefield practices and relied on verbal statements, declarations, and resolutions. The ICTY explained that examination of state practice:

> [I]s rendered extremely difficult by the fact that not only is access to the theater of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse to it is has to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments.[87]

Furthermore:

> In addition to the logistical restraints impeding perfect knowledge of battlefield operations, states often engage in practices that they believe are illegal. To accept that such engagement is evidentiary of a

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[85] *Supra* note 71, at 237.
[86] *Supra* note 68, at 242.
[87] *Id.* at 243.

> customary rule's waning force would lead to absurd results in light of the unlimited possibilities of war's gruesome horrors.[88]
>
> Also:
>
> Finally, a strict reliance on operational state practice in armed conflict neither reflects the law as it is, has been, or should be. As such, the words of states as well as what can be deduced from their support of "soft law" instruments should be afforded more weight in the formation of customary international humanitarian law.[89]

It has been said that however that, "humanitarian law is an area of law in which states more readily accept norms than carry them out; the treaty may be an indication of a norm, but is not necessarily an indicator of practice associated with it."[90]

c. Specially affected states

Bellinger argues that the ICRC Study "often fails to pay due regard to the practice of specially affected states."

Nicholls believes that commentators have criticized the ICRC in its review of state practices because many are "concerned that the ICRC did not weigh state practice according to whether the state actually engaged in military conflict."[91] She adds that "the ICRC [Study] cites unusual evidence that

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[88] *Id.*
[89] *Id.* at 234.
[90] *Supra* note 71, at 234.
[91] *Id.* at 239.

highlights the policies and practices of nations who never actually engage in warfare.[92]

Erakat notes:

> The ICRC agreed with the U.S. that the quantity of states is less relevant than their qualitative value. Accordingly, the quantitative support for a rule is less significant in the case where all specially affected states offered support. In cases where specially affected states opposed a provision, the quantitative value of state support is arguably inconsequential. Still, the ICRC held that in the realm of warfare, all states have an interest in humanitarian provisions and therefore their practice must also be given due weight, thereby diminishing the role of specially affected states in the determination of customary international humanitarian law.[93]

Erakat seems to agree with this position as she argues that when it comes to IHL:

> International society must be evaluated as a collective whole, wherein all states are affected by human rights and humanitarian law violations. Accordingly, this diminishes the value of specially affected states in the assessment of customary international humanitarian law.[94]
>
> International society is a collective whole as opposed to a sum of its parts. The community of nations, or the whole, has particular concerns distinct

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[92] *Id.* at 242.
[93] *Supra* note 68, at 228-229.
[94] *Id.* at 234.

> from each of its states, or its individual parts. This is particularly true as it concerns matters, like humanitarian ones, that constitute common interests. The manner in which a war is fought and regulated is of concern to all nations individually and collectively, regardless of direct participation. A state's non-participation in armed conflict does not diminish its potential participation in one in the near or long-term future. Accordingly, while some states may have more experience with armed conflict or human rights challenges, this does not make them "specially affected" insofar as the formation of custom is concerned. This significantly diminishes the consideration of specially affected states in the formation of customary international humanitarian law and heightens the value of soft-law considerations.[95]

d. Negative practice

Bellinger believes that inadequate weight was given to negative practice.

MacLaren and Scwendimann point out that the editors took the view that "the contrary practice [of States] does not prevent the formation of a rule as long as this practice is condemned by other States or is denied by the perpetrator itself as not representing its *official* practice."[96]

e. Historical considerations

It has been argued that the ICRC failed to filter statements that have historical or political significance but not statements of obligation.

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[95] *Id.* at 238.

[96] *Supra* note 14, at 1224.

For instance. with regard to statements issued by governments were these made as declaration of its law of war obligations, or a statement made for political purposes?[97] He adds that in this regard the ICRC Study "lacks a frame of reference, or a sense of history." He gives as an example the Soviet Union's statement regarding the use of napalm or incendiary weapons as the statement was made during the Vietnam war. He said that "[s]tatements offered by the Soviet Union in 1972 contained in the ICRC Customary Law Study indicate a lack of a 'filtration' process in the study's development."[98]

f. Non-exhaustive

Parks also asserted that the ICRC Study neglects to include certain facts pertaining to the rules regarding exploding bullets and inaccuracies in the discussion on blinding laser weapons.

g. Coverage

MacLaren and Scwendimann point out:

> Above all, customary IHL tends to develop during wartime, but wars are (relatively) infrequent, and the development is therefore non-continuous. In order to circumvent this difficulty, *usus* was not defined for the purposes of the Study as "age-old" state practice but as practice during the last twenty years, with the caveat that sufficiently dense practice can accumulate over an even shorter period of time.[99]

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[97] *Supra* note 68, at 209.
[98] *Id.* at 210.
[99] *Supra* note 14, at 1223.

4. Opinio Juris

With respect to *opinio juris*:

> In examining particular rules, the Study tends to merge the practice and *opinio juris* requirements into a single test.… We do not believe that this is an appropriate methodological approach. Although the same action may serve as evidence both of State practice and *opinio juris*, we do not agree that *opinio juris* simply can be inferred from practice. Both elements instead must be assessed separately in order to determine the presence of a norm of customary international law.[100]

Bellinger also contested the "heavy reliance on military manuals." He said:

> We do not agree that *opinio juris* has been established when the evidence of a State's sense of legal obligation consists predominately of military manuals.… [A] State's military manual often (properly) will recite requirements applicable to that State under treaties to which it is a party.… Moreover, States often include guidance in their military manuals for policy, rather than legal, reasons.... Finally, the Study often fails to distinguish between military publications prepared informally solely for training or similar purposes and those prepared and approved as official government statements.… [101]

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[100] *Supra* note 65, at 640-41.
[101] *Id.* at 641.

He proposed "[a] more rigorous approach to establishing *opinio juris."* He said:

> It is critical to establish by positive evidence, beyond mere recitations of existing treaty obligations or statements that as easily may reflect policy considerations as legal considerations, that States consider themselves legally obligated to follow the courses of action reflected in the rules....

Nicholls notes that the ICRC Study does not distinguish evidence of State practice from *opinio juris.*[102]

MacLaren and *Scwendimann* point out:

> In situations where relevant practice is sparse or ambiguous, *opinio juris* plays an important role, but it too proves elusive because States rarely provide reasons for what they do or do not do. The Study's editors were evidently tempted to adopt a teleological approach that international courts and tribunals have occasionally shown, namely that a rule of customary international law exists "when that rule is a desirable one for international peace and security or for the protection of the human person, provided that there is no important contrary *opinio juris."* Despite the attractiveness of this approach, the editors concluded that sufficient consistent support in the international community (including from so-called specially affected States) remains necessary to establish a customary international rule.

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[102] *Supra* note 71, at 243.

5. Formulation of Rules

Bellinger also argued that the ICRC Study "contains several other flaws in the formulation of the rules and the commentary." He said:

> The Study tends to over-simplify rules that are complex and nuanced. Thus, many rules are stated in a way that renders them over-broad or unconditional, even though State practice and treaty language on the issue reflect different, and sometimes substantially narrower, propositions....[103]

Erakat adds:

> Where the ICRC insisted on general adherence and practice to reflect a rule's customary nature, the U.S. insists upon detail and specificity. Even in the formulation of its rules, the US notes that the ICRC failed to state rules with sufficient precision to reflect state practice and treaty obligations. The US's stringent standards reflect a traditional approach to the formation of customary law wherein, absent treaty law, binding rules are based on actual, not verbal, state practice, and demonstrable opinion juris. In contrast, the ICRC accepts that a legal principle can become customary when it achieves general support from the international community as a collective whole. Like the holding in Nicaragua, it assumes that state behavior conforms with custom and that non-conformity reflects a breach rather than a seed for a new rule. The methodological divergence

[103] *Supra* note 65, at 641.

> evidenced by the U.S. and the ICRC reflects the two schools of thought underlying the formation of customary international law: traditional and modern.[104]

6. Definition of Armed Conflict

While some may argue that the ICRC did too much and took liberties in their identification of rules, others may argue that they did not do enough.

In particular, *MacLaren* and *Schwendimann* point out that the ICRC Study did not define *armed conflict*:

> The Study fails to clarify this ambiguity in the conventions by offering a more precise definition of armed conflict from a customary law perspective. Why was no specific research conducted on this important issue in order to make such a statement? According to one editor, Jean-Marie Henckaerts, no customary definition of "armed conflict" was included in the Study because doing so would require a study in and of itself. [Short of that] all we could have done was to repeat the various provisions in treaty law (Geneva Conventions, Articles 2 and 3; Additional Protocol II, Article 1(1); ICC Statute) and possibly some *dicta* from case- law of the ICTY. But we felt that this was not sufficiently exhaustive to make any statement and, as a result, we left it out. If we are able to do more research into state practice in

[104] *Supra* note 68, at 229.

> the future, we might include a section on this issue in a possible future edition[105]

MacLaren and *Scwendimann* found this explanation "unsatisfying from a process perspective."[106] They add:

> The Mandate given the ICRC in 1995 would have permitted researching a customary definition of "armed conflict." Moreover, the already broad and long consultation could presumably have included an additional issue without assuming unmanageable proportions.[107]

II. Status of the ICRC Rules

A. How has the ICRC Study been Used?

Since its publication, the study has been used as a legal reference to identify and interpret applicable IHL custom in international and non-international armed conflicts.[108]

It has been said that the ICRC Study has "proven to be useful for practitioners, who would not have the time or resources to undertake this research themselves."[109] In particular, it has been argued that the IHL Database has been used "with increased frequency and intensity."[110] This argument is based on the number of page views (537,662 in 2013 compared

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[105] *Supra* note 14, at 1226-1227.
[106] *Id.* at 1227.
[107] *Id.*
[108] *Supra* note 5, at 168.
[109] *Id.*
[110] *Id.*

to 113,446 in 2010.[111] While number of views may not be sufficient basis for determining usefulness, *Henckaerts and Debuf* also point to the fact that:

> Its users include a wide range of relevant actors, including governments, armed forces, domestic and international courts taking important decisions on the applicability and interpretation of IHL, domestic and international commissions of inquiry, nongovernmental organizations and other institutions reporting to alleged violations of IHL. And of course, the academic world.[112]

According to *Henckaerts* and *Debuf*, in connection with international armed conflicts the ICRC Study rules have been relied on "primarily, but not exclusively, in relation to states are not parties to Additional Protocol I (including Israel and the United States of America)."[113] They mention specifically the United Nations Fact-Finding Commission on the Gaza Conflict significantly relied in its 2009 report on rules of customary IHL regulating the conduct of hostilities because Israel had not ratified Additional Protocol I and United Nations Secretary-General's Panel of Inquiry on the May 31, 2010 flotilla incident off the coast of Israel. They also point out that Israeli courts and authorities themselves "have also relied significantly on the ICRC Study in their findings and reports on issues related to the Israel-Palestinian conflict."[114]

As regards non-international armed conflicts, *Henckaerts* and *Debuf* note that the Secretary-General's Panel of Experts on

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[111] *Id.* at fn. 29.
[112] *Id.* at 169.
[113] *Id.*
[114] *Id.*

Accountability in Sri Lanka in its 2011 report, it "relied extensively on rules of customary IHL, including several identified by the ICRC Study."[115]

Henckaerts and *Debuf* also point out that with respect to parties to Additional Protocol II "customary humanitarian law usefully complements the legal framework of the treaty."[116] The examples given were:[117]

- Colombia's operational handbook which refers to several rules identified by the ICRC Study;
- Significant case law from Colombian constitutional court referring to the ICRC Study; and
- International Commission of Inquiry for Libya referencing the ICRC Study.

Henckaerts and *Debuf* added that "several UN special rapporteurs have relied on customary humanitarian law and the ICRC Study."[118] Examples provided include:

- Reports by several special rapporteurs of the UN Human Rights Council and the Representative of the Secretary-General on Internally Displaced Persons on their mission to Lebanon and Israel in the wake of the 2006 conflict;
- Combined report of several mandate-holders of the UN Human Rights Council Special Procedures and the Special Representative of the Secretary-General for Children and Armed Conflict; and

[115] *Id.* at 170.
[116] *Id.*
[117] *Id.* at 171.
[118] *Id.*

- Joint Study on Global Practices in relation to Secret Detention in the Context of Countering Terrorism.

The ICRC Study has also been referred to in national courts and tribunals.[119] Examples include judgments of the Israeli Supreme Court:[120]

- On the "neighbor procedure" used by Israeli Defense Forces (December 2005);
- On the policy of targeted killing (December 2006); and
- Concerning the reduction of fuel and electricity supply from Israel to Gaza (January 2008).

Other judicial decisions include:[121]

- US Supreme Court in *Hamdan v. Rumsfeld* (2006;
- Decisions by the Court of Boznia and Herzegovina;
- Decision by the Federal Court of Justice of Germany; and
- Judgment Hague District Court of the Netherlands.

There are also favorable references made by international courts and tribunals. The ICTY has cited the rules.

B. Are All the Rules or Only Some of the Rules Identified in the ICRC Study Customary in Nature?

According to the ICRC there are 133 rules of customary IHL that govern both international and non-international conflict in an identical fashion.[122] Thus, the ICRC's assessment of what

[119] *Supra* note 5, at 172.
[120] *Id.* at 172-173.
[121] *Id.* at 172-174.
[122] *Supra* note 71, at 237.

constitutes customary IHL in non-international conflict is far more expansive than mainstream opinion.[123]

While the ICRC has been criticized for focusing on what States believe rules should be rather than what States actually practice,[124] there are judicial decisions which confirm the conclusion of the ICRC Study.

For instance, the ICTY has cited the customary law nature of Rule 50 on seizure of property in the ICRC Study.[125]

The International Court of Justice in *Armed Activities in the Territory of the Congo* confirmed "the customary law status of Articles 25, 27, 28, 43, 46 and 47 of the Hague Regulations which correspond to Rules 37, 38 (A), 51 (C), 52, 104 and 105 of the ICRC Study.[126]

Henkaerts and *Debuf* also point out that the ICRC Study has been "used as a reference by the Special Court of Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia and the International Criminal Court and the decisions of these tribunals confirmed the conclusions of the ICRC Study."[127]

III. ICRC Study as Model

A. Is the Process of the ICRC Study Unique?

It seems that the ICRC Study is compatible with the efforts of the International Law Commission (ILC) to identify customary international law.

