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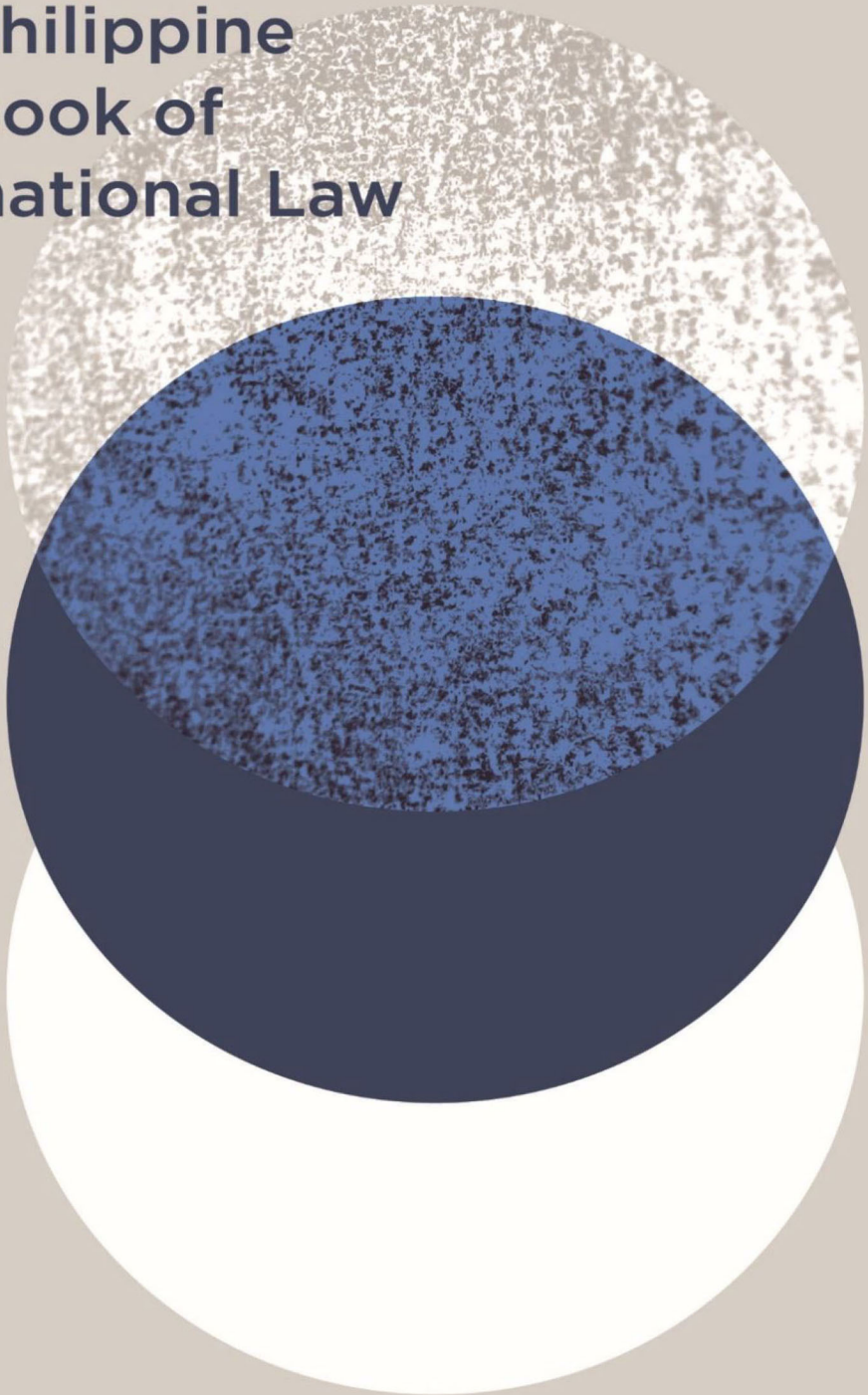

THE PHILIPPINE SOCIETY OF INTERNATIONAL LAW

THE PHILIPPINE YEARBOOK OF INTERNATIONAL LAW

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On the cover: The cover design shows three overlapping circles representing the three related realms of the global sphere, jurisprudence and human affairs

THE PHILIPPINE YEARBOOK OF INTERNATIONAL LAW

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This volume includes three papers that discuss theoretical developments and practical issues involving international law. First, Prof. Rommel J. Casis' paper, "Re-Customizing Customary International Law," discusses the relevance of customary international law (CIL) and the new issues and problems that surface with the completion of the International Law Commission's work on Identifying Customary International Law. The author points out that theoretical and practical issues are brought by applying the traditional approach to CIL. The paper offers alternative approaches to CIL that address the identified problems and respond to the times' needs.

Second, Dr. Lowell Bautista's paper entitled "The Legal Status of the Philippine Territorial Waters Claim in International Law" lays down the theoretical and conceptual background of the legal status of the Philippine territorial water claim in international law. The paper concludes that the Philippines 'territorial sea claim is valid under international law based on recognition by treaty, devolution of treaty rights, historic rights, acquiescence, and estoppel. However, Dr. Bautista also points out a contrary position is equally tenable.

Third, the paper of Ambassador J. Eduardo Malaya and Atty. Anna Christina R. Iglesias, titled "Recognizing the Effects of Same-Sex Marriages: An Examination of Department of Justice Opinion No. 11, Series of 2019 on the Issuance of 9(E-1) Visas to Same-Sex Spouses of Foreign Diplomats," provides an analysis of the implications of the issuance of a visa category lower than the 9(e-1) granted to opposite-sex spouses of other diplomats. It discusses the reasoning behind DOJ Opinion No. 11 and notes that it is carefully confined to apply to same-sex spouses of foreign government officials assigned to the country. The authors also describe how the DOJ Opinion presents an open-minded outlook when acknowledging and recognizing the validity of a same-sex marriage between foreigners based on nationality, domiciliary principles, and *lex loci celebrationis*.

This volume also includes two reports from the International Criminal Court Office of the Prosecutor. The first is the ICC Prosecutor's Report on Preliminary Examination Activities in the Philippines on the South China Sea. The second report relates to the Extrajudicial Killings in the country. Apart from

this, 21 treaties and agreements have been entered into force in 2019. The Philippines have entered into bilateral treaties with Albania, Czech, Israel, Nepal, Qatar, Sweden, and Tukey. Out of the 21 treaties, 9 of which are ASEAN treaties and agreements which span from establishing protocols on customs transit, liberalization of passenger air services, among others. The 2017 ASEAN-Hong Kong, China Free Trade Agreement had also entered into full force in 2019.

In 2019, six (6) judicial declarations touched upon issues and concepts of international law. In *Lagman v. Medialdea*, the Supreme Court took international human rights principles established in the Universal Declaration of Human Rights (UDHR), and principles declared in the International Covenant on Civil and Political rights as guiding principles for domestic law enforcement officials. The Court also points out soft law instruments that uphold the principles of legality, proportionality, necessity, and accountability in situations involving the use of force by law enforcers. Several other judicial declarations are included in this volume.

Write-ups of the books "Problems and Prospects in International Law" by Atty. Merlin M. Magallona, and "Enhancing International Legal Cooperation: Extradition, Mutual Legal Assistance, and Cooperation on Transactional Organized Crimes and Narcotic Drugs (Treaties, Laws & Procedures)" by Ambassador J. Eduardo Malaya, Atty. Shiela Monedero-Arnesto, and Atty. Ricardo V. Paras III are included in this volume.

This volume also includes reports on notable events in 2019, including ICC Judge Pangalangan's election as President of the ICC Trial division, the entry into force of the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, the signing of the Final Act of the 2019 Judgment Convention by the Philippine delegates to the Special Commission on the Recognition and Enforcement of Foreign Judgments and as a recap of the 7th Biennial Conference of the Asian Society of International Law (AsianSIL).

MERLIN M. MAGALLONA
Editor-in-Chief

FOREWORD

International law has once again become prominent in the Philippine legal landscape because of issues such as the unresolved matter of enforcement of the South China Sea Arbitration decision and alleged extrajudicial killings, to name a few. To ensure that developments on these matters become part of the academic and legal discourse in our country, the University of the Philippines Law Center - Institute of International Legal Studies (UPLC-IILS) and the Philippine Society of International Law (PSIL) have provided us with this 2019 volume of the *Philippine Yearbook of International Law*.

