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

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

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

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

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

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

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

[2] *Id.*

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

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

## I. Links Between Diplomacy and International Law

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

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

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

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

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

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

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

[5] *Id.*

[6] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

[12] *Id.*

[13] *Id.*

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

## II. Philippine Contributions to International Law

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

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

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

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[14] *Id.*

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

[16] *Id.*

[17] *Id.*

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

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

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

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

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

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

[20] *Id.*

[21] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### *Peaceful Settlement of Disputes and the Manila Declaration*

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

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

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

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

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

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

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

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

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

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

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

Most significantly, the Manila Declaration states that:

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

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

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

[35] *Id.*

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

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

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

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

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

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

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[36] Roucounas, *supra* note 32.

[37] Bosco, *supra* note 34.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### *The Archipelagic Doctrine in the Law of the Sea Convention*

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

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[42] Robert Beckman, *South China Sea Tribunal Ruling a Game Changer*, THE STRAITS TIMES, July 14, 2016.

[43] The Island of Palmas Case *(U.S. v. Netherlands)*, 2 J. Scott, Hague Ct. Rep. 829 (Perm Ct. Arb. 1928).

[44] *Philippines and the WTO, World Trade Organization*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/countries_e/philippines_e.htm (last visited July 13, 2018).

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

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

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

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

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

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

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

[48] *Id.*

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

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

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

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

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

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

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[49] *Id.*

[50] *Id.*

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

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

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

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

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

### *International Courts and Tribunals*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[59] *Id.*

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

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

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

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

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

[62] *Id.,* at 11.

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

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

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

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

## III. The Department of Foreign Affairs and International Law

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

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

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

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

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

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

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

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

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

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

### *OTLA: Legal Adviser to the Government on International Law*

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

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

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

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

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[72] *Id.* sec. 8(2) – (4) and Chapter 3, sec. 10.

[73] Foreign Service Act, Rep. Act. No. 7152 sec. 9 (1991).

[74] DFA Department Order No. 19A-95, sec. 12 (2004).

[75] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

### *From Law Advisory to Law Policy Making*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Quo vadis international law?

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

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

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

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[82] Kritsiotis, *supra* note 7.

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

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

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

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

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

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

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

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