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[123] *Id.*
[124] *Id.*
[125] *Supra* note 5, at 175.
[126] *Id.* at 176.
[127] *Id.*

Henckaerts and *Debuf* note that "[m]any of the issues discussed in the ICRC's Study on customary IHL have also been raised, and are the subject of debate, in the ILC as part of its current work on the identification of customary international law."[128]

The ILC had Law of Armed Conflict (LOAC) very much in mind and tried to take into account lessons learned in the field of customary IHL when it was working on the topic *Identification of customary international law.*[129]

Michael Wood explains:

> When the ILC began its work on the topic in 2012, almost the only recent and reasonably detailed statements by states on how rules of customary international law were to be identified were those stimulated by the ICRC Study on CIHL. The very fact that the ICRC had produced its study gave rise to important statements on how to identify rules of customary international law, not only by certain governments, but also by the ICRC itself and by individual experts. This has also been the effect of the ILC's own work on the topic; but at its outset, the Commission benefitted greatly from the debate concerning the methodology referred to by the ICRC authors. That methodology also has much in common with the methodology set out by the ILC in its draft conclusions.[130]

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[128] *Id.* at 179.

[129] Michael Wood, The Evolution and Identification of the Customary International Law of Armed Conflict 51 Vand. J. Transnat'l L. 728 (2018).

[130] *Id.* at 729.

In fact it may be said that the ICRC Study provides the ILC "with a concrete example of how the theory of customary international law plays out in practice, in particular in the area of IHL."[131] The ICRC Study also shows that the two-element approach (i.e. State practice and *opinio juris*) followed by the ILC is workable.[132]

As to the broader role of the ICRC Study to the development of customary international law:

> The ICRC Study was a catalyst for much thinking about the methodology for determining the rules of customary international law, just as CIHL itself was a laboratory for appreciating the customary process more broadly. It is also a field in which there is a considerable number of recent and important judgments of international and national courts and tribunals that shed light on several key questions that arise in the general context of identifying rules of customary international law.[133]

It has also been argued however that IHL is such a specialized field that the development of custom in this area is not exactly the same as efforts to codify custom in general.

> *Erakat* argues that: "[t]he specialized regime governing …humanitarian law together with [its] universal and non-reciprocal character informs how relevant treaty provisions should be interpreted. While a contractual treaty provision, of bilateral character, should harden into customary law, the generalizable nature of … humanitarian law need not

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[131] *Id.*
[132] *Id.*
[133] *Supra* note 129, at 735.

> crystallize to be binding upon all other states. Accordingly, custom can develop over a short period of time and *opinio juris* can be inferred from state practice so long as such practice is sufficiently dense.[134]

Erakat further argues that the *restrictive approach* applied in *North Sea* which provides that "state support for a treaty provision does not satisfy *opinio juris* [and therefore] must be demonstrated separately in order to affirm a principle's existence as customary law" does not apply to humanitarian law.[135] It seems the argument is that *generalizable rights* are not the same as treaty provisions which are merely contractual in nature:

> Treaty provisions, which represent generalizable interests, like humanitarian and human rights provisions do, need not harden into custom over a long period of time. Relatedly, *opinio juris* can be inferred from sufficiently dense state practice when establishing the existence of a customary international humanitarian law.[136]

This means that custom in IHL can form more easily than custom in general.

> Customary international humanitarian law, in particular, is an attitudinal position that reflects obligatory norms that have shaped practice as opposed to habitual norms that have come to represent legal obligations. Due to the specialized nature of the human rights and humanitarian legal

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[134] *Supra* note 68, at 235-236.
[135] *Id.* at 236.
[136] *Id.* at 238.

> regime, together with the international community's character as a collective whole, and because of the unreliability of operational state practice, this is especially true where morally loaded norms are at issue. Therefore, customary rules can develop quickly without waiting decades for the law to harden; the influence of specially affected states is significantly diminished; the value of soft-law instruments is heightened; *opinio juris* and state practice can be deduced from the same event or articulation and can be reflected by the reaction, or the lack thereof, of the international community; and, in some cases, they can develop instantly from multilateral treaty provisions. These are not absolute rules; instead they reflect a rebuttable presumption of sorts. They are general assumptions in the approach to the customary human rights and humanitarian rules that are still open to challenge based on the specific nature – permissive, operational, or obligatory – of the rule in question.[137]

B. Can the Role of the ICRC be Performed by Another International Organization?

The ICRC's beginnings is traditionally traced to the 1859 battle in Solferino, Italy where Swiss businessman Henry Dunant, was appalled that the wounded of both sides had been left to die and arranged for their care.[138] Dunant founded the predecessor to the ICRC, the International Committee for the Relief of the Wounded.

Nicholls notes:

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[137] *Id.* at 244-245

[138] *Supra* note 71, at 225.

> From its infancy, the ICRC has been in the practice of creating law, but what is interesting about its most recent foray into law-making is that it claims only to be writing down existing customary law. Whether it has done so accurately or whether it is continuing its practice of creating law is a matter of much debate.[139]

The Geneva Conventions grants the ICRC the authority to conduct its activities during armed conflict.

Nicholls comments:

> Unlike most international organizations, the ICRC is not made up of member states, nor was it originally established by treaty agreement. As a result, the ICRC does not have to answer directly to states, the very bodies the ICRC is trying to force to comply with IHL. In this way, the organization is a sort of monarch in the realm of IHL. It both created the body of IHL and wrote its most recently articulated rules; it is one of the most effective enforcers of IHL; and because it is considered an expert in the interpretation and application of IHL, it is often called upon to advise judges in international tribunals. The ICRC has legislative, executive, and judicial qualities, making it effectively a monarch.[140]

Because the ICRC is the "primary enforcer of IHL" or as *Nicholls* puts it the "humanitarian monarchy" it would seem

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[139] *Id.*
[140] *Id.* at 227-228.

proper that it undertake the identification and codification of customary IHL. However:

> One could argue that such a project conducted by the ICRC could not possibly be objective: the ICRC is not a disinterested bystander, but an organization that actively promotes more comprehensive IHL and describes itself as the "guardian" of IHL. By promoting IHL through its activities, the ICRC actually contributes to what it can consider in its evaluation of what constitutes customary law. This engenders a situation where the ICRC creates customary law by encouraging states to act in a particular way, and then uses those state actions to justify labeling it as customary law.[141]

Thus, "by publishing the study the ICRC may have overstepped the limits of its legislative power, and may have prompted a revolt."[142]

Nicholls argues:

> Knowing that international and domestic judges are likely to treat this listing similarly to the way American judges treat restatements of common law (citing to these works as a shortcut for a detailed exploration of complex law, or otherwise generally treating them as accurately reflecting the law), the ICRC had an incentive to create rules favorable to its own activities.[143]

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[141] *Id.* at 232.
[142] *Id.* at 227-228.
[143] *Id.* at 232.

This dilemma is of course a problem for any organization that would attempt to undertake a project similar to the ICRC Study. Because of the enormity of the work and the expertise required, it would inevitably be necessary for such an organization to be a stakeholder or have strong interest in the area of law being studied. On the other hand, similar to the ICRC, such interest may be perceived as bias which can rightly or wrongly taint the credibility of the project.

But it must be noted that the ICRC Study "was carried out by … the International Committee of the Red Cross at the explicit request of states."[144] It did not set out on this project entirely on their own and they sought to involve as many experts as possible, so it cannot be said that the project came entirely from the ICRC. The fact that the task was initiated by governments should also reflect the trust given by States on the ICRC.

Nevertheless, one view is that "while the ICRC successfully articulated a global consensus on what international humanitarian law ought to be, it may have sacrificed some of its respect in the international community by departing from a traditional definition of customary law."[145]

> Over the years, the ICRC has gained substantial political capital. In articulating the rules of customary IHL, the organization spent a lot of that capital, and the question is whether it spent too much. In other words, does the ICRC still have legitimacy and respect as an impartial organization,

[144] *Supra* note 68, at 473.
[145] *Supra* note 71.

> or did it push its agenda too far to be taken seriously as a neutral body?[146]
> Only time will reveal the answer to this question.

Conclusion

It cannot be denied that engaging in studies to codify custom can be beneficial.

According to *Henckaerts* and *Debuf:*

> First, customary IHL provides a common set of rules applicable to armed conflicts, binding all parties to these conflicts, regardless to the differentiated levels of states' ratification of specific IHL treaties. Second, the formation of customary law has allowed IHL to adapt – perhaps in a more flexible manner than treaty law is able to do – to changes in the conduct of contemporary armed conflicts.[147]

It has also been argued that the "normative gap between the law on international and non-international armed conflicts has been significantly narrowed" by the ICRC Study:

> The ICRC's study on customary international law indicates that the main rules on the conduct of hostilities, the use of means and methods of warfare, and the treatment of persons in the hands of a party to the conflict are part of customary law, not only in international but also in non-international armed conflicts.[148]

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[146] *Id.*
[147] *Supra* note 5, at 163.
[148] *Id.* at 167.

But engaging in such studies can also be risky.

MacLaren and *Schwendimann* point out that "attempting to identify customary international law in areas like IHL that are heavily regulated by treaty can bring certain risks as well as the benefits outlined."[149]

They say that "States that are not party to the treaties concerned may view the attempt to identify customary rules as an attempt to get around the express consent that is required for them to be bound by the related treaty articles" and that "[t]hese States will likely object to the application to them of any of the rules that are identified."[150]

But this is not substantially different from the same push back of these States to any treaty codifying the same rules.

They also say that undertakings like the Study run the risk of increasing not decreasing legal uncertainty in the interpretation and application of the relevant standards. In particular, they point to the possibility of divergence in the statement of the treaty rule and the customary rule. In such a case they say "the normative content of the standard will be brought into doubt, and legal protection may be undermined." But this is not substantially different from a case involving two overlapping treaties where the Court would simply have to apply the *lex specialis* rule.

Whatever the risks may be, it does not seem like they outweigh the benefits of having customary rules codified similar to the ICRC Study.

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[149] *Supra* note 14, at 1224.
[150] *Id.*

But it really all boils down to how the international community will respond to the ICRC Study.

As *Nicholls* points out:

> The real importance of the work will be measured by how states, judges, and other international actors perceive the rules laid out by the ICRC. If enough institutions regard the ICRC's listing as being accurate, regardless of whether it is or not, gradually, the list will become the law in the area, just as restatements published by the American Law Institute become more authoritative the more judges and lawyers regard them as the law.[151]

[151] *Supra* note 71, at 247.

REGULATORY TREATMENT OF CRYPTOCURRENCY AND BLOCKCHAIN TRANSACTIONS IN THE PHILIPPINES

EMERSON BAÑEZ,[*] MICHAEL REMIR MACATANGAY,[**] AND RAMON SARMIENTO[***]

Introduction

Regulatory authorities worldwide are closely watching crypto-currencies (such as Bitcoin and Ethereum) for both promises and perils. The upswing in transaction volume and worth of these cryptocurrencies during 2017 made them a popular store of value and instruments of speculation. Beyond this initial utility, cryptocurrencies promise secure, reliable payments that do not bank on trusted intermediaries, lower transaction costs, and provide insulation of the financial system from political decision.[1] The market's earlier uninterrupted exuberance for cryptocurrencies was eventually broken by a sharp decline in cryptocurrency prices, driven partly by governments imposing (or threatening to impose) regulations. The need for regulation

[*] Assistant Professor, University of the Philippines College of Law; LL.M., Kyushu University (2016); and Juris Doctor, University of the Philippines College of Law (2008).

[**] Juris Doctor, University of the Philippines College of Law (2007).

[***] Juris Doctor, University of the Philippines College of Law (2007).

[1] Ryan, R., and Donohue, M., Securities on Blockchain. *Business Lawyer*, 73, 85-108.

was, in turn, based on concerns regarding the use of cryptocurrencies for illicit activities and the need to protect the public from fraud.[2]

This paper will introduce the technologies behind cryptocurrencies, with a focus on Bitcoin, the most popular cryptocurrency. It will then examine emerging regulatory themes in the Philippines' and United States' federal law. These themes include: (a) cryptocurrencies as money and forms of payment; (b) treatment of cryptocurrencies as securities or investment contracts; (c) tax treatment of cryptocurrencies; and (d) measures against the use of cryptocurrencies for illicit activities that include money laundering and financing of terrorism. Finally, this paper will analyze the current Philippine regulatory regime for gaps in coverage and enforcement, and make recommendations to address such gaps.

Introduction to the Technology of Cryptocurrency and Blockchain

A full technical description of cryptocurrencies as well as its underlying blockchain technology is beyond the scope of this paper. However, the general structure and mechanisms of these technologies, insofar as is necessary to inform the legal analysis, are described here.

Cryptocurrencies may be considered the latest iteration of a technological response to the age-old problems of trust and reliability in trade and finance. Even prior to the adoption of computer systems, different means for recording and transmitting information were adopted over time by trading parties to

[2] *See* for example, Hagiwara, Y., and Nakamura, Y. (n.d.). Bitcoin Falls on Fears of Regulatory Trouble for Big Crypto Exchange. Retrieved April 20, 2018, from https://www.bloomberg.com/news/articles/2018-03-22/bitcoin-falls-after-report-that-binance-faces-warning-in-japan.

represent and enforce trust – from clay tokens to the documentary credit system.[3] In addition to documents and rudimentary authentication measures such as handwritten endorsements, commerce has depended on a network of trusted institutions to vouch for parties, provide solvency, or facilitate delivery. Banks and other financial institutions are at the center of this network, and so their organization and behavior are severely regulated by the State. To a certain extent, these institutions are deputized with a public function, and financial regulations were originally designed to align incentives towards the public good. This means that the State is entrusted not to defect from the public welfare, and to provide sound policies.

For Satoshi Nakamoto, Bitcoin's pseudonymous inventor,[4] the financial crisis of 2007-2008 and the recession it precipitated demonstrated that the system of regulation was inadequate and that technology could make it possible to have financial transactions that would not require ponderous "trusted" institutions.[5]

Bitcoin and most similar cryptocurrencies are built on blockchain technology. A unit of Bitcoin does not exist as a coin or bill but only as an entry in an account. Like any virtual currency, or most *fiat* currency, it is manifested as data – one has money in the bank not through actual cash in the vault, but by numbers in the bank's ledger. In the case of cryptocurrency, that data is encoded in an online, distributed ledger called the blockchain. The blockchain is not hosted by any single

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[3] Varian, H. R. (2010). Computer Mediated Transactions. *American Economic Review*, 100(2), 1-10.