Through this year's edition, significant issues that our country is confronting were examined through the lens of international law. One of the works featured in this year's edition focused on the legal status of the Philippine territorial water claim in international law. Another paper discussed DOJ Opinion No. 11 which recognized same-sex marriages between foreign diplomats assigned to the Philippines and their spouses. In addition to these practical issues, theoretical developments were also reviewed in this year's edition such as the identification of customary international law. The 2019 volume also includes the International Criminal Court (ICC) Prosecutor's Report on Preliminary Examination Activities in the Philippines, specifically on the South China Sea and Extrajudicial Killings. We are also provided with a listing of treaties and agreements that entered into force, as well as notable judicial decisions touching upon international law that were promulgated during the year. Finally, this edition features the year's significant international law developments such as the election of Raul Pangalangan as ICC Judge and the entry into force for the Philippines of the Apostille Convention, to name a few.

Through the hard work of the UPLC-IILS, the PSIL, the volume contributors and the editorial staff, we are able to perpetuate the tradition of putting out a publication that advances international law in our country. Congratulations and many thanks to all of you!

EDGARDO CARLO L. VISTAN II
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University of the Philippines College of Law

ARTICLES

RE-CUSTOMIZING CUSTOMARY INTERNATIONAL LAW

Rommel J. Casis*

Abstract

Customary international law remains relevant, if not increasingly relevant, as a source of international law. With the completion of the International Law Commission's work on Identifying Customary International Law, specific issues became clearer, but new problems have arisen. The traditional approach with its two-element requirement is fraught with theoretical and practical issues. There is no surprise that alternative methods have been suggested to respond to past questions and meet the demand of current realities. This paper adds to these alternative approaches by addressing the problems and meeting the needs of the times.

> *"[t]he renaissance of custom requires the articulation of a coherent theory that can accommodate its classic foundations and contemporary developments."*
> *— Anthea Roberts*

I. Introduction

A. The Importance of Custom

International custom, *international conventions*, and *general principles of law* are the three formal sources of international law listed in the Statute of the International Court of Justice ("ICJ").[1] But the more common term used to refer to it is customary international law ("CIL").

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[1] Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, 33 U.N.T.S. 993 (entered into force Oct. 24, 1945) ("international custom, as evidence of a general practice accepted as law").

CIL is important in international law as one of its cornerstones.[2] Some have argued that international law is built on the bedrock of custom[3] as CIL is the "foundation on which all international legal rules are built."[4] For instance, the principle of state sovereignty, the rule on which the international legal order is built, is a custom.[5]

Since the end of the Second World War, the growing number of states has increased international conventions or treaties. But the prevalence of treaties governing international relations does not diminish the importance of treaties. First of all, the "rules governing treaties themselves originated in customary international law."[6] Many of the provisions of the Vienna Convention on the Law of Treaties originated as customs or remained part of CIL (e.g., *pacta sunt servanda*).

Furthermore, as the International Law Commission ("ILC") has pointed out:

> Some important fields of international law are still governed essentially by customary international law, with few if any applicable treaties. Even where there is a treaty in force, the rules of customary international law continue to govern questions not regulated by the treaty and continue to apply in relations with and among non-parties to the treaty. In addition, treaties may refer to rules of customary international law.[7]

Judicial decisions further point to the importance of custom, as international and national courts continue to identify and apply rules of customary international law.[8] As for national legislation, "a number of state

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[2] REEXAMINING CUSTOMARY INTERNATIONAL LAW 1 (Brian D. Lepard ed., 2017).

[3] Michael Wood, *Foreword*, *in* Lepard (ed.), *supra* note 2, at xiii.

[4] Lepard (ed.), *supra* note 2, at 1 (citing Hans Kelsen, General Theory of Law and State (Andes Wedberg trans., Harvard University Press 1945)).

[5] *Id.* at 3.

[6] *Id.* at 1.

[7] International Law Commission, *Draft conclusions on identification of customary international law, with commentaries*, UNITED NATIONS OFFICE OF LEGAL AFFAIRS, n. 663, ¶ 66 (2018), https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf [hereinafter "ILC Commentary"].

[8] Lepard (ed.), *supra* note 2, at 3.

constitutions specifically incorporate customary international law into the national legal systems in some way."[9]

Thus, CIL is not just relevant but "increasingly relevant."[10] In fact, it has been pointed out that there has been a "contemporary resurrection of custom."[11]

B. The Work of the ILC

Pursuant to its mandate to promote the progressive development of international law and its codification, the ILC has included the topic *"Identification of customary international law"*[12] in its programme of work, appointing Mr. Michael Wood as Special Rapporteur for the topic.[13] After several reports, the ILC adopted a set of 16 draft conclusions on the identification of customary international law ("Conclusions"), together with Commentary ("Commentary").[14] In 2018, the United Nations ("UN") General Assembly ("GA") took note of the Conclusions[15] and the Commentary and encouraged their widest possible dissemination.[16]

The work of the ILC demonstrates the importance of rules identifying CIL. The UN GA itself noted that "the subject of identification of customary international law is of major importance in international relations."[17] The Conclusions "concern the methodology for identifying rules of customary international law" and "seek to offer practical guidance on how the existence of rules of CIL, and their content, are to be determined."[18] According to the Commentary, "[t]he draft conclusions reflect the approach adopted by states, as

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[9] *Id.* at 6.

[10] *Id.* at 8.

[11] Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95(4) AM. J. INTL L. 757 (2001).

[12] Originally the topic was "Formation and evidence of customary international law" but in 2013, the ILC decided to change the title of the topic to "Identification of customary international law".

[13] International Law Commission, *Summaries of Work of the International Law Commission: Identification of Customary International Law*, UNITED NATIONS OFFICE OF LEGAL AFFAIRS (2020), http://legal.un.org/ilc/summaries/1_13.shtml.

[14] Int'l Law Comm'n, Rep. on the Work of its Seventieth Session, U.N. Doc. A/73/10 (2018).

[15] In this paper, the draft conclusions are treated as a single document hence "Conclusions" is singular.

[16] G.A. Res. 73/203 (Dec. 20, 2018).

[17] *Id.*

[18] ILC Commentary, *supra* note 7, ¶ 66(2).

well as by international courts and organizations and most authors."[19] Therefore, the Conclusions of the ILC can be said to reflect the current state of CIL if not the customary rules in determining CIL.

But despite the extensive work of the ILC on this matter, the issues are far from settled. For instance, the requirements for state practice and *opinio juris* are foremost among issues. While the Conclusions and the Commentary seem to settle some concerns, they also reiterate past problems and raise new ones.

The importance of a clear and credible methodology in determining CIL is crucial. As the Commentary has stated, "a structured and careful process of legal analysis and evaluation is required to ensure that a rule of customary international law is properly identified, thus promoting the credibility of the particular determination as well as that of customary international law more broadly."[20] Blutman correctly asserts that "[t]he first and most fundamental issue in customary international law must be that of its constituent elements or the criteria of existence."[21] Without settling this issue, the validity of custom as a source of law will always be questioned because how can a rule provide guidance if there is no agreement on what the rule is.

C. Finding the Right Approach

Part II of this paper discusses the "traditional" two-element approach described by the ICJ and provided for by the ILC's Conclusions and Commentary.

Part III examines the problems inherent in the two-element model. It also discusses issues in applying the model in practice.

Part IV explains the alternative approaches to the two-element model, while Part V explains the approach forwarded by this paper.

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[19] *Id.* at ¶ 66(4).

[20] *Id.* at ¶ 66(2).

[21] Laszlo Blutman, *Conceptual Confusion and Methodogical Deficiencies: Some Ways that Theories on Customary International Law Fail*, 25(2) EUR. J. INT'L L. 530 (2014).

II. The Traditional Approach

A. The Confluence of Two Elements

Article 38.1 (b) of the ICJ Statute lists "international custom, as evidence of a general practice accepted as law" as one of the sources of law.

In addition, Conclusion 2 provides that "[t]o determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (opinio juris)."[22]

In the *North Sea* case, the ICJ stated that "[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[23]

According to the Commentary, "determining a rule of customary international law requires establishing the existence of two constituent elements: a general practice, and acceptance of that practice as law (*opinio juris*)."[24] It explains that this "two-element approach" serves to ensure that the exercise of identifying rules of CIL results in determining only such rules that actually exist.[25] It further adds that such determination "requires a careful analysis of the evidence for each element."[26]

It further states that:

> the identification of a rule of customary international law requires an inquiry into two distinct, yet related, questions: whether there is a general practice, and whether such general practice is accepted as law (that is, accompanied by *opinio juris*). In other words, one must look

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[22] International Law Commission, *Draft conclusions on identification of customary international law*, UNITED NATIONS OFFICE OF LEGAL AFFAIRS, Conclusion 2 (2018) https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_13_2018.pdf [hereinafter "ILC Draft Conclusions"].