[4] Although there have been many theories and several false leads, the true identity of Bitcoin's inventor has not yet been discovered. At the time Satoshi Nakamoto first put forward his proposals for a decentralized payment system, he claimed to be a Japanese man. *See* Joshua Davis. The Crypto-Currency, Bitcoin and its mysterious inventor, THE NEW YORKER 62, Oct. 10, 2011.

[5] Nakamoto, S. (2008). Bitcoin: A Peer-to-Peer Electronic Cash System. Retrieved April 20, 2018, from http://www.bitcoin.org.

institution but through all the computers that participate in the Bitcoin network (called "nodes").

> When someone requests a transaction on a blockchain (for example, sending currency from person A to person B), the requested transaction is broadcast to a network consisting of nodes. This network of nodes validates the transaction and the status of person A and person B using the cryptographic algorithms… Once validated, the transaction is timestamped and combined with other validated transactions in chronological order to create a new "block" of data for the ledger. This new block is then added to the existing blocks, thereby creating the blockchain, which is distributed publicly among the nodes and known to all participants in the system. [6]

The blockchain leverages several known technologies to enable secure online transactions that do not require centralized and trusted institutions. Data is stored and transmitted through a peer-to-peer network within which users can execute and confirm transactions without relying on a centralized authority, such as a government agency or a bank. The system also uses cryptographic principles to ensure that the integrity of transactions is preserved even without trusted institutions.[7] Since

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[6] Ryan, R., and Donohue, M. *Supra* note 1.

[7] *Id.* "Blockchains use cryptography to verify transactions, process payments, and provide security for individual participants that maintains trust within the system. Blockchains generally rely on two cryptographic schemes: digital signatures and cryptographic hash functions. Briefly, the former enables the exchange of accurate (payment or other transfer) instructions between parties to a transaction, and the latter is used to enforce discipline in writing transaction records in the public ledger. Neither of these schemes

the network has no central authority, the computational load of verifying these transactions and writing them into the blockchain is carried out by special nodes called "miners," which are rewarded for their efforts when the system generates newly minted coins.[8]

Although initially used to create the Bitcoin currency and facilitate payments, blockchain technology is general enough to represent all sorts of assets. Thus, a blockchain can be used to keep track of assets, such as a share in an enterprise or physical goods for a supply chain. Since the source code for Sakamoto's blockchain implementation is an open source, others can easily create their own blockchains with expanded functionality. One example is the Ethereum blockchain which can also host and run programs in addition to data. This makes it a suitable platform for executing blockchain transactions such as "smart contracts."[9]

Emerging Regulatory Themes

The diversity in uses of blockchain and its adaptability for other purposes mean that blockchain transactions can cover all sorts of commercial activity. This, in turn, could make it the subject of various regulatory regimes. As a system of payments and

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is unique to blockchain, as they are widely used to secure commercial and governmental communications. The combination of these cryptographic tools with distributed ledgers is the technological advancement that has allowed Bitcoin's blockchain to serve as the model for revolutionizing our financial systems."

[8] *Id.*, at 89, footnote 15.

[9] Stuart, B., Wl, D. L., and Insights, P. (2018). Blockchains offer revolutionary potential in fintech and beyond. *Westlaw Pract*, *954702*: "The concept behind smart contracts is that machine code would replace or, more likely, supplement legal contracts so the terms of a contract would be executed automatically. For example, the system would be able to verify that a party satisfied its performance obligations and then transfer the applicable consideration from the counterparty."

transaction settlements, it invites the interest of central banks which carry out the State's interest in ensuring that the payment system is secure and that it is not used for illicit activities. As a way to represent assets (including shares in a particular undertaking), the blockchain would be relevant to securities regulators. Finally, the financial gains associated with the production and exchange of cryptocurrencies make it an obvious target for taxation. Despite the paucity of legislation clarifying the legal status and characterization of cryptocurrencies and related blockchain products, several distinct regulatory themes have emerged in countries where the adoption rate or transaction volumes are high. These themes include:

- *Payments and Monetary Regulations* – these address issues relating to the legal status of cryptocurrencies as a valid form of payment and medium of exchange for goods, services, and other currencies. These are also concerned with ensuring that the underlying payment system is secure for its users, while at the same time preventing use for illicit purposes.
- *Securities Regulations* – cover cryptocurrencies being offered and sold as a form of investment, either as commodities subject to futures contracts or as securities.
- *Tax Regulations* – may include recognizing the taxable incidents across various blockchain transactions (whether or not they involve cryptocurrencies). These also include measures against tax evasion.

In the USA where most of the Bitcoin nodes are located[10] and where one of the highest volumes of Bitcoin transactions

[10] Global Bitcoin Nodes Distribution. (n.d.). Retrieved April 30, 2018, from https://bitnodes.earn.com/.

occur,[11] state and federal agencies have begun issuing rules specific to cryptocurrencies. Cases have also been filed against parties both within and outside the blockchain – from developers of new blockchains and cryptocurrency-like products, to operators of "mining pools," to the exchanges where virtual currencies are traded with money or other assets.[12] At the same time, U.S. law enforcement agencies have been able to track down and arrest persons using Bitcoin for illicit purposes. Although the law and jurisprudence on cryptocurrencies remains sparse, as it does everywhere else, the U.S. experience can offer a preview of relevant regulatory themes and provide a suitable template for our own attempts at regulation.

Payments and Monetary Regulations

The regulation of payment systems is concerned with limiting risks especially for consumers who may use these systems. At the transaction level, there are liquidity risks for parties that employ a float. There are also operational risks, such as when a payment system's security is breached, or where it cannot maintain availability in the face of increased transactional volume. Governments are also concerned with systemic risks, such as when the currency of a payment system becomes an inordinate substitute for legal tender. In the case of Bitcoin which has a cap

[11] *See* https://www.bloomberg.com/graphics/2017-bitcoin-volume/.

[12] *See* Webster, N., and Charfoos, A. (2018). How the Distributed Public Ledger Affects Blockchain Litigation. Banking and Financial Services Policy Report, 37(1), 6-4. Although most of these cases have been settled and did not generate jurisprudence, the issues raised in pleadings for these cases may provide a useful guide as to what aspects of cryptocurrencies can be addressed by current law, and what may still be clarified by future legislation or rulemaking.

of 21 million coins, a high adoption rate is likely to result in deflation.[13]

Both the blockchain and Bitcoin were originally designed to replace centralized payment systems. The technology promised secure, reliable payments, as well as immediate settlements without relying on institutions that could be vulnerable to hacking or agency problems. Blockchain transactions are also immutable and irreversible. Blockchain proponents assert that these attributes imply regulation of cryptocurrencies as unnecessary since payments through the blockchain are settled instantaneously and are more secure than any other system in the market today. Nevertheless, in instances where cryptocurrencies are exchanged with *fiat* currency or vice versa, not all transactions would occur within the blockchain and users still have to interact with the systems of traditional financial institutions. These could include currency exchanges, remittance companies, as well as banks; although they may deal in cryptocurrencies, their systems do not necessarily employ blockchain technology and are subject to failures of security and trust. A currency exchange, for example, may be hacked[14] or it may deliberately defraud its users, accepting their money without delivering the appropriate amount of cryptocurrency.

Governments can avail of several tools to ensure that any type of payment system does not harm the public or the rest of

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[13] Litwack, S. (2015). Bitcoin: Currency or Fool's Gold: A Comparative Analysis of the Legal Classification of Bitcoin. Temple International and Comparative Law Journal, 29, 309-248. https://doi.org/10.3366/ajicl.2011.0005, at 340.

[14] The Mt. Gox exchange was one of the earliest and largest cryptocurrency exchanges before it was hacked in 2014 and forced to declare bankruptcy (*See* McMillan, R. (n.d.). The Inside Story of Mt. Gox, Bitcoin's $460 Million Disaster. Retrieved April 30, 2018, from https://www.wired.com/2014/03/bitcoin-exchange/); The scale of the breach was superseded only recently with the hack of Coincheck, a Japan-based cryptocurrency exchange (*See* http://fortune.com/2018/01/31/coincheck-hack-how/).

the financial system. It may assert that a cryptocurrency is not a valid medium of exchange and ban use or recognition of blockchain transactions. It was the approach taken by China, when it declared an outright ban against cryptocurrency exchanges.[15] The other approach considers the specific sites and character of the risks involved, and then adopts a more calibrated response. Since Bitcoin and most cryptocurrencies are not backed by a government, they are not considered legal tender. That status, however, does not prevent it from being a store of value or medium of exchange. In the case of the U.S., exchange of private currencies is not prohibited and trade of crypto-currencies in the blockchain is not subject to an outright ban. While the distributed architecture of the blockchain and the relative anonymity of its users make direct regulation difficult, both state and federal governments have issued regulatory guidance and are considering legislation that addresses issues at the interface of the blockchain and traditional financial system. Under the 2013 guidance of the Financial Crimes Enforcement Network ("FinCEN"),[16] actors within this space may be subject to regulation based on their status as "money service businesses." The Bank Secrecy Act and the Patriot Act require these businesses to operate only under a license, maintain records, and report suspicious transactions, as well as take steps to prevent money laundering.[17]

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[15] Yu, X. (n.d.). China to stamp out cryptocurrency trading completely with ban on foreign platforms. Retrieved April 26, 2018, from http://www.scmp.com/business/banking-finance/article/2132009/china-stamp-out-cryptocurrency-trading-completely-ban.

[16] Department of the Treasury Financial Crimes Enforcement Network. Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies, Reports § (2013). Retrieved from http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2013-G001.pdf.

[17] Financial Recordkeeping and Reporting of Currency and Foreign Transactions Act of 1970, 31 USC § 5311 (1970) (Bank Secrecy Act); USA PATRIOT Act, 18 USC § 1960 (2001).

The Philippines' central bank, Bangko Sentral ng Pilipinas ("BSP"), has adopted a similar track. Cryptocurrency transactions that interact with the financial system on scale will be regulated. So far, the BSP has issued two advisories on virtual currencies ("VCs") dated March 6, 2014 and December 29, 2017. The first advisory warned the public of the risks when dealing with VCs particularly that: (1) virtual exchanges are unregulated and thus money may be lost; (2) VCs in a digital wallet may get stolen; (3) there is no protection when using VCs for payment; (4) the value of VCs can change quickly; and (5) VCs may be used for illicit purposes.[18]

The banking authority later approved BSP Circular No. 944 dated February 6, 2017, known as the Guidelines for VC Exchanges ("BSP Circular"). It governs VC exchanges in the Philippines, which engage in providing facility for the conversion (or exchange of legal currency) to VC or *vice versa*.[19] The BSP does not currently regulate VCs.[20] A VC exchange must obtain a Certificate of Registration ("CoR") to operate as a remittance and transfer company.[21] To date, two companies in the Philippines have been issued a CoR for this purpose.[22]

Among the salient features of the BSP Circular is the rule that VC transaction amounts are regulated in size such that payouts of more than P500,000.00 or its foreign currency equivalent, in any single transaction, shall only be made via

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[18] *See* BSP Warning Advisory on Virtual Currencies available at http://www.bsp.gov.ph/publications/media.asp?id=3377.

[19] BSP Circular No. 944 , Subsec.4512N.1 Scope.

[20] *Id*; *See also* "We do not endorse virtual currency as a currency because it is not a currency," Melchor Plabasan, deputy director and head of the BSP's Core Information Technology Specialist Group, told a news conference. available at https://business.mb.com.ph/2017/12/14/bsp-evaluates-12-applications-for-virtual-currency-exchanges/.

[21] BSP Circular No. 944, Subsec. 4512N.3.

[22] List is available at http://www.bsp.gov.ph/banking/MSB.pdf.

check payment or direct credit to bank deposit accounts.[23] In accord with its earlier advisory, the BSP also requires VC Exchanges to ensure the safety of its customers and the stability of the system. A VC exchange is required to adopt adequate risk management and security control mechanisms,[24] as well as maintain an internal control system.[25] BSP reiterated these warnings in an advisory dated December 29, 2017:

> Following the warning advisory issued by the BSP in March 2014, a formal regulatory approach was adopted through the issuance of Circular No. 944 dated 6 February 2017. Under the said issuance, VC exchanges or businesses engaged in the exchange of VCs for equivalent fiat money in the Philippines, are required to register with the BSP as remittance and transfer companies. In view thereof, BSP-registered VC exchanges are now required to put in place adequate safeguards to address the risks associated with VCs such as basic controls on anti-money laundering and terrorist financing, technology risk management and consumer protection. **Notwithstanding said issuance, the BSP does not, in any way, endorse VCs as legal tender, store of value or an investment vehicle.** (Emphasis supplied)[26]

These advisories were reiterated, yet again, in a recently published "Frequently Asked Questions (FAQs) on Virtual

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[23] BSP Circular No. 944, Subsec. 4512N.5.
[24] BSP Circular No. 944, Subsec. 4512N.6.
[25] BSP Circular No. 944, Subsec. 4512N.7.
[26] BSP Advisory on the Use of Virtual Currencies dated 29 December 2017 available at http://www.bsp.gov.ph/publications/media.asp?id=4575.

Currencies."[27] Of note is that the BSP further emphasized the dangers of investing in VCs in the following statement:

> Because of price volatility, VC holders may incur significant losses when trading or investing in VCs. While VCs were not initially designed to be used as an investment product, some traders/people speculate on VCs which adds to the price volatility. As in any other type of investment, prospective VC investors should know and fully understand VCs and crypto-currencies before speculating or investing in such a product. The public is advised not to blindly follow the crowd, adopt herd mentality, or engage in speculative transactions. The public should exercise extreme caution at all times when dealing with VC products and transactions in general.

Securities Regulations

As discussed above, parties can build their own blockchains, creating public, distributed ledgers where everyone can join and trade cryptocurrencies or other assets. This was the case for most of the "alt-coins" that proliferated in the wake of the Bitcoin hype. It is also possible to create "permissioned" blockchains, where participants can be limited to certain institutions. A group of banks, for example, can establish a private blockchain for clearing and settlement. The blockchain can also be programmed to account not for currency, but for shares in an undertaking that can reward its participants (with *fiat* currency, virtual currency, or additional shares).

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[27] Available at http://www.bsp.gov.ph/downloads/Publications/FAQs/VC.pdf.

The Ethereum blockchain's capability to store and execute "smart contracts" enables it to perform "reward" mechanisms as blockchain transactions – instantaneously, and without the need for trusted actors. In April 2016, developers of the Ethereum blockchain announced the creation of Distributed Autonomous Organization ("DAO"),[28] an application built on top of the Ethereum blockchain. The DAO allowed participants in the blockchain to contribute their cryptocurrency to a pool, in exchange for a certain number of DAO "tokens." Ownership of a DAO token gives the contributor the right to vote on which projects to fund, as well as entitles one to dividend-like rewards. [29] Based on the whitepaper released by the DAO's developers, certain members, called "curators" are chosen by the organization's founders. These curators then determine which investment proposals may be submitted to a vote.[30]

The DAO model of offering tokens representing rights in an undertaking, is known as "Initial Coin Offering" ("ICO"). It has since been replicated by companies to finance the development of new products and services. For example, a company can use the contributions to develop an online game, and buyers (to whom participation in the game has been presold through tokens) can use tokens to play the game or purchase items within the game itself. Other companies have simply used tokens as a new source of funding without any promise of a product or service other than the promise of future profits to be distributed to token owners, or the chance to sell one's tokens in the open market once their value has appreciated. In fact, "utility tokens"

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[28] A whitepaper released by the developers describes the DAO as "a 'virtual' organization' embodied in computer code and executed on a distributed ledger or blockchain." *See* https://github.com/slockit/DAO

[29] Weiner, P. M., Paci, C. C., & Hsu, K. (2018). Cryptocurrencies and ICOs: A SEC enforcement perspective. *Practitioner Insights Commentaries*, (WL 1060487).

[30] *Id*.

(token offers that correspond to the use of a product or service) have often been bought not by presumed future users, but by investors relying on the future success of the company's offerings. Most likely, this was owing to the mania surrounding anything related to cryptocurrencies, and the fear of missing out on a lucrative market before the bottom fell out.

Time will tell if any of the first generation of ICO-funded ventures will turn out to be wise investments. For many, the influx of ICOs has been a costly opportunity to re-learn lessons of past speculative bubbles, as well as the need for regulation. In 2016, the DAO itself was hacked – a loophole in the code allowed a rogue member to take away $55 million worth of cryptocurrency from the pool of contributions.[31] On the other hand, some ICOs have been tainted by allegations of fraud – either no tokens were exchanged for cryptocurrency, or there was never a *bona fide* product or service being developed in the first place.[32]

The U.S. Securities and Exchange Commission's first major regulatory guidance on ICOs came through an investigative report on the DAO.[33] The U.S. SEC concluded that DAO tokens were securities under the Securities Act; as such, they must be registered prior to any offer and sale to the public. The U.S. SEC used the test established in *SEC v. W.J. Howey Co.* which held that an "investment contract" (which includes securities) involves "a common enterprise with a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others. The U.S. SEC noted that the

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[31] *See* Leising, M. (n.d.). The Ether Thief. Retrieved April 26, 2018, from https://www.bloomberg.com/features/2017-the-ether-thief/.

[32] *Id; See also* Webster, N., and Charfoos, A. (2018). How the Distributed Public Ledger Affects Blockchain Litigation. *Banking & Financial Services Policy Report*, *37*(1), 6-14.

[33] Securities and Exchange Commission, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO (July 25, 2017), http://bit.ly/2uySAZs.

contributions of cryptocurrency into a pool is an investment of "money" under the *Howey* test. Contributors had a reasonable expectation of profits because the organization's intent was to fund projects that the members could use themselves or charge others for using. Finally, such profits would be made through the management of DAO's developers and their appointed curators. Although token holders had voting rights, their control was too dispersed, and limited by the actual range of projects proposed by the curators.

The fact that a token has some utility, or is connected to actual goods and services, is not conclusive as to its status as a security. If the circumstances or the developer's behavior fit the test, the token should be registered as a security.[34]

This reasoning was adopted in a subsequent SEC enforcement action against Munchee, which launched an ICO to fund improvements in its online platform for restaurant recommendations. The SEC maintained that the ICO was an offer of unregistered securities. Munchee agreed to a settlement with the agency (where it did not admit to any wrongdoing) and refunded every purchaser of its tokens.

The Philippines' SEC issued a similar regulatory guidance through an Advisory posted in January 2018.[35] Although not a binding order, it nevertheless reflected the agency's interpretation of the law informing its enforcement actions. The Advisory communicated a warning against the actual commercial risks of cryptocurrency ventures, especially those that promise high rates of return that are too good to be true. The Advisory likewise adopted the view that cryptocurrency-based investments may be considered as securities under Section 3.1 of the Securities Regulation Code, which adopts language similar

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[34] *Id.*

[35] Securities and Exchange Commission. (January 8, 2018). SEC Advisory on Initial Coin Offerings. Retrieved from http://www.sec.gov.ph/wp-content/uploads/2018/01/2017Advisory_InitialCoinOffering.pdf.

to the *Howey* test.[36] Thus, when an ICO amounts to a sale of securities to the public, it must be registered as such. Otherwise, offerors and promoters risk criminal sanctions.

The SEC applied this framework in an enforcement action against the developer of an ICO (*In Re: Blackcell Technologies*).[37] The SEC's enforcement unit relied on the *Howey* test to determine that the ICO amounted to an offering of unregistered securities.[38] It ordered the developer to cease and desist from selling the tokens and recommended the filing of appropriate administrative and criminal cases against those involved.[39]

In July 2019, the SEC issued its Rules and Regulations Governing Crowdfunding ("CF").[40] These CF rules define crowdfunding as "the offer or sale of securities of a limited scale usually for start-ups, micro, small, and medium enterprises ("MSMEs") done through an online electronic platform."[41] To the extent that ICOs can provide/serve this function, such offerings are subject to the SEC's crowdfunding rules. Under the issuance, ICOs can be offered only through an intermediary – which could be a registered broker, investment house, or funding portal.[42] The crowdfunding intermediary has the burden of due diligence of prospective issuers,[43] compliance with the SEC,[44] maintenance of minimum capital,[45] as well as employment of measures to reduce the risk of fraud.[46]

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[36] *Id*.

[37] Securities and Exchange Commission. In the Matter of Black Cell Technology, Inc., SEC CDO Case No. 01-18-046 (2018).

[38] *Id*. at 5-6.

[39] *Id*. at 9.

[40] "Rules and Regulations Governing Crowdfunding (CF)", SEC Memorandum Circular No. 14 Series of 2019, released July 10, 2019.

[41] *Id.*, Sec. 2A.

[42] *Id.*, Sec. 2B.

[43] *Id.*, Sec. 8.

[44] *Id.*, Sec. 9.

[45] *Id.*, Sec. 12.

[46] *Id.*, Sec. 13.

The SEC likewise released draft rules governing ICOs specifically, inviting stakeholders to submit their comments.[47] The Draft SEC Rules on ICOs recognize that some ICO coins can be asset, payment, or utility tokens, but they may nevertheless also be considered securities despite their function as such.[48] If this becomes the approved Rule it will be the ICO developer's burden to prove that its offerings are not securities.[49] To this end, it is required to submit an Initial Assessment Request to the SEC, along with documentation on the ICO

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[47] "Draft SEC Rules on ICOs," Unnumbered Memorandum Circular, released August 02, 2018. Available at http://www.sec.gov.ph/wp-content/uploads/2018/08/MC-Rules-for-ICOs.pdf.

[48] *Id.:*

> **Section 2. Definition of Terms** – For purposes of these Rules, the following definition of terns shall apply, unless the context otherwise requires:
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> …
>
> **C. Asset Tokens** – are tokens that represent assets such as a debt or equity claim of the issuer.
>
> …
>
> **Q. Payment Tokens** – are tokens which are intended to be used, now or in the future, as a means of payment for acquiring goods or services or as a means of money or value transfer.
>
> …
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> **W. Securities** – are shares, participation, or interests in a corporation or in a commercial enterprise or profit making venture evidenced by a certificate, contract, instruments, whether written or electronic in character.
>
> …
>
> **X. Security Tokens** – are payment, utility, and/or asset tokens that satisfy the definition of securities under the SRC, its implementing rules, and other issuances of the SEC.
>
> …
>
> **BB. Utility Tokens** – are tokens which are intended to provide access digitally to an application or service by means of a blockchain-based infrastructure.

[49] *Id.*, Sec. 3.

proponents and the details of the offering.[50] Should the SEC make a finding that the ICO is a security offering, it will be subject to the registration and disclosure regime (along with other requirements) of the Securities Code and its implementing regulations.

Tax Regulations

Although accounting for only a small part of the economy, cryptocurrency transactions have been growing in volume. While falling from its December 2017 high of more than $19,000 to around $9,000.00 at the time of writing,[51] Bitcoin still retains the interest of institutional investors. More businesses accept Bitcoin payments, and both mainstream banks and governments are considering their own cryptocurrency based payment systems. Miners continue to spend computational resources and electricity to extract various cryptocurrencies. Traders still seek to take advantage of regulatory arbitrage to gain profit in exchanges. The continued use of cryptocurrencies as stores of value and a vehicle for speculation make it a lucrative activity – producing a crop of "crypto billionaires."[52] States, through their taxing authorities, have a legitimate interest in capturing the value of cryptocurrency transactions.

As a preliminary matter, tax regulation is concerned with identifying the taxable incidents and the persons liable to pay the amount due. After this, the taxing authority must characterize the transaction or asset to be taxed to determine the applicable base and rate of taxation.

As early as March 2014, the U.S. Internal Revenue Service ("IRS") issued Notice 2014-21 which elaborated the IRS'

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[50] *Id.*, Sec. 4.

[51] Coindesk. Retrieved May 3, 2018, from https://www.coindesk.com/price/.

[52] *See* for example https://www.bloomberg.com/view/articles/2018-02-06/bitcoin-billionaires-want-a-crypto-utopia-in-the-sun.

position as to how existing U.S. tax law could apply to cryptocurrency transactions.[53] The IRS recognized several taxable incidents and the persons who may be liable, including: (1) miners, who gain new units of cryptocurrency based on their computational work for the blockchain; (2) "traders" and "dealers" who gain in the exchange of cryptocurrencies; and (3) persons who receive cryptocurrencies as payment for goods and services.

The IRS has expressed its view that cryptocurrencies should be treated as property instead of currency. This is especially true for the cryptocurrency miner, who extracts a commodity (akin to gold or oil) through his effort and investment. Only when the miner later sells that cryptocurrency would there be taxable income.[54] The next necessary question for tax treatment is whether or not such property should be considered a capital asset. Under the Notice, this would depend on the circumstances through which the cryptocurrency is disposed of. A person who deals in cryptocurrency (i.e., buys and sells cryptocurrency to customers as part of his regular activity) would realize ordinary income on transfers that result in a gain.[55] On the other hand, one who occasionally trades cryptocurrency in an exchange should only account for capital gains.

Under Notice 2014-21, a person who receives cryptocurrency as payment for goods or services (e.g., an employee who receives wages in Bitcoin) should be treated as receiving ordinary income subject to income tax.[56] The same applies to self-employed individuals who receive cryptocurrency payments.

Tax enforcement can be problematic when it comes to the decentralized nature of cryptocurrency participants, as well as the relative anonymity afforded by most blockchain implementations. However, just as in the regulation of cryptocurrencies in payment systems, tax authorities can lean on actors at the

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[53] United States Internal Revenue Service. Notice 2014-21 (2014).
[54] *Id.*, at Q-8.
[55] *Id.*, at Q-7.
[56] *Id.*, at Q-11.

intersection of the blockchain and the traditional financial system. For example, exchanges and money transmitters may be required to identify clients who trade or deal in cryptocurrencies. Such was the case of Coinbase, a cryptocurrency exchange that was compelled to turn over thousands of "high transacting" clients in 2016 to the IRS which enabled the agency to detect tax evasion.[57] The next logical step is to deputize these institutions to act as withholding agents.

In the Philippines, the Bureau of Internal Revenue has not yet issued any guidance on the tax treatment of cryptocurrency transactions. However, the country's tax code already requires that any type of income earned by a Filipino citizen should be taxed unless subject to exception. The tax law likewise makes a distinction between capital and non-capital gains of property.

Conclusion

Cryptocurrencies and blockchain technology confront enterprises and States with a new universal platform that resists traditional modes of jurisdiction and regulatory power. Given the novelty of the technology, legislation may be required to create both new rights and obligations, as well as new institutional arrangements to respond to its ramifications. Prior to such legislation, however, regulatory agencies are constrained to act only within the parameters of current law: first, to protect the public against fraud and other illicit activities; and second, to maintain trust in areas where cryptocurrencies interact with conventional financial institutions.

The only theme missing from this immediate response is administrative guidance on tax matters. Considering that guidance has been available from the IRS, which administers a similar tax law to that of the Philippines – the paucity of BIR issuances on the matter is an unfortunate oversight. It will not

[57] Karaman, A. F. (2017). Virtual Currency - What is it and How is it Taxed? *Insights*, 4 (12), 19-30.

only deny the government millions in new revenue, but also cast a shadow of uncertainty over the country's growing financial technology industry.

The focus on "consumer protection" may build trust for the public and prevent fraud. However, such protection may be cumbersome or unnecessary for more experienced actors, such as institutional investors and financial services companies. These actors may deploy blockchain and cryptocurrency not for the general public, but to facilitate internal transactions or exchanges within a trusted circle of institutions. Under the current regulatory regime, even private or permissioned blockchains may be subject to payment systems or securities regulation if they operate on a particular scale even if they are not made available to the public. This could slow adoption of the technology even for internal purposes where its benefits of security and privacy can be leveraged with lesser risk of illicit behavior.

To achieve a balance between technology adoption and protecting the public, the government can consider adopting a regulatory sandbox approach. This means providing special exemptions and allowances for particular sectors or transactions, while the full regulatory regime applies to everything else. The Monetary Authority of Singapore, for example, allows ICOs to launch even without extensive disclosure requirements if they feature innovations that make financial markets more efficient.[58] The Philippines can adopt a similar approach, allowing blockchain based technology for transactions between institutions and certified investors.

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[58] Chanjaroen, C. (n.d.). Singapore Regulator Would Consider Trialing Certain ICOs. Retrieved April 30, 2018, from https://www.bloomberg.com/news/articles/2017-11-15/singapore-regulator-would-consider-certain-icos-for-a-sandbox

SUSTAINABLE DEVELOPMENT AND INTERNATIONAL ENVIRONMENTAL GOVERNANCE: A CASE FOR A WORLD ENVIRONMENT ORGANIZATION*

RAYMOND MARVIC BAGUILAT*

I. Introduction

Sustainable development has been a very popular concept since its introduction in the Brundtland Report.[1] It presented a duty that required the current generation to manage our natural resources for the benefit of future generations. It also presented a development framework that assured the equal recognition of economic development, social development, and environmental protection. Suddenly, States were willing to negotiate and consensus was reached.