[23] North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, at 44, ¶ 77 (Feb. 20) [hereinafter "North Sea"].

[24] ILC Commentary, *supra* note 7, at 124.

[25] *Id.* at 125.

[26] *Id.* at 124.

> at what States actually do and seek to determine whether they recognize an obligation or a right to act in that way.[27]

Therefore, the identification of CIL requires essentially a two-step process. First, there must be an inquiry into whether there is a general practice. Second, if a general practice is established, it must then be determined if such practice is accepted as law. The two elements together are essential conditions.[28] Thus, both must be established. The existence of one cannot be implied or inferred from the presence of the other.

In the *North Sea* case, the ICJ stressed that these *two conditions* must be fulfilled.[29] In the *Jurisdictional Immunities* case, the ICJ said the existence of a rule of CIL requires that there be "a settled practice" *together* with *opinio juris*.[30] Thus:

> Practice without acceptance as law (opinio juris), even if widespread and consistent, can be no more than a non-binding usage, while a belief that something is (or ought to be) the law unsupported by practice is mere aspiration; it is the two together that establish the existence of a rule of customary international law.[31]

Conclusion 3 paragraph 2 states that "[e]ach of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element."[32]

But according to the Commentary, this "does not exclude that the same material may be used to ascertain practice and acceptance as law."[33] It explains further:

> A decision by a national court, for example, could be relevant practice as well as indicate that its outcome is required under

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[27] *Id.* at 125.

[28] *Id.*

[29] North Sea, *supra* note 23, at 44, ¶ 77.

[30] Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening), Judgment, 2012 I.C.J. Reports 99, at 122–123, ¶ 55 (Feb. 3).

[31] ILC Commentary, *supra* note 7, at 126.

[32] ILC Draft Conclusions, *supra* note 22, Conclusion 3.2.

[33] ILC Commentary, *supra* note 7, at 129.

> customary international law. Similarly, an official report issued by a state may serve as practice (or contain information as to that state's practice) as well as attest to the legal views underlying it. The important point remains, however, that the material must be examined as part of two distinct inquiries, to ascertain practice and to ascertain acceptance as law.[34]

Thus, while the evaluation of whether there is state practice is separately determined from whether there is *opinio juris*, the same evidence can be used to establish both.

Interestingly, the Commentary also provides that the determination of *opinio juris* can come before the establishment of general practice. It says:

> While in the identification of a rule of customary international law, the existence of a general practice is often the initial factor to be considered, and only then is an inquiry made into whether such general practice is accepted as law, this order of examination is **not mandatory**. Thus, the identification of a rule of customary international law may also begin with appraising a written text allegedly expressing a widespread legal conviction and then seeking to verify whether there is a general practice corresponding to it.[35] (emphasis supplied)

This rule seems to be an expansion of the definition of *opinio juris*. The original idea for *opinio juris* is that it is a belief of a state concerning a particular practice it is engaging in and not a belief in the existence of a rule in general. A state believing that its current practice is required by law is different from a state thinking that a rule (regardless of whether that state is practicing it or not) is required by law. The former is a belief that their practice is required by law, while the second is a belief that a rule is or should be law.

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[34] *Id.*

[35] *Id.*

The Commentary, however, reiterates that:

> To establish that a claim concerning the existence or the content of a rule of customary international law is well-founded thus entails a search for a practice that has gained such acceptance among States that it may be considered to be the expression of a legal right or obligation (namely, that it is required, permitted or prohibited as a matter of law). The test must always be: is there a general practice that is accepted as law?[36]

1. The Requirement for General Practice

Conclusion 8 provides that the relevant practice must be general, which means that it must be sufficiently widespread, representative, and consistent.[37]

In the *North Sea* case, portions of its paragraph 74 are often quoted to provide the standard that practice must be "both extensive and virtually uniform." Paragraph 74 states in part:

> Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been **both extensive and virtually uniform** in the sense of the provision invoked;- and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved. (emphasis supplied)

Taken into context, the ICJ referred to the standard (i.e., extensive & virtually uniform) in connection with the question as to whether custom could form within a short time period. It is therefore arguable that the said standard need not apply in all cases.

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[36] ILC Commentary, *supra* note 7, at 125.

[37] ILC Draft Conclusions, *supra* note 22, Conclusion 8, ¶ 1.

This notwithstanding, the requirement for widespread and representative practice for all situations seems to have achieved general acceptance.

a. Widespread and Representative

Concerning the requirement that practice is sufficiently widespread and representative, the ILC admits in the Commentary that this "does not lend itself to exact formulations."[38] It further explains that the word *sufficiently* "implies that the necessary number and distribution of States taking part in the relevant practice (like the number of instances of practice) cannot be identified in the abstract."[39]

Universal participation is not required, but "the participating States should include those that had an opportunity or possibility of applying the alleged rule."[40] According to the Commentary:

> Thus, in assessing generality, an indispensable factor to be taken into account is the extent to which those States that are **particularly involved in the relevant activity** or are **most likely to be concerned with the alleged rule** ("specially affected States") have participated in the practice.[41] (emphasis supplied)

However, the requirement that practice must be widespread implies a way to determine the required amount of practice. Lepard asks:

> Do all 196-odd states in the international system have to engage in a practice for it to give rise to a customary norm? Do at least a super-majority of all states have to do so? Or is a simple majority sufficient… should we give special weight… to the practice of certain states?[42]

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[38] ILC Commentary, *supra* note 7, at 136.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] Lepard (ed.), *supra* note 2, at 20.

This issue is still a question that remains unanswered by the Conclusions and the Commentary.

b. Consistent

According to the Commentary, consistent practice means that no relevant acts are divergent to the extent that no pattern of behavior can be discerned.[43]

But it is "important to consider instances of conduct that are in fact comparable, that is, where the same or similar issues have arisen."[44] So, the requirement of consistency looks into whether the manner of practice is similar.

However, complete consistency is not required,[45] and some divergence may be allowed as long as a pattern of behavior can still be demonstrated. Thus, "[t]he relevant practice needs to be virtually or substantially uniform, meaning that **some inconsistencies and contradictions are not necessarily fatal** to a finding of 'a general practice.'"[46] (emphasis supplied)

In the *Nicaragua* case, the ICJ stated:

> It is not to be expected that in the practice of States the application of the rules in question should have been perfect... The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules...[47]

Thus, breaches are not necessarily inconsistencies that preclude general practice.[48]

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[43] ILC Commentary, *supra* note 7, at 137.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, at 98 ¶ 186 (June 27) [hereinafter "Nicaragua"].

[48] ILC Commentary, *supra* note 7, at 137.

The ICJ in *Nicaragua* further stated*:*

> [I]nstances of State conduct inconsistent with a given rule **should generally have been treated as breaches of that rule**, not as indications of the recognition of a new rule. **If a State** acts in a way prima facie incompatible with a recognized rule, but **defends its conduct by appealing to exceptions or justifications** contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.[49] (emphasis supplied)

Conclusion 8 also provides that general practice does not require a particular duration.[50] Thus, "a relatively short period in which a general practice is followed is not, in and of itself, an obstacle to determining that a corresponding rule of customary international law exists."[51]

As previously quoted in the *North Sea* case, the ICJ said, "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law."[52]

But as "some period of time must elapse for a general practice to emerge; there is no such thing as 'instant custom.'"[53]

2. *The Source of the Practice*

Conclusion 4 states:

> 1. The requirement of a general practice, as a constituent element of customary international law, **refers primarily to the practice of States** that contributes to the formation, or expression, of rules of customary international law.

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[49] Nicaragua, *supra* note 47, at 98, ¶ 186.

[50] ILC Draft Conclusions, *supra* note 22, Conclusion 8, ¶ 2.

[51] ILC Commentary, *supra* note 7, at 138.

[52] North Sea, *supra* note 23, at 43, ¶ 74.

[53] ILC Commentary, *supra* note 7, at 138.