As years went on, however, criticisms started to be raised against sustainable development. The criticisms ranged from its failure to present a concrete definition, its masking of legitimate priorities, and its coopting towards economic and social interests. Despite these criticisms, its value has not diminished and it still remains to be an important concept in international

* Professorial Lecturer, UP College of Law; Law Reform Specialist, UP Law Center; LL.M., University of Melbourne (under the Australia Awards Scholarship); JD, UP Law; and Member of the Tuwali Indigenous Peoples from Ifugao Province.

[1] UNITED NATIONS, REPORT OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT: OUR COMMON FUTURE (1987) [hereinafter 'Brundtland Report'].

law. This is exemplified by the fact that the post-2015 development goals even adopted it and coined itself as Sustainable Development Goals ("SDGs").

In this paper, sustainable development shall be defined and analyzed by breaking it into its various elements. I shall then argue that the concept of sustainable development remains to be relevant and important to international environmental law. As a result, despite the criticisms levied against it and the limitations of its status in international law, it should still be maintained and supported.

I will point out that the biggest problem of sustainable development is due to the poor international environmental governance, particularly with the leadership of the United Nations Environmental Programme ("UNEP"). I would then argue that to address the problem in international environmental governance, a World Environment Organization ("WEO") should be created. To argue this, I have presented the limitations of the UNEP and the reasons for each limitation. I have then provided the alternatives that may be adopted in lieu of the UNEP.

II. The Concept of Sustainable Development

In Part II-A, I shall introduce the concept of sustainable development by providing its definition under the *Brundtland Report* and the 2002 *Johannesburg Declaration on Sustainable Development*.[2] I will then explain how it was used in international law. In Part II-B, I shall explain the interaction between international environmental law and sustainable development. I will explain how the elements of sustainable development incorporate principles of international environmental law. In

[2] Johannesburg Declaration on Sustainable Development, UN Doc A/CONF.199/20, 4 Sept. 2002 [hereinafter 'Johannesburg Declaration'].

Part II-C, I shall present the history of the concept and how it has changed throughout the years. In Part II-D, I will explain that the concept of sustainable development is not yet considered as customary international law but it is an interstitial norm that has great influence in international decision-making. In Part II-E, I shall explain that sustainable development remains valuable for international law; thus, it should be supported. In Part II-F, I have presented the criticisms against the concept of sustainable development to note its weaknesses. Finally, in Part II-G, I shall present the possible approaches to implement sustainable development.

A. Definition

The concept of sustainable development is commonly defined as a "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[3] This is the definition popularized through the *Brundtland Report*, the output of the World Commission on Environment and Development ("WCED") back in 1987.

Later on, the 2002 *Johannesburg Declaration on Sustainable Development*[4] expanded this definition to reflect the dominant understanding of sustainable development decades after the WCED.[5] The Johannesburg Declaration provided that sustainable development covers the interdependent and mutually reinforcing pillars that are economic development, social development and environmental protection—at the local, national, regional and global levels.[6]

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[3] Brundtland Report, *supra* note 1, at 41.

[4] Johannesburg Declaration, *supra* note 2.

[5] MARIA LEE, EU ENVIRONMENTAL LAW, GOVERNANCE AND DECISION-MAKING 59 (2 ed. 2014).

[6] Johannesburg Declaration, *supra* note 2, at ¶ 5.

In essence, the definitions highlight the duty of States to make use of natural resources in a sustainable manner as they attempt to develop.[7] Central to this is the protection of future generations. Furthermore, the definitions also show that moving towards sustainable development requires the integration of its three pillars, which are economic development, social development, and environmental protection.[8]

Sustainable development is valuable in international environmental law because it eases the tension between the competing values of economic and social development and environmental protection.[9] It also helps bridge the competing concerns by reiterating that there exists an obligation to future generations that may be fulfilled through the accommodation of the three pillars of sustainable development.[10] Since this idea proves to be both significant and enduring,[11] States remain on the negotiating table and consensus for the adoption of policies is achieved.[12]

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[7] ENVIRONMENTAL LAW, THE ECONOMY AND SUSTAINABLE DEVELOPMENT THE UNITED STATES, THE EUROPEAN UNION AND THE INTERNATIONAL COMMUNITY 374 (R.L. Revesz, P. Sands, & R.B. Stewart, eds., 2000).

[8] Laura Horn, *Rio+20 United Nations Conference on Sustainable Development: Is this the Future We Want?* 9 MACQUARIE JOURNAL OF INTERNATIONAL AND COMPARATIVE ENVIRONMENTAL LAW 18-20 (2013).

[9] J.E. Viñuales, *The Rise and Fall of Sustainable Development* 22 REVIEW OF EUROPEAN COMMUNITY AND INTERNATIONAL ENVIRONMENTAL LAW 3-4 (2013).

[10] MARIE-CLAIRE CORDONIER SEGGER & ASHFAQ KHALFAN, SUSTAINABLE DEVELOPMENT LAW: PRINCIPLES, PRACTICES, AND PROSPECTS 3 (1 ed., 2004).

[11] ROUTLEDGE INTERNATIONAL HANDBOOK OF SUSTAINABLE DEVELOPMENT 124 (Michael Redclift & Delyse Springett eds., 1 ed., 2015).

[12] Viñuales, *supra* note 9.

B. Overlapping Principles of International Environmental Law and International Sustainable Development

International environmental law is a field of international law that provides for substantive, procedural, and institutional rules in international law with the principal objective of protecting the environment.[13] It is from this field where sustainable development first emerged, as sustainability originated from international efforts to bargain and control the exploitation of natural resources to ensure its conservation.[14] This explains the strong relationship between international environmental law and sustainable development. However, international environmental law is focused primarily on the protection of the environment[15] while sustainable development extends to the relationship of the environment to economic development and social development where there is clear divergence between the two. Nonetheless, the intersection remains and as seen below, the elements of sustainable development finds expression in the legal regime of international environmental law.

The concept of sustainable development has four integral elements. These elements are: first, the principle of inter-generational equity; second, the principle of intragenerational equity; third, the principle of sustainable use of natural resources; and fourth, the principle of integration.

1. Intergenerational Equity

The principle of intergenerational equity is an international law principle that provides that the present generation may use

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[13] PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 13 (Philippe Sands ed., 3 ed. 2013).

[14] MARIE-CLAIRE CORDONIER SEGGER & ASHFAQ KHALFAN, *supra* note 10, at 15.

[15] PRINCIPLES OF ENVIRONMENTAL LAW, *supra* note 13, at 13.

existing natural resources, however, they should recognize its long-term impact and its effect to future generations.[16] As a consequence, the "present generation holds the earth in trust for future generations."[17]

This principle is expressed in several Multilateral Environmental Agreements ("MEAs") such as the *1946 International Whaling Convention*, the 1946 *African Nature Convention*, and the 1972 *World Heritage Conservation.*[18] It also finds application in several non-binding declarations such as the 1972 *Stockholm Declaration*, UN General Assembly Resolution 35/8 on the Historical Responsibility of States for the Preservation of Nature for Present and Future Generation, and the 1992 *Rio Declaration on Environment and Development*.[19] It has also influenced several international cases such as the *Pacific Fur Seal Arbitration*,[20] the *ICJ Gabcikovo – Nagymaros Case*, and the ICJ Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons*.[21]

2. Intragenerational Equity

The principle of intragenerational equity provides that all peoples of the current generation have the right to access the world's natural resources.[22] A State may not exhaust natural resources to the point of total extinction.

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[16] MARIE-CLAIRE CORDONIER SEGGER & ASHFAQ KHALFAN, *supra* note 10, at 99.
[17] PRINCIPLES OF ENVIRONMENTAL LAW, *supra* note 13, at 209.
[18] *Id.* at 209.
[19] *Id.* at 210.
[20] *Id*.
[21] *Id*.
[22] MARIE-CLAIRE CORDONIER SEGGER & ASHFAQ KHALFAN, *supra* note 10, at 99.

This concept is significant particularly in relation to the principle of the common heritage of humankind. Hence, in the global commons, States are tasked to ensure that they will preserve and manage the natural resources because it should be shared to the whole of humanity.[23]

This is expressed in various MEAs such as the 1987 Montreal Protocol, the 1992 UN Framework Convention on Climate Change, the 1992 Biodiversity Convention, the 1997 Kyoto Protocol, and the 2010 Nagoya Protocol to the Biodiversity Convention.[24] It is also provided for under the Stockholm Declaration and the Rio Declaration. It has also influenced several ICJ cases such as the Pulp Mills on the River Uruguay Case and the Gabcikovo – Nagymaros Case.

3. Sustainable Use of Natural Resources

The principle of sustainable use of natural resources holds that states have the sovereign right to exploit and manage the natural resources within its territory in a manner that is consistent with its own development policies.[25] However, this right is not absolute. The actions of the State should not cause irreparable damage to other States nor should it affect areas beyond the limits of national jurisdictions.[26] In so far as areas beyond the limits of national jurisdiction are concerned, all States are enjoined to ensure the protection of the environment and the sustainable use of the natural resources found within it;[27] while within their territory, States should use their natural resources in

[23] *Id.* at 81.

[24] PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 13, at 215.

[25] MARIE-CLAIRE CORDONIER SEGGER & ASHFAQ KHALFAN, *supra* note 10, at 99.

[26] *Id*.

[27] *Id*.

a "rational, sustainable, and safe" way in order to ensure that they may provide for all their citizens and the future generations.[28] This includes the avoidance of any wasteful practices.[29]

This principle is expressed in MEAs such as the 1952 North Pacific Fisheries Convention, the 1976 Pacific Fur Seals Convention, the 1985 ASEAN Agreement, the 1992 Biodiversity Convention, the WTO Agreements and the 2010 Nagoya Protocols.[30]

4. Principle of Integration

The Principle of Integration as applied to sustainable development recognizes that development involves economic, social, and environmental concerns.[31] Thus, in international environmental law, it is necessary that in its creation, implementation, and interpretation, the economic and social impact must be considered.[32] This principle found its roots as early as 1949 in the *United Nations Conference on the Conservation and Utilisation of Resources ("UNCCUR")* and it was subsequently applied and recognized in the 1972 *Stockholm Conference,* the 1982 *World Charter for Nature,* 1992 Biodiversity Convention, the 1992 Climate Change Convention, and the *Rio Declaration.*[33] The Arbitral Panel in the *Iron Rhine Arbitration Case* applied the principle as well.[34]

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[28] *Id*.
[29] *Id*.
[30] PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 13, at 211.
[31] MARIE-CLAIRE CORDONIER SEGGER & ASHFAQ KHALFAN, *supra* note 10, at 103.
[32] PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 13, at 215.
[33] *Id.*
[34] *Id.* at 215.

The elements of sustainable development that have been discussed highlight similar principles that are applied in international environmental law. As a result, forwarding the concept of sustainable development also advances international environmental law because the elements are aligned with the principles that serve to protect the environment.

C. History and Development

Despite the popularization of sustainable development through the *Brundtland Report* in 1987, it was not a new concept.[35] It has been used for centuries in conjunction with environmental protection and effort to sustain natural resources and wildlife.[36] It was also used to further the idea of resource conservation and management for present and future generations.[37]

The earliest international application of this idea is found in the *1893 Pacific Fur Seal Arbitration Case.*[38] In this case, the United States passed regulations to conserve fur seals in the Bering Sea, an area outside the national jurisdiction of the United States.[39] The United States lost this case; however, it has paved the way towards the adoption of regulations that preserve fur seals outside of national jurisdictions.[40]

Later on, the United Nations ("UN") which was established to become the pre-eminent world organization that deals with international cooperation after World War II recognized the need to preserve natural resources. Hence, in 1962, it passed a

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[35] MARIE-CLAIRE CORDONIER SEGGER & ASHFAQ KHALFAN, *supra* note 10, at 15.
[36] *Id*.
[37] *Id.* at 16.
[38] 1 Moore's International Arbitration Awards 755 (Aug. 15, 1893).
[39] PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 13, at 399.
[40] *Id*.

resolution[41] that urged governments to adopt measures to preserve natural resources during the infancy stages of its economic development while also encouraging their support to developing countries as they adopt the same measures.[42] This was followed in 1968, when the UN filed another resolution[43] vowing to address global environmental concerns.

At that point, there was already growing tension between the Global North (Developed Countries) and South (Developing Countries).[44] The Global North pushed for stronger environmental protection while the Global South wanted to focus on economic concerns.[45] This tension was addressed in the 1972 UN Conference on the Human Environment ("UNCHE") as expressed in the *Stockholm Declaration*.

The UNCHE became a forum where States were able to discuss international cooperation in light of the existing global ecological crisis.[46] The Conference resulted in the establishment of the United Nations Environment Programme ("UNEP").[47] UNEP was created to function as an anchor institution for environmental concerns that provide monitoring and assessment, agenda setting and policy processes, and capacity development.[48]

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[41] Economic Development and the Conservation of Nature, GA Res. 1831, UN GAOR, 17th sess., 1197th plen. mtg., (Dec. 18, 1962).

[42] MARIE-CLAIRE CORDONIER SEGGER & ASHFAQ KHALFAN, *supra* note 10, at 16.

[43] 1968 UNYB 84, 430

[44] MARIA LEE, *supra* note 5, at 58.

[45] *Id*.

[46] MARIE-CLAIRE CORDONIER SEGGER & ASHFAQ KHALFAN, *supra* note 10, at 17.

[47] *Id*.

[48] Maria Ivanova, *Assessing UNEP as Anchor Institution for the Global Environment: Lessons for the UNEO Debate* 8 WORKING PAPER NO. 05/01, YALE CENTER FOR ENVIRONMENTAL LAW & POLICY (2005).

Ten years after, the United Nations General Assembly adopted the 1982 World Charter for Nature.[49] The World Charter reiterated the importance of a vibrant ecosystem and introduced the need for productive use and protection of the ecosystem through adequate management.[50] It was explained that sustainable productivity may only be achieved and maintained through the proper management of ecosystems and the resources found within it.[51]

This understanding was used in various forums which unfortunately gave rise to conflicting interpretations as regards the priorities that should be made in relation to it.[52] Nevertheless, despite the confusion, there was global acknowledgement that measures for the protection of the environment and the conservation of natural resources are necessary in light of the changing times.[53]

A special commission, known as the World Commission on the Environment and Development ("WCED"), was soon convened in 1983 to formulate environmental strategies to achieve sustainable development, recommend potential strategies to spur cooperation between States, and provide a global perspective of the issues facing the international community.[54] The outcome document that resulted from the WCED came to be known as the *Brundtland Report* (also known as *Our Common Future*). Sustainable development, at that point, already reached global significance.