2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.
3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2. (emphasis supplied)

Thus, it is the practice of states which serves *primarily* as the building block of custom. The term primarily seemingly opens the door to other sources of practice. But Conclusion 4 only grants relevance to the practice of international organizations in *certain cases.*

a. Practice of States

Conclusion 5 states that "State practice consists of conduct of the State, whether in the exercise of its **executive, legislative, judicial, or other functions**.[54]" (emphasis supplied)

i. Government Practice

According to this definition, what is meant by "state" practice is actually *government* practice. Only the government of a state has executive, legislative and judicial functions. What is referred to as the "state" is the organ exercising governmental powers. So while the "state" under international law consists of an entity that consists of four elements (i.e., *people, territory, sovereignty,* and *government*), this is not the "state" referred to in "state practice." It is perhaps more accurate to call it "government practice."

ii. Intra-State?

So, state practice consists of the acts of a government. But is it limited to the action of governments in relation to other governments? In other words, are all government actions considered state practice or only those actions done in

[54] ILC Commentary, *supra* note 7, at 132.

connection with international relations? Is state practice limited to interstate action, or does it include intra-state action? Roberts argues:

> we need to broaden our understanding of state practice to include consideration of intrastate action (not just interstate interaction), obligations being observed (not just obligations being breached), and reasons for a lack of protest over breaches (other than acquiescence in the legality of those breaches). State practice should include intrastate practice rather than just interstate interaction because of the changing subject matter of international law.[55]

The Commentary clarifies that "[t]he relevant practice of States is not limited to conduct vis-à-vis other States or other subjects of international law; conduct within the State, such as a state's treatment of its own nationals, may also relate to matters of international law."[56] So the government practice need not be connected to international relations to be considered as state practice.

iii. Disclosed Practice

However, government practice must be disclosed. State practice cannot include "secret practice" because:

> In order to contribute to the formation and identification of rules of customary international law, practice must be known to other States (whether or not it is publicly available). Indeed, it is difficult to see how confidential conduct by a State could serve such a purpose unless and until it is known to other States.[57]

This rule may pose a problem considering some aspects of government practice are confidential. There are activities that governments only disclose to their counterparts in other states. Can such confidential communications become

[55] Roberts, *supra* note 11, at 777.
[56] ILC Commentary, *supra* note 7, at 133.
[57] ILC Commentary, *supra* note 7, at 133.

state practice, or must practice be disclosed to the public? Based on the Commentary, it must be the latter.

b. The Practice of International Organizations

Conclusion 4 provides that in "certain cases," the practice of international organizations may also contribute. The Commentary clarifies this by stating that:

> The practice of international organizations in international relations (when accompanied by opinio juris) may count as practice that gives rise or attests to rules of customary international law, but **only** those *rules* (*a*) *whose subject matter falls within the mandate of the organizations*, and/or (b) *that are addressed specifically to them* (such as those on their international responsibility or relating to treaties to which international organizations may be parties).[58] (emphasis supplied)

So, the practice of international organizations is only relevant for certain types of rules.

The Commentary further clarifies that:

> the practice falling under paragraph 2 arises most clearly where member States have transferred exclusive competences to the international organization, so that the latter exercises some of the public powers of its member States and hence the practice of the organization may be equated with the practice of those States.[59]

Thus, the relevance of the practice of international organizations largely depends on the purpose of the international organization.

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[58] ILC Commentary, *supra* note 7, at 131.

[59] *Id.*

3. Nature of the Practice

a. Verbal Acts

Under the Conclusions, state practice may take a wide range of forms, including physical and verbal acts.[60]

The inclusion of "verbal acts" can be contentious as there can be a discrepancy between what states say and what they actually do. States may publicly state support for certain principles, for example, in the field of human rights, yet through actions violate the same principles. The Commentary responds to this by stating:

> While some have argued that it is only what States "do" rather than what they "say" that may count as practice for purposes of identifying customary international law, it is now generally accepted that verbal conduct (whether written or oral) may also count as practice; indeed, practice may at times consist entirely of verbal acts, for example, diplomatic protests.

While it is true that verbal conduct can constitute practice, the explanation does not address the situation where diplomatic statements contradict conduct. This issue is partially addressed by Conclusion 7, paragraph 2, which state that "[w]here the practice of a particular State varies, the weight to be given to that practice may, depending on the circumstances, be reduced."

According to the Commentary:

> Paragraph 2 refers explicitly to situations where there is or appears to be inconsistent practice of a particular State. As just indicated, this may be the case where different organs or branches within the State adopt different courses of conduct on the same matter or where the practice of one organ varies over time. If in such circumstances a State's practice as a whole is found to be

[60] ILC Draft Conclusions, *supra* note 22, Conclusion 6, ¶ 1.

inconsistent, that State's contribution to "a general practice" may be reduced.[61]

b. Inaction

Under certain circumstances, state practice includes inaction.[62] However, such "negative practice" covers "only deliberate abstention from acting may serve such a role: the State in question needs to be conscious of refraining from acting in a given situation, and it cannot simply be assumed that abstention from acting is deliberate."[63]

The problem with this requirement is how to prove that abstention is deliberate. This is similar to the situation with determining *opinion juris* - the determination of the intention of states.

4. Evidence of Practice

Conclusion 6 paragraph 2 states that forms of state practice include, but are not limited to:

- diplomatic acts and correspondence;
- conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference;
- conduct in connection with treaties;
- executive conduct, including operational conduct "on the ground";
- legislative and administrative acts; and
- decisions of national courts.[64]

The Conclusions state that "[t]here is no predetermined hierarchy among the various forms of practice."[65] But a hierarchy may be necessary for specific situations. Lepard gives an example: "[I]n the case of putative customary norms involving the conduct of foreign relations, an area of activity the primary

[61] ILC Commentary, *supra* note 7, at 135.
[62] ILC Draft Conclusions, *supra* note 22, Conclusion 6, ¶ 1.
[63] ILC Commentary, *supra* note 7, at 133.
[64] ILC Draft Conclusions, *supra* note 22, Conclusion 6, ¶ 2.
[65] *Id.*, Conclusion 6, ¶3.

responsibility for which most state constitutions assign to the executive branch, is it appropriate to treat national court decisions as having the same weight as executive policy?"[66]

5. The Requirement for Opinio Juris

a. Sense of Legal Right or Obligation

In the *North Sea* case,[67] the ICJ stressed:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be **carried out in such a way**, **as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law** requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The **States** concerned **must** therefore **feel that they are conforming to what amounts to a legal obligation.** The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty. (emphasis supplied)

Conclusion 9 paragraph 1 provides that *opinio juris* requirement means "the practice in question must be undertaken with the sense of legal right or obligation."

According to the Commentary, this means that the practice "must be accompanied by a conviction that it is permitted, required or prohibited by customary international law."[68]

Lepard notes that "one function of this requirement is to distinguish behavior motivated by perceived legal rules from behavior motivated purely by

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[66] Lepard (ed.), *supra* note 2, at 19.

[67] North Sea, *supra* note 23, at 44, ¶ 77.

[68] ILC Commentary, *supra* note 7, at 138.

self-interest, by a sense of moral obligation, or by a desire on the part of a state to treat other states with consideration, or 'comity.'"[69]

Thus, according to the Commentary, "[a]cceptance as law (opinio juris) is to be distinguished from other, extralegal motives for action, such as comity, political expediency or convenience: if the practice in question is motivated solely by such other considerations, no rule of customary international law is to be identified."[70]

b. Which States should Exhibit Opinio Juris

As to which states should exhibit *opinio juris*:

> Acceptance as law (*opinio juris*) is to be sought with respect to both the States engaging in the relevant practice and **those in a position to react to it**, who must be shown to have understood the practice as being in accordance with customary international law.[71] (emphasis supplied)

The inclusion of states in a position to react to the said practice is problematic as it does not appear that they are engaging in the said practice.

This idea is based on the *Nicaragua* case, where the ICJ stated that "[e]ither the States taking such action or other States in a position to react to it, must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[72]

The fundamental question is whether states not engaged in the said practice can provide *opinio juris*. According to the rule stated, for states who do not engage in the practice, *opinio juris* is present when their abstention arises from a belief that such abstention is required by law.

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[69] Lepard (ed.), *supra* note 2, at 23.

[70] ILC Commentary, *supra* note 7, at 139.

[71] *Id.*

[72] Nicaragua, *supra* note 47, at 109, ¶ 207.

c. Forms of Evidence of Opinio Juris

Conclusion 10 paragraph 2 provides that the forms of evidence of *opinio juris* include but are not limited to:

- public statements made on behalf of States;
- official publications;
- government legal opinions;
- diplomatic correspondence;
- decisions of national courts;
- treaty provisions; and
- conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.

Even a cursory comparison would lead to the observation that some evidence for *opinio juris* also qualifies as evidence of practice. The Commentary recognizes this and says:

> There is some common ground between the forms of evidence of acceptance as law and the forms of State practice referred to in draft conclusion 6, paragraph 2 … in part, **this reflects the fact that the two elements may at times be found in the same material** (but, even then, their identification requires a separate exercise in each case). In any event, statements are more likely to embody the legal conviction of the State, and may often be more usefully regarded as expressions of acceptance as law (or otherwise) rather than instances of practice.[73] (emphasis supplied)

In addition to the forms listed above, Conclusion 10 paragraph 3 also provide that "[f]ailure to react over time to a practice may serve as evidence of acceptance as law (opinio juris), provided that States were in a position to react and the circumstances called for some reaction."[74]

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[73] ILC Commentary, *supra* note 7, at 141.

[74] *Id.* at 140.

In addition to the *Nicaragua* case, the other basis for this rule appears to be the *Fisheries* case, wherein it was stated that the failure of states to react within a reasonable time "[bear] witness to the fact that they did not consider ... [a certain practice undertaken by others] to be contrary to international law."[75]

This is explained by the fact that "[t]olerance of a certain practice may indeed serve as evidence of acceptance as law (opinio juris) when it represents concurrence in that practice."[76] However, two requirements need to be complied with:

> First, it is **essential that a reaction** to the practice in question **would have been called for**: this may be the case, for example, where the practice is one that affects — usually unfavourably — the interests or rights of the State failing or refusing to act. Second, the reference to a State being "in a position to react" means that the **State concerned must have had knowledge of the practice** (which includes circumstances where, because of the publicity given to the practice, it must be assumed that the State had such knowledge), **and that it must have had sufficient time and ability to act**. Where a State did not or could not have been expected to know of a certain practice, or has not yet had a reasonable time to respond, inaction cannot be attributed to an acknowledgment that such practice was mandated (or permitted) under customary international law. A State may also provide other explanations for its inaction. (citations omitted, emphasis supplied)

Therefore, it seems that *opinio juris* is not limited to the intention of states engaged in the practice but the opinion of the entire international community of states regarding the existence of a particular rule.

III. Problems with the Traditional Approach

The traditional approach has been heavily criticized for a number of reasons. Roberts writes:

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[75] *Id.* at 141 (citing Fisheries Case (U.K. v. Nor.), Judgment, 1951 I.C.J. Rep. 116, at 139).

[76] *Id.* at 141-142.

> Traditional custom lacks procedural normativity. The process of custom formation is inherently uncertain, with no clear guide to the amount, duration, frequency, and continuity of state practice required to form a custom. The unwritten nature of traditional custom makes its content inherently insecure, while requiring repeated practice is "too clumsy and slow" to accommodate the fast-paced evolution of law. Traditional custom is meant to be based on general and consistent state practice, but selective analysis inheres in this approach because of the impossibility of thoroughly analyzing the practice of almost two hundred states. This selectivity results in a "democratic deficit" because most customs are found to exist on the basis of practice by fewer than a dozen states. [77]

Some of these problems are fleshed out further in the following section.

A. The Problem with the Two Elements in General

1. How to Distinguish the Two Elements

One problem with the two elements is the difficulty "to determine what states believe as opposed to what they say."[78] Roberts gives as an example the controversy as to whether treaties constitute state practice or *opinio juris*.[79] To resolve this, she adopts the "distinction between action (state practice) and statements (*opinio juris*)."[80] Under this view, "[*o*]*pinio juris* concerns statements of belief rather than actual beliefs."[81] However, the implication is that "actions can form custom only if accompanied by an articulation of the legality of the action."[82] But under the Conclusions, verbal acts also constitute practice. So, how can one differentiate whether the articulation is evidence of *opinio juris* or constitutes practice?

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[77] Roberts, *supra* note 11, at 767.
[78] *Id.* at 757.
[79] *Id.*
[80] *Id.*
[81] *Id.* at 758.
[82] *Id.* at 757.

2. Historically Not Applied

The traditional two-element approach presumes that customs have been established based on the two elements of state practice and *opinion juris*. However, Kelly argues that from a "the wider political and economic context… state practice and general acceptance of states played only a limited role in norm development."[83]

In his view, "if one looks at how norms were actually articulated and justified during the sixteenth century through much of the twentieth century, state practice and general acceptance played a minor, even inconsequential role in the formation of customary international law norms."[84] Thus, historical support for the two-element requirement prior to the *North Sea* case seems to be lacking. The irony is that there seems to be no state practice or *opinio juris* to support the two-element requirement as the means for establishing custom.

Lepard further points out that:

> [T]he apparent consensus on the "technical" definition of customary law and its elements is superficial. It frays as soon as we attempt to probe such questions as whether state practice is always required, or *opinio juris* is always required, or how to prove the existence of a sufficient "quantum" of either.[85]

B. The Problem with Practice

1. Theoretical Basis

For a proper evaluation of practice, it is essential to understand why a regularity of practice gives rise to a legal obligation.[86] Why does the repetition of conduct by states give rise to binding rules? In other words, why should practice determine law? Shouldn't law determine practice? So as Lepard puts it, "some

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[83] J. Patrick Kelly, *Customary International Law in Historical Context: The Exercise of Power Without General Acceptance*, *in* Lepard (ed.), *supra* note 3, at 50.

[84] *Id.* at 49.

[85] Lepard (ed.), *supra* note 2, at 18.

[86] *Id.* at 16-17.

meta-theory is required to explain this transmutation of consistent behavior into a legal rule."[87]

Based on one view, each state that engages in a practice because it believes it is a rule is consenting to be bound by the rule.[88] This view considers "custom as a form of tacit agreement: States behave to each other in given circumstances in certain ways, which are found acceptable, and thus tacitly assented to."[89] So each practice is considered a vote in favor or against the rule.[90]

Yet another view is that practice becomes a rule because "legal expectations from legitimate expectations [are] created in others by conduct."[91] Furthermore, "[r]eliance on state practice provides continuity with past actions and reliable predictions of future actions."[92]

The problem with both views "is that if agreement makes customary law, absence of agreement justifies exemption from customary law."[93] Worse, the absence of practice exempts some states from the application of the law. Furthermore, states formed subsequent to the crystallization of custom would never be bound by unless it engages in the said practice.

In addition, repeated practice serving as the basis for a binding rule does not seem to be legitimate in all cases. Supposing a majority of the states of the world choose to violate human rights norms, should such practice generate CIL? In other words, should ethics be considered or simply pervasiveness of conduct?

The traditional approach has been criticized because it looks at practice clinically and does not distinguish ethical conduct from non-ethical conduct. Lepard points out that "[t]raditional customary international law doctrine… adopts the pretense of being ethically neutral; it purports not to care whether a rule formed through the marriage of consistent state practice and *opinio juris* is ethically desirable or not."[94]

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[87] *Id.* at 17.

[88] *Id.*

[89] Hugh Thirlway, *The Sources of International Law*, *in* INTERNATIONAL LAW 121 (Malcolm D. Evans ed. 2003).

[90] Lepard (ed.), *supra* note 2, at 17.

[91] Thirlway, *supra* note 89, at 121.

[92] Roberts, *supra* note 11, at 762.

[93] Thirlway, *supra* note 89, at 122.

[94] Lepard, *supra* note 2, 14.

2. What is the "State"

Earlier it was said that what is referred to as "state practice" is actually "government practice" based on the text of the Conclusions. If the element would actually consider "state" and simply "government" practice, what should be considered is the practice of the entire citizenry. If the government decisions are supported by at least a majority of the citizens then it is state practice. However, if the government actions are unsupported by the citizenry, then they should not be considered. But this is not how state practice is evaluated. It is assuming that the acts of the government represent the will of the entire state and not just the ruling elite. This is reasonable in democratic countries where the popular vote determines the leadership and policy of a nation. But this would not be the case in authoritarian regimes where the government imposes its will on the citizenry.

3. Effect of Silence

As mentioned in Part II, according to the Conclusions, state practice includes inaction under certain circumstances.