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[49] UN World Charter for Nature of October 28, 1982, A/RES/37/7.

[50] SUSTAINABLE DEVELOPMENT IN INTERNATIONAL LAW MAKING AND TRADE: INTERNATIONAL FOOD GOVERNANCE AND TRADE IN AGRICULTURE 21 (EB Bonanomi ed., 2015).

[51] Art. 4, World Charter for Nature, Part I (General Principles)

[52] MARIE-CLAIRE CORDONIER SEGGER & ASHFAQ KHALFAN, *supra* note 10, at 17.

[53] *Id.* at 18.

[54] Brundtland Report, *supra* note 1.

The 1992 United Nations Conference on Environment and Development ("UNCED"); otherwise known as the Rio Conference) held in Rio de Janeiro followed after the release of the *Brundtland Report*. The Rio Conference reiterated that sustainable development is necessary in light of the global need for environmental protection.[55] However, there was a marked difference between the Rio Conference and the Stockholm Conference.[56] This is reflected in the outcome document of the Conference, the *Rio Declaration on Environment and Development*, which includes 27 principles that serves as the guideline towards achieving sustainable development.[57]

The differences involve the role of human beings in sustainable development and the expansion of the sovereign rights of the State to exploit its own resources. It was noted that the *Rio Declaration* adopted an anthropocentric approach which meant that human beings are "at the centre of concerns for sustainable development and that they are entitled to a healthy and productive life in harmony with nature."[58] Furthermore, it was also noticed that instead of reiterating the *Stockholm Declaration's* sovereign right to exploit, the *Rio Declaration* includes the sovereign right to exploit not only pursuant to environmental policies but also developmental policies.[59] As a consequence, the global policy objective shifted to involve the dual priorities of environmental protection and economic development.[60]

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[55] MARIE-CLAIRE CORDONIER SEGGER & ASHFAQ KHALFAN, *supra* note 10, at 15-16.

[56] *Id.* at 20.

[57] Luc Hens, *The Rio Declaration on Environment and Development,* 2 REGIONAL SUSTAINABLE DEVELOPMENT REVIEW (2015).

[58] PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 13, at 42.

[59] *Id*.

[60] MARIE-CLAIRE CORDONIER SEGGER & ASHFAQ KHALFAN, *supra* note 10, at 20.

Another product of the Rio Conference is *Agenda 21*, a non-binding action plan that served as the blueprint for national and international actions in relation to sustainable development.[61] *Agenda 21* reflected the global commitment to implement national strategies, plans, policies and processes towards sustainable development with the support and cooperation of the international community.[62] The document provided specific plans of action that aim to prevent and remediate environmental degradation while supporting global sustainable development.[63] This resulted in the establishment of the Commission on Sustainable Development ("CSD"), a body tasked to coordinate with the UN System and other organization in relation to sustainable development.[64]

The UNCED was subsequently followed by the rather uneventful Earth Summit +5 held in New York in 1997 and the World Summit for Sustainable Development ("WSSD") in Johannesburg in 2002.[65] At that juncture, a major shift was again noticed as the WSSD came on the heels of the increasing demands of developing countries to address their needs and the introduction of the UN Millennium Development Goals ("MDGs").[66] This shift relegated environmental protection to

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[61] REPORT ON THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, UNCED REPORT, A/CONF.151/26/Rev.11 (Aug. 12, 1992).

[62] PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 13, at 44.

[63] MARIE-CLAIRE CORDONIER SEGGER & ASHFAQ KHALFAN, *supra* note 10, at 21.

[64] PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 13, at 44.

[65] MARIE-CLAIRE CORDONIER SEGGER & ASHFAQ KHALFAN, *supra* note 10, at 16.

[66] HIGH LEVEL PANEL ON GLOBAL SUSTAINABILITY, SUSTAINABLE DEVELOPMENT: FROM BRUNDTLAND TO RIO 2012, 8 (2010).

the background, as social and economic development came into focus due to the attention placed on global poverty alleviation.[67]

Twenty years since the first Rio Conference, the United Nations Conference on Sustainable Development ("Rio+20") was held again in Rio de Janeiro, Brazil in 2012 under the banner of sustainable development as a means towards the reduction of poverty, promotion of social equity, and the protection of the environment.[68] To achieve these broad aims, it was proposed that there should be a push for a green economy[69] which was defined by the UNEP as "one that results in improved human well-being and social equity, while significantly reducing environmental risks and ecological scarcities."[70] Furthermore, it was moved that reforms be made in relation to the institutional governance of sustainable development.[71] These reforms would involve the streamlining of the roles of international institutions as well as the adoption of new implementation and review mechanisms.[72] These proposals were all reflected in the non-binding outcome document of Rio+20 known as *The Future We Want*.[73]

In 2015, a new shift in the understanding of sustainable development unfolded. The UN MDGs,[74] an initiative that served as the blueprint of UN Member States to eradicate global poverty, concluded, and it was followed by the Sustainable

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[67] *Id*.

[68] Laura Horn, *supra* note 8, at 18.

[69] *Id.* at 24.

[70] Karen Morrow, *Rio+20, the Green Economy and Re-orienting Sustainable Development* 14 ENVIRONMENTAL LAW REVIEW 279-286 (2012).

[71] Laura Horn, *supra* note 8, at 18.

[72] *Id*.

[73] THE FUTURE WE WANT, GA Res 66/288**,** UN GAOR, 66th sess., Agenda Item 19**,** UN Doc. A/RES/66/288 **(**September 11, 2012).

[74] UNITED NATIONS MILLENNIUM DECLARATION, GA Res 55/2, UN GAOR, 55th sess., 8th plen. mtg., Agenda Item 60 (b), UN Doc. A/RES/ 55/2 (September 18, 2000, adopted September 8, 2000).

Development Goals (SDGs),[75] which carries forward the MDGs goals to help the world's poorest and most vulnerable population by reducing income poverty around the globe for the next 15 years.[76] The SDGs includes 17 goals and 169 targets that cover economic, social, and environmental concerns, yet it is clear that the focus has shifted further away from the environment towards social and economic development as the SDG explicitly provides that the eradication of poverty is the "greatest global challenge and an indispensable requirement for sustainable development."[77]

From the review of the history of sustainable development, it is clear that there has been an increasing shift from the environmental concerns under the Rio Declaration to the Stockholm Conference and Rio+20.[78] The Recognition of the right to safe environment under the Stockholm Conference challenged the primacy of economic development and this would have been a great launching pad for future policies that engender the importance of environmental protection, but the Rio Conferences did not carry this momentum.[79] Instead, it

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[75] TRANSFORMING OUR WORLD: THE 2030 AGENDA FOR SUSTAINABLE DEVELOPMENT, GA Res. 70/1, UN GAOR, 70th sess., 4th plen. mtg., Agenda Items 15 and 116, UN Doc A/RES/70/1 (October 21, 2015, adopted September 25, 2015).

[76] WORLD BANK GROUP, DEVELOPMENT GOALS IN AN ERA OF DEMOGRAPHIC CHANGE: GLOBAL MONITORING REPORT 2015/2016 1 (2016).

[77] PREAMBLE, TRANSFORMING OUR WORLD: THE 2030 AGENDA FOR SUSTAINABLE DEVELOPMENT, GA Res. 70/1, UN GAOR, 70th sess., 4th plen. mtg., Agenda Items 15 and 116, UN Doc. A/RES/70/1 (October 21, 2015, adopted 25 September 2015).

[78] Woong Kyu Sung, *Core Issues in International Sustainable Development: Analysis of the Shifting Priorities at U.N. Environmental Conferences* 44 ENVIRONMENTAL LAW REPORTER 10574-10594 (2014).

[79] *Id*.

introduced the right to development.[80] Worse is that Rio+20 totally deletes the environmental aspect of the right to an adequate environment and instead retains the right to an adequate standard of living.[81] More recently, the diagnosis in the SDGs that extreme poverty is the most critical issue that has to be addressed to achieve sustainable development clearly highlights how the economic and social development concerns have overtaken environmental protection as the primary concern in relation to sustainable development. Sustainable development has already morphed since its first inception as an environmental principle raising the fear that it is starting to be co-opted more as an economic and social development concept than an environmental protection principle.

D. Status of Sustainable Development in International Law

The normative value of sustainable development in international law is dependent on its status in international law. As an aspiration, it merely provides a suggestion for States to consider it. On the other hand, if it is shown that it has already crystallized as customary international law and the twin requirements of state practice and *opinion juris sive necessitates* concur, then sustainable development may be legally demandable upon States.

A review of the literature shows that sustainable development has not yet evolved as customary international law. As a result, it does not create any specific obligation on the part of States. However, it still has significant influence in international law as an interstitial norm.

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[80] *Id.*

[81] *Id.* at 10579.

The reason why sustainable development has not ripened into customary international law is due to the uncertainty of the concept of sustainable development.[82] Sustainable development is still an evolving concept. This can be gleaned from the shifting focus of sustainable development.[83] This idea is further confirmed under Principle 27 of the *Rio Declaration,* which called for States and people to cooperate in developing the concept of sustainable development in international law.[84]

Nevertheless, the concept should not be dismissed to have no normative value in international law. Sustainable development still reflects an emerging field of international law that deals with the intersection between economic, social, and environmental law.[85] This is seen by the continuous use of the concept since the Brundtland Report globalized it. Sustainable development has been forwarded in the *Rio Declaration, Agenda 21, Programme for the Further Implementation of Agenda 21, Johannesburg Declaration*, *World Summit on Sustainable Development Plan of Implementation,* Millennium Development Goals, and Sustainable Development Goals. It has also been used in various international legal instruments across the different parts of the world. The concept has been recognized in the *Declaration on Establishment of the Arctic Council*, the *Revised Protocol on Shared Watercourses in the Southern African Development Community*, and the *2009 Agreement on the Central Asian and Caucasus Regional Fisheries and Aquaculture Commission*, among others.[86]

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[82] MARIE-CLAIRE CORDONIER SEGGER & ASHFAQ KHALFAN, *supra* note 10, at 45.

[83] Karen Morrow, *supra* note 70, at 283.

[84] PRINCIPLE 27, UN DOC A/CONF. 151/26 (VOL. 1), 31 ILM 874 (1992).

[85] MARIE-CLAIRE CORDONIER SEGGER & ASHFAQ KHALFAN, *supra* note 10, at 46-47.

[86] PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 13, at 207.

While not forming part of customary international law, it may be characterized as an interstitial norm (i.e., a norm that establishes or modifies the relationship between primary norms, which regulates the conduct of legal persons).[87] This is explained by its characterization as an obligation of means, where best efforts are undertaken to arrive at an outcome that is consistent with sustainable development.[88] It means that, while sustainable development does not present legal obligations, it may still influence international legal persons as they interpret conflicting environmental, social, and economic policies. This is reflected in the *Gabčikovo-Nagymaros case*[89] where the International Court of Justice recognized that sustainable development is a concept in international law that serves to reconcile economic development and environmental protection.[90] Hence, States should look at the consequences that economic development brings to the environment. Additionally, sustainable development was also recognized in the World Trade Organization, particularly through the *Shrimp/Turtle Case*, where the WTO Appellate Body acknowledged that the 'objective of sustainable development' is found in the 1994 *Marrakesh Agreement Establishing the World Trade Organization*'s Preamble and it does influence the interpretation of the obligations under the WTO Agreements.[91]

This is significant, because sustainable development remains to be a persuasive legal concept. The incremental acceptance that economic development should be discussed

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[87] Virginie Barral, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm* 23 THE EUROPEAN JOURNAL OF INTERNATIONAL LAW, 377-389 (2013).

[88] *Id.* at 391.

[89] *Gabcikovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7, *75.*

[90] Laura Horn, *supra* note 8, at 20; MARIE-CLAIRE CORDONIER SEGGER & ASHFAQ KHALFAN, *supra* note 10, at 47-48.

[91] PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 13, at 209.

along with social development and environmental protection opens the door for the eventual recognition of sustainable development as part of customary international law.[92]

E. Supporting Sustainable Development

It has been established that sustainable development is valuable for international environmental law as it helps keep environmental concerns on the agenda. While there have been shifts in its level of importance, environmental protection has not been totally ignored. It still has a significant place in the field of international sustainable development law and is still carried out.

Consequently, it is necessary to support the growth of sustainable development. It may be achieved through the following:

First, sustainable development should be allowed to evolve by learning.[93] With the world evolving as the years pass by, several anchors of sustainable development have changed. The global ecology has seen the extinction of several species while other species propagate. Technology has also developed to the point that it is capable of rendering species extinct. Social demands have also shifted, with poverty alleviation currently treated as the key to a better world. The world's political economy has also shifted as a response to the global crisis that it has faced. For sustainable development to remain relevant, it is necessary for the concept to grow with the changes, analyze its role within the new set of circumstances, and apply it accordingly.

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[92] MARIE-CLAIRE CORDONIER SEGGER & ASHFAQ KHALFAN, *supra* note 10, at 50.

[93] ROUTLEDGE INTERNATIONAL HANDBOOK OF SUSTAINABLE DEVELOPMENT, *supra* note 11, at 124.

Second, sustainable development also requires a transparent and inclusive interaction among all States and social institutions.[94] The diversity of human society presents equally diversified values, principles, desires, and demands. As such, the concept of sustainable development also shifts along with every society's interpretation of it. In order for the concept to move forward, it is necessary for there to be an understanding of the various notions of sustainable development as understood by States and other stakeholders. This understanding gives way to a richer discussion of sustainable development as it applies cumulative knowledge and practices of multiple organizations.

Third, accountability is also necessary to properly assess sustainable development.[95] Before moving forward, it is essential to determine whether previous prescriptions and policies have been effective while pushing for sustainable development. This may be achieved through the establishment of institutional arrangements that sets an analytical assessment of the effects and limitations of the policies and programs adopted to attain the balance prescribed by sustainable development.[96]

F. Criticisms Against Sustainable Development

There is value in pushing for sustainable development and this is supported by the continuous use of the concept in international law. However, a plethora of criticisms have also been raised against it.

One of the biggest criticisms against sustainable development has been its malleability and vagueness.[97] Since the *Brundtland Report* the concept has yet to crystallize into a definite concept. As a result, it has not been able to provide any

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[94] *Id.* at 125.
[95] *Id.*
[96] *Id.*
[97] Virginie Barral, *supra* note 87, at 382.

normative value and different States may still interpret it whichever way they want. Moreover, it has not provided any clear rules regarding important related concepts such as sustainable "rate" of use. As a result, States have skirted their commitments towards sustainable development.