But as *Crawford* points out, "often the real problem is to distinguish mere abstention from protest by a number of states in the face of a practice followed by others. Silence may denote either tacit agreement or simple lack of interest in the issue."[95]

Roberts says that "[b]reaches of intrastate obligations are also likely to result in inaction by other states because states do not usually protest violations unless they affect their rights or the rights of their nationals."[96]

Roberts also says:

> Many plausible explanations can be made for a failure to protest intrastate breaches other than belief in the legality of the action, including lack of knowledge, political and economic self-interest, and realization of the futility of action. The lack of protest

[95] James Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 23 (2019).

[96] Roberts, *supra* note 11, 777.

> over intrastate breaches should not necessarily imply acquiescence in the legality of those breaches.[97]

Lepard adds that "[e]very day every state-affiliated entity undertakes actions — but also refrains from undertaking countless other actions. Which is the relevant practice for purposes of determining customary international law?"[98]

4. Effect of Non-Conforming Practice or Inaction

There is a problem with the state practice requirement in International Human Rights Law. Lepard argues that "an honest application of the two-element test… must result in a conclusion that human rights norms cannot satisfy the test because there is simply insufficient consistent state practice in favor of human rights."[99] He adds "the reality is that very often there appears to be consistent state practice of violating many rights not respecting them."[100] This seems to be inevitable considering the nature of human rights:

> human rights norms are based on ethical principles, not merely the self-interest of states… it will often be in states' perceived short term interest to violate these ethics-based on norms…This means there is a permanent tension between states' self-interest and the demands of human rights norms… this tension can lead to widespread human rights abuses in practice.[101]

Roberts adds:

> The observance of many human rights is also difficult to measure because they are negative rights, which means that they place limitations on state action rather than impose a positive duty on states to act. Observance by inaction, in the form of not violating

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[97] *Id.* at 778.

[98] Lepard, *supra* note 2, at 19.

[99] Brian D. Lepard, *Toward a New Theory of Customary International Human Rights Law*, *in* Lepard (ed.), *supra* note 2, at 240.

[100] *Id.* at 249

[101] *Id.* at 251

> rights, is inherently ambiguous because it may result from an obligation (prohibitive norm) or discretion (permissive norm); or from domestic or treaty obligations rather than custom.[102]

Perhaps the same argument can be made for International Humanitarian Law, International Environmental Law, and International Criminal Law.

C. The Problem with Opinio Juris

1. Paradoxical Implications

The existence of *opinio juris* requires that states act with the belief that the relevant practice is law.

Thirlway points out that this requirement:

> is paradoxical in its implications: for how can a practice ever develop into a customary rule if states have to believe the rule already exists before their acts of practice can be significant for the creation of the rule? Or is it sufficient if initially states act in the mistaken belief that a rule already exists, a case of *communis error facit jus* (a shared mistake produces law)?[103]

Lepard puts it this way:

> the traditional formulation of the *opinio juris* requirement tests results in a chronological paradox… it requires that before the customary norm comes into existence, states must believe that they are already bound by the (nonexistent) norm. This implies that states must mistakenly believe that a norm already exists as a precondition for it coming into existence.[104]

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[102] Roberts, *supra* note 11, 777.

[103] Thirlway, *supra* note 89, at 122.

[104] Lepard, *supra* note 2, at 25.

The implication of this is that CIL becomes a product of the collective mistake of states.

2. *Impossibility to Determine the State of Mind*

Lepard asks, "states are not people, so how can they 'believe' and 'think' anything"?

According to Thirlway, "[s]ince the *opinio juris* is a state of mind, there is evident difficulty in attributing it to an entity like a State; and in any event it has to be deduced from the State's pronouncements and actions, particularly the actions alleged to constitute the 'practice' element of the custom."[105]

Even if *opinio juris* is determinable using statements of states, the task is no less daunting. This is because, as *Roberts* points out, "*opinio juris* is inherently ambiguous in nature because statements can represent *lex lata* (what the law is, a descriptive characteristic) or *lex ferenda* (what the law should be, a normative characteristic)."[106]

IV. Suggestions for Re-Customization

Worster points out that "[m]any scholars have identified a shift in customary international legal analysis from the 'traditional' to the 'modern' approach."[107]

The traditional approach has been accused of being an anachronism because of "the increasing number and diversity of states, as well as the emergence of global problems that are addressed in international fora,"[108] whereas the modern approach has been praised as "a progressive source of law that can respond to moral issues and global challenges."[109]

Of course, what constitutes the traditional approach as opposed to a modern approach is up for debate. The traditional approach can be viewed as the strict implementation of the two-element requirement, while the modern

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[105] Thirlway, *supra* note 89, at 123.

[106] Roberts, *supra* note 11, at 763.

[107] William Thomas Worster, The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches, 45(2) Georgetown J. Int'l L. 445, at 449 (2014).

[108] Roberts, *supra* note 11, 759.

[109] *Id.*

approach allows for leniency on of the two elements depending on the circumstances. Roberts would describe the traditional approach as "evolutionary and… identified through an inductive process in which a general custom is derived from specific instances of state practice."[110] On the other hand, the modern approach is "derived by a deductive process that begins with general statements of rules rather than particular instances of practice [and therefore] emphasizes *opinio juris* rather than state practice because it relies primarily on statements rather than actions."[111] While this distinction is interesting, some "modern" approaches (e.g., Kirgis' sliding scale) do not necessarily focus on *opinio juris* alone.

For purposes of this paper, the traditional approach is understood to refer to the strict implementation of the two-element approach, while the modern approach would be anything other than that. Perhaps the term "alternative approach" would be more accurate in that sense.

The ILC recognizes that "[w]hile writers have from time to time sought to devise alternative approaches to the identification of customary international law, emphasizing one constituent element over the other or even excluding one element altogether, such theories have not been adopted by States or in the case law."[112] Thus, the ILC would seem to uphold the traditional approach.

The following part of the paper discusses the various alternative approaches and the ILC's responses to them.

A. Subject Matter Customization

Some scholars have argued that revising the requirements for CIL depending on the subject matter. Lepard asserts that:

> [E]xperience demonstrates that courts in practice have adopted quite different approaches to finding customary law in different areas… for example, they have exhibited a tendency to focus on *opinio juris* rather than state practice in assessing the existence of customary human rights norms, or customary norms of international humanitarian law.

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[110] *Id.* at 758.

[111] *Id.*

[112] ILC Commentary, *supra* note 7, at 126.

However, the ILC believes that the two-element approach applies to all fields:

> The two-element approach applies to the identification of the existence and content of rules of customary international law in all fields of international law. This is confirmed in the practice of States and in the case law, and is consistent with the unity and coherence of international law, which is a single legal system and is not divided into separate branches with their own approach to sources.[113]

Nevertheless, Conclusion 3 paragraph 1 of the ILC states:

> In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (opinio juris), *regard must be had to* the **overall context**, the **nature of the rule** and the **particular circumstances** in which the evidence in question is to be found.[114] (emphasis supplied)

The language suggests the possibility of a varying standard of determination of the elements depending on the context, nature of the rule, and circumstances. According to the Commentary the said paragraph:

> sets out an overarching principle that underlies all of the draft conclusions, namely that the assessment of any and all available evidence must be careful and **contextual**. Whether a general practice that is accepted as law (accompanied by opinio juris) exists must be carefully investigated in each case, **in the light of the relevant circumstances**. Such analysis not only promotes the credibility of any particular decision, but also allows the two-element approach to be applied, with the **necessary flexibility**, in all fields of international law.[115] (emphasis supplied)

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[113] *Id.*

[114] ILC Draft Conclusions, *supra* note 22, Conclusion 3 (Assessment of evidence for the two constituent elements).

[115] ILC Commentary, *supra* note 7, at 127.

This may be interpreted to mean that the standards may vary depending on context and circumstances and that the two-element approach is contemplated to be flexible. Thus, "the type of evidence consulted (and consideration of its availability or otherwise) depends on the circumstances, and certain forms of practice and certain forms of evidence of acceptance as law (opinio juris) may be of particular significance, according to the context."[116]

As to the nature of the rule, the Commentary further adds that:

> The nature of the rule in question may also be of significance when assessing evidence for the purpose of ascertaining whether there is a general practice that is accepted as law (accompanied by opinio juris). In particular, where prohibitive rules are concerned, it may sometimes be difficult to find much affirmative State practice (as opposed to inaction); cases involving such rules are more likely to turn on evaluating whether the inaction is accepted as law.[117]

B. One Element Approaches

Some approaches question the necessity of having strong evidence of both state practice and *opinio juris*. The argument is that in certain instances, strong evidence of one would offset weakness in the other.

For instance, Kirgis' sliding scale approach allows strong evidence of *opinio juris* to offset weak evidence of state practice and vice versa.[118] However, Roberts rejects this sliding scale approach because "it does not accurately describe the process of finding custom and would create customs that are apologies for power or utopian and unachievable."[119]

On the other hand, Sharf's "Grotian moments" approach allows for CIL creation based on new *opinio juris* and with less state practice. Grotian moments are said to "reflect the reality that in periods of fundamental change… rapidly developing customary international law may be necessary to keep up with the pace of developments."[120]

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[116] *Id.*

[117] *Id.* at 128.

[118] Lepard, *supra* note 2, at 30.

[119] Roberts, *supra* note 11, at 760.

[120] Lepard, *supra* note 2, at 30.

C. Re-imagining Opinio Juris

Some alternative approaches revise the traditional approach by re-imagining what *opinio juris* is.

1. Belief that It Should be Law

Lepard posits that "a rule or principle ought to be considered customary if states generally believe that it is desirable, now or in the near future, to make the rule or principle legally authoritative for all members of the global community of states."[121] While his theory emphasizes *opinio juris* over state practice, it redefines *opinio juris* as a belief by states that a norm *should be* law, rather than a belief by states that it is *already* law.[122] This approach resolves the paradoxical implications of the *opinio juris* requirement.

2. Ethical Belief

Aside from that, Lepard suggests that "fundamental ethical principles… form a background value system that can inform… interpretation and assessment of the beliefs of states about whether a norm ought to be a legal norm."[123] Thus, not all "beliefs" can become *opinio juris*, only "ethical beliefs." This argument addresses the issue as to whether the widespread practice of human rights violations could ever become customary. Even assuming there is sufficient state practice, the absence of *opinio juris* would prevent the transformation of the practice into custom.

D. State Practice as Evidence of Opinio Juris Only

Lepard asserts that while state practice is essential evidence of the belief that a norm should be universally binding, it is not by itself an essential independent requirement for recognition of a norm as customary law.[124] Under his

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[121] Lepard, *supra* note 99, at 252.
[122] *Id.* at 253.
[123] *Id.* at 254.
[124] *Id.* at 252-253.

approach, state practice is merely evidence of the belief that a norm should be law.[125]

The implication of this is that since practice is only *a type* of evidence for *opinio juris*, it may be dispensed with in cases where there is other evidence.

However, the Commentary does not support this argument that practice is only evidence of *opinio juris*:

> Although customary international law manifests itself in instances of conduct that are accompanied by *opinio juris*, acts forming the relevant practice are not as such evidence of acceptance as law… No simple inference of acceptance as law may thus be made from the practice in question; in the words of the International Court of Justice, "acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature."[126]

Blutman would also ask, "how can state practice be one constituent element and at the same evidence of the other element?"[127] The proposed approach would therefore reduce state practice into mere evidence and not a constitutive element.

V. Re-Customization as a Way Forward

It seems unlikely that the ICJ, the ILC, and states are ready to officially give up the traditional two-element approach. But the status quo is also untenable, as demonstrated by the issues discussed earlier.

This paper argues that the way forward may simply be to re-customize the requirements. First of all, to say re-customize means it was previously customized. To customize something is to build or modify something based on specifications or needs. The ICJ in cases like the *North Sea* case customized the requirements of custom to fit the particular needs of those times. The proliferation of scholarly work arguing the review or revision of the two-element proves that it is time to customize it again to meet specific needs.

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[125] *Id.*

[126] ILC Commentary, *supra* note 7, at 129.

[127] Blutman, *supra* note 21, at 531.

A. Re-define Opinio Juris as Statements of What the Law is or Should Be

The *North Sea* definition of that *opinio juris* as "a belief that this practice is rendered obligatory by the existence of a rule of Iaw requiring it" has long been criticized on theoretical and practical grounds.

At the theoretical level, how can the creation of a rule depend on a belief that a rule already exists? It must be remembered that the determination of the existence of *opinio juris* is relevant when trying to determine whether a rule exists. It makes no sense to say that the determination of the presence of a rule depends on whether the state believes that the rule already exists. In other words, for a customary rule to exist, there must be a sufficient number of states who mistakenly believe that the rule already exists.

Furthermore, what would be the reason for states to believe that a rule already exists? The most logical reason would be because the state observes other states engaging in the said practice, which convinces it that it must be obligatory. This implies that the earliest state practice cannot be considered for establishing custom because they would have no basis for having the belief required. Such early practicing states must have had another reason for engaging in that practice.

At the practical level, the problem is how courts can determine the belief of states. How can courts determine the beliefs of juridical entities? At the domestic level, it is like asking what corporations were thinking when they acted the way they did. In such a scenario, that court may take a look at minutes of meetings of the Board of Directors. Therefore, it may be argued that "minutes" of the decision-making, legislative, or adjudication process may be considered. But not everything which a state does would be properly documented. This is particularly true of highly controversial or sensitive matters.

The other problem is that as a matter of practice, and under the Conclusions, the same documents can be used as evidence of state practice and *opinio juris*. So, the evidence for the action is also evidence for the belief?

Because of these issues, it may be better to simply define *opinio juris* as "statements of what the law should be."

This addresses the theoretical problem because it does not matter whether the rule already exists or not at the time of the practice. States no longer have to be mistaken that the rule already exists. Furthermore, it would not be necessary for a state to observe other states before it can generate its own *opinio juris*.

This definition also addresses the practical problem because it would be easier to identify statements than beliefs. Statements may be given orally or in writing.

Furthermore, this view is consistent with the Commentary's discussion on the possibility of *opinio juris* being established first, with verifying practice being established later. If *opinio juris* were a belief, there would be no way for this reversed order to work.

Finally, according to the Commentary, "statements are most likely to embody the legal conviction of a state, and may often be more usefully regarded as expressions of acceptance as law… rather than instances of practice."[128]

B. Limit State Practice to Actual Practice and not Stated Practice

One issue identified earlier is the inconsistency between what states say and what states actually do. For instance, in the case of International Humanitarian Law, governments may establish extensive military manuals on engaging the enemy. But their actual practice in the field may be different from their manuals. In such a situation, should the courts consider verbal state policy or actual state policy?

Clearly, what states actually do would be more reflective of state practice than what states say. One possible exception is when actual practice inconsistent with stated practice is condemned by the government as contrary to its practice. Absent such condemnation when there is a conflict between stated practice and actual practice, the latter should be considered to establish the custom.

A related question is when the same instrument is examined as evidence of both state practice and *opinio juris*. As earlier discussed, the Commentary allows this. However, it is preferable that the instrument, as a statement, be considered as *opinio juris,* and the state actions concerning the instrument are considered practice. For example, if the alleged customary rule is stated as a provision of a treaty. Then such provision is better regarded as *opinio juris* rather than State practice. Otherwise, the court would use the same provision as evidence of both state practice and *opinio juris*.

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[128] ILC Commentary, *supra* note 7, at 141.

C. Re-customize Depending on the Nature of the Obligation

There is merit in the argument that requiring widespread state practice in specific areas like human rights or humanitarian law is unreasonable. Allowing widespread human rights or humanitarian law violations to create custom is unacceptable. But not requiring state practice at all to establish custom may blur the distinction between custom and soft law.

Perhaps the focus on state practice or *opinio juris* should depend on whether the custom is facilitative or moral. Facilitative rules "promote co-existence and cooperation" while moral rules are those which "deal with substantive moral issues"[129] Roberts explains:

> Facilitative customs are more descriptive than normative because they turn a description of actual practice into a prescriptive requirement for future action. Moral customs are more normative than descriptive because they prescribe future action based on normative evaluations of ideal practice.[130]

In certain types of customs, state practice cannot be expected to be widespread or consistent, or at least proof of which cannot be expected to be readily available (e.g., use of torture). Roberts argues, "[s]tate practice is less important in forming modern customs because these customs prescribe ideal standards of conduct rather than describe existing practice."[131] Schachter argues: "[I]nternational rules are not all equal. Some are more important than others because they express deeply-held and widely shared convictions as to the unacceptability of the prohibited conduct… Contrary and inconsistent practice would not and should not defeat their claims as customary law."[132]

As Roberts points out, "a lower standard of practice may be tolerated for customs with a strong moral content because violations of ideal standards are expected."