Second, corollary to its vagueness, sustainable development as a hollow concept remains as a diplomatic trick that merely allows the engagement of stakeholders without providing concrete priorities that will help in dealing with its conflicting pillars.[98] As a result of this limited engagement, the implementation of sustainable development may not be achieved because no clear directions are set.[99] Furthermore, the simple satisfaction of stating sustainable development to mean a balance between the three pillars of economic development, social development, and environmental protection prevents rational discussion as to the needed priorities and the tradeoffs that exist.[100] Without this rational discussion, sustainable development becomes a mere farce and it will not solve social and environmental concerns that remain subservient to economic development.

Third, as an evolving concept, sustainable development has been coopted from environmental protection towards economic development.[101] While this shift has been seen before with the reliance on the green economy and the belief that the global environment shall be protected if there is continued economic growth,[102] it has been accelerated by the 2008 economic crisis where industrialized countries aimed to rebound by focusing their efforts back to economic development and

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98 J.E. Viñuales, *supra* note 9, at 4.

99 *Id.* at 6.

100 *Id*.

101 *Id*.

102 D.K. Anton, *The 2012 United Nations Conference on Sustainable Development and the Future of International Environmental Protection* 7 CONSILIENCE: THE JOURNAL OF SUSTAINABLE DEVELOPMENT, 64-67 (2012).

growth.[103] This has led to the notion that the primary goal of sustainable development is to ensure economic growth without leading to environmental degradation.[104] This mindset presupposes that environmental concerns are mere consequence that should be prevented and not a primary objective in itself.[105] Environmental protection is therefore given least priority. This coopting proves that a balance between the three pillars is merely an illusion and environmental protection will always remain in the background of economic and social development policies.

Fourth, there is a lack of consensus on what the proper and relevant indicators should be to assess the effectiveness of sustainable development efforts. There are numerous formulations to determine progress in sustainable development; however, indicators are usually arbitrary or otherwise incomplete.[106] To address these, a consensus should be reached to determine the relevance of the criteria used, a role that science should play in its determination, and the method of reporting and its transparency.[107] It is necessary to develop and arrive at a consensus on what should be the proper indicators of sustainable development[108] because without appropriate indicators, sustainable development would be measured in varying ways and States could simply mask their failures. If this happens, the concept of sustainable development would lose its persuasive value and will be easily ignored. Any claim of progress may simply be brushed aside as self-serving.

What the criticisms ultimately show is that the weaknesses of sustainable development are consequences of its failure to be

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[103] J.E. Viñuales, *supra* note 9, at 6.

[104] D.K. Anton, *supra* note 102, at 69.

[105] *Id*.

[106] Tomáš Hák, Svatava Janoušková, & Bedrich Moldan, *Sustainable Development Goals: A Need for Relevant Indicators* 565-566 (2016).

[107] *Id.* at 568.

[108] *Id*.

implemented.[109] While sustainable development was initially helpful in drawing people to the negotiating table due to its extensive coverage, it has since failed to move beyond its original conception.[110] It has not fleshed out a clear meaning and it has not generated rational discussion of the tradeoffs between the three pillars of sustainable development. It has also failed to create a global consensus on relevant indicators should be applied to determine progress in sustainable development efforts.

G. Implementing Sustainable Development

Several approaches have already been presented to help in the implementation of sustainable development. Viñuales suggests that the focus of sustainable development should be on the "four Gordian knots," which are participation, differentiation, decarbonization, and innovation and technology diffusion.[111] Wiesmann, on the other hand, suggests that in light of the complexities of the three pillars, it is necessary to adopt a context-based approach that shall not rely on any objective definition of sustainable development; instead, it should recognize the existing set of specific circumstances.[112] Amartya Sen then proposes a people-centered approach.[113] Through this approach, Sen argues that the priority should be measured according to the well-being that it brings to an individual.[114] Well-being is then linked to the idea of individual freedoms such

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[109] J.E. Viñuales, *supra* note 9, at4.

[110] *Id*.

[111] *Id*. at 7.

[112] SUSTAINABLE DEVELOPMENT IN INTERNATIONAL LAW MAKING AND TRADE: INTERNATIONAL FOOD GOVERNANCE AND TRADE IN AGRICULTURE, *supra* note 50, at 64.

[113] *Id*.

[114] *Id*.

as political freedom, social opportunities, and protective security, among others.[115] These approaches may help guide States as they move sustainable development forward. Irrespective of the direction chosen, what is important is that it moves sustainable development beyond what Viñuales coins as a mere diplomatic trick.[116]

To add to this suggestion, I present the possibility of addressing the criticisms lodged against sustainable development by proposing the establishment of a World Environmental Organization ("WEO"). This suggestion finds support in John Whalley and Ben Zissimos' proposal for a WEO that would help merge the understanding of the global economy and environmental protection.[117] More specifically, they argue that a WEO should be established to help the internalization of global environmental externalities in the global economy.[118] They suggest that true internalization, which recognizes the true determination of the real cost of a commodity, may only be attained if the social and environmental cost of the commodity are also valued.[119] To achieve this, the WEO should be created to help negotiate and present the environmental externalities of commodities.[120]

Sustainable development is deeply rooted in environmental law and poor international governance gravely affects its effectiveness. Hence, it is sensible to explore the possibility of establishing a WEO to support sustainable development.

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[115] *Id.*

[116] J.E. Viñuales, *supra* note 9, at 4.

[117] JOHN WHALLEY & BEN ZISSIMOS, *Making Environmental Deals: The Economic Case for a World Environmental Organization in* GLOBAL ENVIRONMENTAL GOVERNANCE: OPTIONS AND OPPORTUNITIES 17 (D.C. Esty and M.H. Ivanova eds., 2002).

[118] *Id.*

[119] *Id.* at 3.

[120] *Id.* at 4.

III. WEO and Sustainable Development

In Part III-A, I shall present the criticisms against the UNEP to explain why it has to be reformed into a WEO. In Part III-B, I shall present the history of this discontent against the UNEP. In Part III-C, I shall then provide the proposals for the WEO. In Part III-D, I shall explain the process of establishing the WEO. In Part III-E, I shall provide the functions and structure of the WEO. In Part III-F, I shall only provide the contrary view against the WEO. Finally, in Part III-G, I shall provide a caution to the adoption of a world sustainable development organization and instead suggest that if the proposal for the WEO fails, support should be placed instead in the limited reforms to the UNEP and the High-Level Political Forum ("HLPF") on Sustainable Development.

A. UNEP Criticisms

Established in 1972, UNEP is the "leading global environmental authority."[121] It is a subsidiary organ of the UN and it "serves" as the environmental anchor institution for the environment.[122]

The Programme has been criticized for its severe failings to fulfill its mandate.[123] These criticisms involve the UNEP's lack of "formal" status, miniscule financial resources, poor governance structure, limited organizational structures, and non-strategic location.

The criticism revolving around the formal status of the UNEP is brought about by its status as a UN Programme, a body that is granted with the least independence and authority within

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[121] M.J. Vijge, *The Promise of New Institutionalism: Explaining the Absence of a World or United Nations Environment Organization* 13 INTERNATIONAL ENVIRONMENTAL AGREEMENTS, 153-154 (2013).

[122] Maria Ivanova, *supra* note 48, at 14-20.

[123] *Id*.

the UN. This is severely restrictive compared to a specialized agency that is separate and autonomous in relation to other UN bodies.[124] This limited authority is problematic because the UNEP is unable to rein in other UN institutions with environmental portfolios and other environmental institutions created under MEAs.[125] As of the moment, the UNEP struggles and is easily ignored as a "second rate" UN Agency.[126] As a consequence, the UNEP is unable to fulfill its mandate to coordinate environmental concerns within the UN System and with other environmental institutions.[127]

This lack of authority is exacerbated by the miniscule budget that it receives compared to the new institutions. For the past years, the budget for UNEP has fallen dramatically when looking at the percentage allocated to it in relation to the whole UN.[128] The budget problem is due to its financial structure.[129] UNEP's budget is not based on any predictable mandatory assessed contributions; instead, it relies on voluntary contributions that are provided by UN Member States.[130] As a result, the agenda laid down for the UNEP is dependent on the dictated priorities of the contributors and it may not plan for the long-term.[131] Moreover, the legitimacy of the institution is also questioned due to the control wielded by the contributors in setting the UNEP's policy direction.[132] In addition to this, it is

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[124] *Id.* at 14.

[125] *Id*.

[126] Steve Charnovitz, *A World Environmental Organization* 27 COLUMBIA JOURNAL OF ENVIRONMENTAL LAW 323-346 (2002).

[127] M.J. Vijge, *supra* note 121, at 154.

[128] *United Nations Environment Programme, Regular Budget*, UN Environment, http://www.unep.org/about/funding/SourcesofFunding/RegularBudget/tabid/131358/Default.aspx.

[129] Maria Ivanova, *supra* note 48, at 16.

[130] *Id*.

[131] *Id*.

[132] *Id*.

unable to address more complex environmental concerns such as climate change and biodiversity.[133]

The poor governance structure of the UNEP also cripples it. It is composed of a Governing Council, Committee of Permanent Representatives, and a Secretariat.[134] The Committee of Permanent Representatives, tasked with the review of the program of work and budget, monitoring of the implementation of the decisions of the Governing Council, and crafting of draft decisions of the Governing Council, consists of ambassadors to Kenya, and serves other functions apart from their mandate in the Committee leading to a less than ideal policy.[135] This is further exacerbated by their lack of environmental competency.[136] On the other hand, the Governing Council only meets once a year to provide the final stamp of approval for the program of work and budget of the organization; this means that they have limited opportunity to assess the policies laid down before them.[137]

There are also concerns regarding the overlapping functions within the UNEP. As early as 1997, it was determined that the organizational structure should be streamlined to reflect areas of responsibilities among the various global issues.[138] It was determined that the overlaps of functions or non-alignment of expertise within the organization diminishes the effectiveness of the programme.[139]

Finally, the location of the UNEP also presented severe operational limitations. UNEP is located in Nairobi, Kenya. The location is geographically hard to travel to and it faced

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[133] Laura Horn, *supra* note 8, at 35.
[134] Maria Ivanova, *supra* note 48, at 15.
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*

infrastructural limitations.[140] As a result, interaction with the people in UNEP was limited and coordinating demanded significant resources. It is then unable to fulfill its mandate to coordinate and to help in efforts towards environmental capacity-building.[141]

B. History of UNEP Discontent

The proponents of the World Environment Organization ("WEO") suggest that international environmental governance should be centralized under a single umbrella institution.[142] It is a proposal that has existed for several decades, starting with George Kennan who raised this proposal in the early 1970s and suggested an International Environmental Agency that would work as an international environmental authority.[143] Later on, Lawrence David Levien raised his own comprehensive proposal for a WEO modeled after the International Labour Organization ("ILO").[144] To address this proposal, the UNEP was established in 1972.[145] Albeit weak in the eyes of many, it drowned down the push for the WEO up until the next couple of decades.[146]

By 1989, new calls were mounted. This time it was the governments of the Netherlands, France, and Norway which called for an international environmental body that is authoritative and structured with an effective majority rule.[147] This did

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[140] *Id.* at 19.
[141] *Id.*
[142] Steve Charnovitz, *supra* note 126, at 325.
[143] *Id.*
[144] *Id.*
[145] FRANK BIERMANN, REFORMING GLOBAL ENVIRONMENTAL GOVERNANCE: THE CASE FOR A UNITED NATIONS ENVIRONMENT ORGANISATION (UNEO) 5 (2011).
[146] Steve Charnovitz *supra* note 126, at 325.
[147] FRANK BIERMANN, *supra* note 145, at 5.

not represent the sentiments of most States at the time. Hence, it did not gather much support but it was able to stir the debate.[148]

In the 1992 Rio Conference, this matter was again raised, this time by former New Zealand Prime Minister Geoffrey Palmer.[149] He pushed for the establishment of an International Environmental Organization that roughly resembles the ILO.[150] Palmer hoped that this proposal will help in the streamlining of the overlapping environmental institutions.[151] Unfortunately, this proposal was again ignored and was not acted upon.[152] Instead, a Commission on Sustainable Development ("CSD") was established along with a call for a strengthened role of the UNEP.[153]

Ignoring the call by Palmer for a WEO did not dampen the push for a stronger international environmental institution. The calls for a WEO increased as international trade grew as an international agenda.[154] Several environmentalists pushed for the WEO in an effort to counter the expansive General Agreement on Tariffs and Trade ("GATT").[155] At this point, Daniel Esty proposed that a Global Environmental Organization ("GEO") modeled after the GATT would help environmental governance.[156] This was followed by Ford Runge who espoused the establishment of a WEO that would serve as an overarching institution tasked to handle the mounting MEAs.[157] Other members of the academe also supported the idea

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148 *Id*.
149 Steve Charnovitz, *supra* note 126, at 325.
150 *Id*.
151 *Id*.
152 *Id*.
153 *Id*.
154 *Id.* at 326.
155 *Id*.
156 *Id*.
157 *Id.* at 327.

of a WEO, each adding their unique perspective of why a WEO is necessary, what may be done, and how it would be done.[158]

In the 1997 UN General Assembly Special Session, Brazil along with Germany, Singapore, and South Africa pushed for a "Declaration" that called for a global environmental umbrella organization.[159] The umbrella organization shall continue to work within the UN and work hand in hand with the UNEP that serves as its major pillar.[160] This was again met with lukewarm reception coming from the international community.[161] Nonetheless, it spurred further discussions regarding the problems faced by the UNEP, and several proposals were made to address the situation.[162]

By 2001, proponents of a WEO got a boost from the proposal of the UN High-Level Panel on Financing Development.[163] The Panel proposed that there is a need for a GEO that will consolidate the dispersed organizational responsibilities dealing with environmental concerns.[164] However, it failed to provide a clear rationale and operational details on the suggested organization,[165] rendering it unpersuasive.

Four years after, a new proposal was raised. France proposed a UN Environment Organization, a specialized agency under the UN in the same form as the World Health Organization ("WHO").[166] The "Paris Call of Action" gathered

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158 *Id*.

159 *Id.* at 324.

160 FRANK BIERMANN, *supra* note 145, at 5; Steve Charnovitz, *supra* note 126, at 324.

161 Steve Charnovitz, *supra* note 126, at 324.

162 *Id*.

163 *Id.* at 328.

164 *Id*.

165 *Id*.

166 Nils Goeteyn, *Legal Challenges in the Creation of a World Environment Organization in* GLOBAL ENVIRONMENTAL LAW AT A CROSSROADS 299 (R V Percival, Jolene Lin, & William Piermattei eds., 2014).

the backing of 46 nations, including the European Union.[167] Unfortunately, the top four emitters of greenhouse gases, the United States of America, Russia, China, and India did not support it.[168]

In the Rio+20 Conference, calls for the restructuring of the UNEP were again mounted in an effort to strengthen the UNEP,[169] providing to either change the status of the UNEP into a specialized UN Agency or to reform its membership and funding.[170] The latter proposal gained the assent of States.[171] As a result, a request to the General Assembly will be made calling for it to pass a resolution to make membership in the UNEP's Governing Council universal and to increase its financial resources.[172] While the UNEP's reformation has already started, it still does not address the fundamental problems raised against it.

C. Proposed Structures

A review of the progression of the ongoing calls for a WEO shows that there are diverging prescriptions to deal with the ills of the UNEP.[173] These proposals may be categorized based on three models.

The proposal that I support is the least radical proposal of the three. It is coined as the cooperation model[174] that suggests

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[167] Alister Doyle, *46 Nations Call for Tougher U.N. Environment Role*, REUTERS, (Feb. 3, 2007), http://www.reuters.com/article/idUSL03357553._CH_.2400.

[168] *Id*.

[169] Laura Horn, *supra* note 8, at 36.

[170] *Id*.

[171] *Id*.

[172] *Id*.

[173] Nils Goeteyn, *supra* note 166, at 296.

[174] THE COURIER ACP-EU, A WORLD ENVIRONMENT ORGANIZATION: ISSUES IN GLOBAL GOVERNANCE DOSSIER EUROPEAN COMMISSION

the improvement of the UNEP as a specialized agency.[175] The function of this new organization is both norm-building and implementation.[176] Currently, the UNEP is a Programme that is limited to norm-building and is financed through voluntary contributions.[177] On the other hand, a specialized agency is funded by both voluntary contributions and assessed contributions, which are dues that UN Member States pay as members of the organization.[178] As a specialized agency, it will also be granted more political authority and autonomy within the UN System.[179] This proposal follows the framework of other organizations such as the ILO and the WHO as its model.[180] The new organization will not merge nor amalgamate existing environmental organizations.[181]

The second proposal, known as the centralization model,[182] provides for a WEO that integrates global environmental governance under one organization.[183] This centralized model attempts to coordinate and unify the more than 500 MEAs around the world today (compared to the 52 major MEAs at the time when the UNEP was created).[184] It also

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(2015), http://ec.europa.eu/development/body/publications/courier/courier193/en/en_038.pdf.

175 FRANK BIERMANN, *supra* note 145, at 6.

176 *Id*.

177 *Funds, Programmes, Specialized Agencies, and Others,* UNITED NATIONS (2015), http://www.un.org/en/sections/about-un/funds-programmes-specialized- agencies-and-others/index.html.

178 *Id*.

179 Nils Goeteyn, *supra* note 166, at 302.

180 FRANK BIERMANN, *supra* note 145, at 6.

181 *Id.*

182 THE COURIER ACP-EU, *supra* note 174.

183 FRANK BIERMANN, *supra* note 145, at 6.

184 Nils Goetyn & Frank Maes, *The Quest for a World Environment Organization: Reflections on a Failing Debate as an Input for Future Improvement in*

seeks to unite numerous international institutions that have been created to address environmental concerns around the world.[185] It will also attempt to encourage the participation of stakeholders that have been empowered to voice their concerns over a plethora of environmental issues under one body.[186] It is suggested that this international environmental organization integrate the major international organizations to shed its overlapping functions.[187] This proposal loosely follows the the model of the WTO.[188]

The third proposal is the hierarchical model.[189] This model is meant to create a quasi-supranational agency that would be empowered with norm-making and enforcement functions that will allow it to sanction States that fail to comply with its MEA obligations.[190] This is the least supported model due to its expansive functions.[191]

While the proposals provide marked differences, there are also significant similarities. First, it is clear that there is a need for an overarching organization that will coordinate the myriad of MEAs that exist today.[192] Second, coordination is also necessary between the various UN Systems and non-UN organizations that handle environmental concerns.[193] Third, the organization should serve as a forum to negotiate and respond on contemporary environmental issues.[194] Fourth, the WEO

Environmental Governance and Sustainability, *in* ENVIRONMENTAL GOVERNANCE AND SUSTAINABILITY 233–236 (Paul Martic ed., 2012).

185 *Id*.

186 *Id*.

187 FRANK BIERMANN, *supra* note 145, at 7.

188 *Id*.

189 THE COURIER ACP-EU, *supra* note 174.

190 FRANK BIERMANN, *supra* note 145, at 7.

191 THE COURIER ACP-EU, *supra* note 174.

192 Nils Goeteyn, *supra* note 166, at 303.

193 Steve Charnovitz *supra* note 126, at 328.

194 Nils Goeteyn, *supra* note 166, at 303.

should also have the capacity to help States as they attempt to comply and implement their obligations under MEAs.[195] Finally, the WEO must also have oversight function over the activities of national governments to ensure accountability.[196]

D. Establishing the WEO

To create a specialized agency consistent with Articles 57 and 63 of the UN Charter, two elements are required.[197] First, it is necessary that there be a multilateral treaty that serves as the charter of the agency.[198] The multilateral treaty shall contain the details about the organizational structure of the agency, the functions of each organ, decision-making mechanisms, and membership.[199] This should be negotiated either through an inter-governmental conference or the General Assembly.[200] The second requirement is an agreement that will cover the relationship between the agency and UN ECOSOC.[201]

E. Function and Structure

The creation of a WEO is meant to address the criticisms lodged against UNEP. Hence, it is necessary to ensure that the WEO provides significant differences compared to the status quo. In this regard, the following functions and institutional structure of the WEO is proposed.

The current fragmented state of MEAs around the globe, exacerbated by the increase of the number of independent

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[195] *Id.*
[196] Steve Charnovitz *supra* note 126, at 328.
[197] Nils Goeteyn, *supra* note 166, at 303.
[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] *Id.*

governing bodies/institutions, has given rise to the need for a WEO that effectively coordinates with these different bodies in an effort to align the environmental goals of each MEA.

To deal with this, a WEO should have the power to coordinate with the other international environmental institutions in order to achieve synergy between the MEAs and to determine the existing overlaps and conflicting ideas.[202] This may also serve as the forum to present the state of the world's environment, the current gaps, and the solutions that may be considered. This change will ultimately strengthen environmental norm-setting.

Upon the establishment of a strengthened coordination mechanism, the WEO should then be empowered to help improve the implementation of MEAs. Putting in place evaluation processes, reporting mechanisms, and/or a dispute settlement mechanism may help achieve this purpose.[203] These mechanisms ensure the stability of environmental governance and encourage them to fulfill their commitments.

The WEO should also be granted capacity-building powers. These capacity-building powers are important in mainstreaming the policies adopted by the WEO, particularly in developing countries that do not have the resources to comply with the obligations provided under MEAs.[204] These capacity-building measures may involve government training and support, among others, to ensure that developing countries would not be left behind in the implementation of their commitments.

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[202] Steve Charnovitz, *supra* note 126, at 346.
[203] THE COURIER ACP-EU, *supra* note 174.
[204] FRANK BIERMANN, *supra* note 145, at 9.

F. Critique Against a WEO

It is undeniable that the UNEP leaves much to be desired. It is also clear that reforms should be made in order to achieve more effective international environmental governance, an ingredient necessary for the normalization and implementation of sustainable development. To some, however, the solution does not lie in the creation of a WEO.

Adil Najam argues that pushing for the WEO merely distracts and takes away the attention of the international community from the discussion on the reformation of existing organizations.[205] He opines that the issues levied against the UNEP do not really relate to its mandate.[206] Instead, the changes should relate to its existing structural limitations, such as its lack of resources, staff, and authority.[207] He then adds that the push should be for the improvement of the UNEP, not its overhaul that is highly disruptive and politically impracticable.[208]

Calestous Juma also provides a similar view. He opines that the push for the WEO diverts the attention of the international community from more urgent concerns that the international community faces.[209] He argues that the underlying cause of the problem is the failure of States to pay their dues to the UN and to fulfill their commitments to poverty alleviation.[210] As a result, agencies tasked with capacity-building are not able to fulfill their mandate.[211] He then adds that the proposal for a

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[205] Adil Najam, *The Case Against a New International Environmental Organization* 9 GLOBAL GOVERNANCE, 367-381 (2003).
[206] *Id.* at 376.
[207] *Id.* at 377.
[208] *Id*.
[209] THE COURIER ACP-EU, *supra* note 174.
[210] *Id*.
[211] *Id*.

WEO do not in any way touch on this. Hence, he concludes that a new WEO would not solve the existing problem.[212]

Juma also criticizes the calls for the centralization of powers.[213] He notes that there is currently a movement towards decentralizing institutional operations. Yet, the proposals for the WEO centralize the environmental functions in the WEO.[214] In relation to this, Najam proposed that instead of pushing for centralization, there should be a push for coordination that is primarily led by governments and supported not only under the UNEP but also under the Commission on Sustainable Development (CSD; now the high-level political forum on Sustainable Development), the Environmental Management Group ("EMG") and the Global Ministerial Environment Forum ("GMEF").[215]

Nils Goeteyn and Frank Maes notes that the failure of those moving for a WEO is due to the lack of consensus as to how to properly measure the performance of the UNEP.[216] Furthermore, it was also raised that given the lack of consensus as to the proper alternative to the UNEP there has also been a failure to come to a decision as to how to best solve the problems presented.[217] Finally, they explain that States simply do not want to create a powerful WEO because they remain unconvinced that it will be beneficial to them.[218] Thus, any proposal for a WEO is doomed to begin with.

Despite the criticisms against the moves to reform the UNEP and/or to create the WEO, it is apparent that the status quo may not be maintained. The global environment is still deteriorating and the UNEP is not able to function effectively

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[212] *Id.*

[213] Steve Charnovitz, *supra* note 126, at 328.

[214] THE COURIER ACP-EU, *supra* note 174.

[215] Adil Najam, *supra* note 205.

[216] Nils Goetyn & Frank Maes, *supra* note 184, at 244.

[217] *Id.*

[218] *Id.* at 245.

given that international environmental governance needs changes that will help in addressing the worsening condition of the environment.

Furthermore, a stronger international environmental organization may greatly support sustainable development. The increase in the world population and the push for economic growth is incrementally shifting the focus away from environmental protection and this trend will unlikely subside. Hence, it is necessary to strengthen international governance to ensure that sustainable development would always carry environmental concerns.[219]

G. Caution and Alternatives

While it is suggested that the fulfillment of sustainable development provides impetus for a WEO, one should not fall into the trap of pushing the WEO as a "world sustainable development organization" ("WSDO").[220] To create one would require a greater merger of the UNEP and the UN Development Programme ("UNDP"), UN Conference on Trade and Development ("UNCTAD") and UN Industrial Development Organization ("UNIDO"), among others.[221] While it is ideal for the concerns to be addressed under one overarching organization, the fear is that eventually the environment shall lose out again in the equation. As lengthily discussed, the UNEP has organizational and logistical weaknesses. Therefore, when a merger is pushed, it is easy to brush aside the UNEP along with the environmental portfolio that it manages. Furthermore, even if the organizations are on equal footing, there is a fear that merging the two would only shortchange both environmental and development agenda.[222] Hence, it will only hurt both

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[219] *Id.* at 37.
[220] FRANK BIERMANN, *supra* note 145, at 10-11.
[221] Steve Charnovitz, *supra* note 126, at 355.
[222] *Id.* at 356.

portfolios. Finally, this is a doomed proposal from the beginning as a WSDO would necessitate the inclusion of trade and finance concerns[223] which are under the mandate of the WTO and the World Bank.[224] It is not feasible to propose the inclusion of the WTO and the World Bank under the WSDO. Hence, this proposition should be readily dismissed.

A more feasible alternative in case the WEO fails is the UNEP's marginal reformation while it also supports the reforms of the High-Level Political Forum ("HLPF") on Sustainable Development. The HLPF is the body that took over the CSD, an organization that was established in lieu of the calls for a restructured UNEP in 1992.[225] The HLPF is mandated to continue as well as develop the work of the CSD. As such, it is tasked to lead the discussion on sustainable development, create the agenda to be discussed, and implement its output.[226] It also serves to synergize the sustainable development within the UN System and other international governance institutions in all levels of decision-making.[227] Furthermore, it is also tasked to review the implementation of sustainable development commitments under the major UN Conferences and Summits covering the environment, economic, and social concerns.[228]

Unfortunately, the HLPF takes over the CSD that had issues of its own. It had problems with the lack of participation of high-level ministers and policy-makers, particularly those handling the economic and social concerns.[229] Their absence prevents any fruitful discussion of the three pillars and hinders

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223 *Id.*

224 *Id.*

225 *Id.* at 341.

226 STEVEN BERNSTEIN, THE ROLE AND PLACE OF THE HIGH-LEVEL POLITICAL FORUM IN STRENGTHENING THE GLOBAL INSTITUTIONAL FRAMEWORK FOR SUSTAINABLE DEVELOPMENT 2 (2013).

227 *Id.*

228 *Id.*

229 *Id.*, 5.

the integration of the issues surrounding each concern.[230] This then makes it harder to come up with agreements in the CSD.[231] Furthermore, the CSD also fails to properly follow-up or monitor the progress in relation to the decisions that it has reached.[232] Hence, it is unable to ensure compliance among its Member States. [233] Nevertheless, the reform of the HLPF is currently underway. [234]

IV. Conclusion

In this paper, I have presented the concept of sustainable development. I have explained its importance, particularly for international environmental law. I have also argued that while the concept has limitations brought about by its indefinite nature and limited status in international law, it is still important for international environmental law because of its drawing effect and influence.

I have also argued that the poor governance of the UNEP is the biggest problem in applying sustainable development. Consequently, I have argued that a WEO may solve this problem. Nevertheless, I also recognize that this proposal faces an uphill climb. Hence, as a middle-ground, an alternative is also presented. This alternative involves the support for the conservative reformation of the UNEP and the HLPF.

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230 *Id.* at 6.
231 *Id.*
232 *Id.*
233 *Id.*
234 *Id.*