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[129] Roberts, *supra* note 11, at 764.

[130] *Id.*

[131] *Id.*

[132] Roberts, *supra* note 11, at 783 (quoting Oscar Schachter, Recent Trends in International Law Making, 1988–89 AUSTL. Y.B. INT'L L. 1, at 11).

Thus, customs that deal with ethical considerations should not require as much state practice as descriptive or facilitative customs in nature. Hence, what is necessary to be pervasive—state practice or *opinio juris*—depends on the nature of the obligation. This proposal is different from the sliding scale approach because the acceptability of having one element compensate for the weakness of the other is based on the nature of the rule and not the deficiency of the other element.

For instance, it was earlier discussed how it will often be the case that it would be in the states' interest to violate human rights norms. Thus, the threshold for general practice for customary human rights rules may be lower, as any practice would usually be contrary to state interests.

VI. Conclusion

The renewed enthusiasm for CIL necessitates reviewing traditional notions about the concept. But the traditional approach was stitched together at a time when the family of nations was vastly different from the community of states and international organizations today.

Furthermore, the traditional approach is unworkable, as shown by the absence of practice applying strictly in international courts and tribunals. While the two-element approach appears to be sacrosanct, in actuality, it is impossible to apply without doing violence to logic.

Finally, because the two-element requirement in the traditional approach has not been practiced by courts consistently, it has never ripened into custom. Thus, it is only proper to re-customize the criteria for establishing custom.

THE LEGAL STATUS OF THE PHILIPPINE TERRITORIAL WATERS CLAIM IN INTERNATIONAL LAW

Lowell Bautista*

Abstract

This paper will analyze the legal status of the Philippine territorial waters claim in international law. The paper will be of two parts. In the first part, the international law of territorial waters will be discussed to provide the theoretical and conceptual background to the issue. This part will elaborate on the breadth of the territorial sea as both a conventional and customary rule of international law and will analyze State practice in terms of territorial sea claims. In the second part, the legal status of the Philippine territorial waters claim will be examined vis-à-vis the customary and conventional international legal obligations of the Philippines as well as in relation to treaty interpretation and acquiescence of the international community.

Keywords: Philippine Territorial Waters Claim, Treaty Limits, Territorial Sea, Law of the Sea, International Law

I. Introduction

The Philippines claims a polygonal territorial sea[1] of irregular width at some

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[1] It was at the Conference for the Codification of International Law, held at the Hague, Mar. 13–Apr. 12, 1930, that the Second Committee (Committee on Territorial Waters) chose the term "territorial sea" in preference to the more commonly used term "territorial waters." In 1952, at its fourth session, the International Law Commission decided, in accordance with a suggestion of the Special Rapporteur, Mr. J.P.A. François, to use the term "territorial sea" in lieu of "territorial waters". *See Report of the International Law Commission to the General Assembly*, [1956] 2 Y.B. INT'L L. COMM'N, U.N. Doc. A/2163, ¶ 37. The UN General Assembly, however, in its relevant resolutions, continued using the term "territorial waters" in the title of the topic. As noted by Professor Nordquist: "The terms "territorial sea" and "territorial waters" are used interchangeably

points exceeding twelve nautical miles in width.[2] The critical issue that needs to be addressed is this: is the Philippine territorial waters claim valid in international law?[3] In order to answer this question the international law on the territorial sea must be examined and its rules on the maximum breadth of the territorial sea analyzed.[4]

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in State practice (including treaties and legislation), judicial decisions and arbitral awards and in literature. There is no substantial difference between these two terms, although there may be a subtle distinction in that territorial "waters" sometimes encompass internal waters." UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY 55-56 (Myron Nordquist, ed., 1985). In this paper, the terms "territorial sea" and "territorial waters" will be used interchangeably. The words "breadth," "extent," and "limit" are all used in the same sense and also used interchangeably.

[2] Three colonial treaties define the territorial boundaries of the Philippines: (1) *Treaty of Peace between the United States of America and the Kingdom of Spain,* U.S.-Spain, Dec. 10, 1898, T.S. No. 343 [Hereinafter referred to as *Treaty of Paris*]; (2) *Treaty between the Kingdom of Spain and the United States of America for Cession of Outlying Islands of the Philippines*, U.S.-Spain, Nov. 7, 1900, T.S. No. 345; (3) *Convention Between the United States of America and Great Britain Delimiting the Boundary Between the Philippine Archipelago and the State of North Borneo*, U.S.-U.K., Jan. 2, 1930, T.S. No. 856. For academic material on the Treaty of Paris limits, *please see* LOWELL BAUTISTA, THE PHILIPPINE TREATY LIMITS: HISTORICAL CONTEXT AND LEGAL BASIS IN INTERNATIONAL LAW (2015); Lowell Bautista, *The Legal Status of the Philippine Treaty Limits in International Law*, 1 AEGEAN REV. L. SEA & MAR. L., 111-139 (2010); Lowell B. Bautista, *The Historical Context and Legal Basis of the Philippine Treaty Limits*, 10 ASIAN PACIFIC L. & POL'Y J., 1-31 (2008); Lowell Bautista, *The Historical Background, Geographical Extent and Legal Bases of the Philippine Territorial Water Claim*, 8 J. COMP. ASIAN DEV., 365-395 (2009); *But see* Magallona v. Ermita 655 SCRA 477 (2011), where the Philippine Supreme Court rejected the argument that the Treaty of Paris lines should be the baselines of the Philippines from where to measure its maritime zones.

[3] *See generally*, Joseph W. Dellapenna, *The Philippines Territorial Water Claim in International Law* 5 J. L. & ECON. DEV. 45 (1970-1971). *See also*, Lowell Bautista, *Philippine Boundaries: Internal Tensions, Colonial Baggage, Ambivalent Conformity*, 16 J. SOUTHEAST ASIAN STUD. 35 (2011); Lowell Bautista, *The Legal Status of the Philippine Treaty Limits in International Law*,' 1 AEGEAN REV. L. SEA & MARITIME L. 111 (2010); Lowell Bautista, *The Philippine Treaty Limits and Territorial Water Claim in International Law,* 5 SOC. SCI. DILIMAN 107 (2009).

[4] Henry M. Arruda, *The Extension of the United States Territorial Sea: Reasons and Effects* 4 CONNECTICUT J. INT'L L. 697 (1989); Loftus Becker, *The Breadth of the Territorial Sea and Fisheries Jurisdiction,* 40 Dep't St. Bull. 369 (1959); H. S. K. Kent, *Historical Origins of the Three-Mile Limit* 48 AM. J. INT'L L. 537 (1954); H. Gary Knight, *The 1971 United States Proposals on the Breadth of Territorial Sea and Passage through International Straits,* 51 OREGON L. REV. 759 (197); Geoffrey Marston, *The Evolution of the Concept of the Sovereignty over the Bed and the Subsoil of the Territorial Sea,* 48 BRITISH Y.B. INT'L L. 321 (1977); D. P. O'Connel, *The Juridical Nature of the Territorial Sea,* 45 BRITISH Y.B. INT'L L. 303 (1971); Shigeru Oda, *The Extent of the Territorial Sea -*

The question, although theoretical in nature, actually presents a host of practical issues. For instance, even proceeding from the premise that the maximum breadth of the territorial sea allowed under contemporary international law is twelve nautical miles, it must be asked, does this permit of exceptions? In what cases does the rule not apply? If there is such an exception, does the Philippine case fall within the exception? Is a coastal State entitled to extend its territorial sea to more than twelve nautical miles from the baseline? Is a territorial sea extension of more than twelve nautical miles violative of conventional and/or customary international law? These questions will be addressed in this paper.

II. The International Law of Territorial Waters

The historical development of the issue on the delimitation of the outer limit of the territorial sea has been one of the most divisive issues in the law of the sea.[5] It has been particularly contentious for two reasons: first, because of its impacts on passage through straits used for international navigation;[6] and second, because the freedom of navigation in some parts of the high seas would be subject to the limited right of innocent passage.[7]

Some Analysis of the Geneva Conferences and Recent Developments, 6 JAPANESE ANN. INT'L L.7 (1962).

[5] UNCLOS I and UNCLOS II, as well as the previous 1930 Codification of International Law efforts, all failed to reach an agreement on the maximum breadth of the territorial sea. This is the reason why Article 3 of the LOSC is widely regarded as "one of the major achievements of UNCLOS III." NORDQUIST, *supra* note 1, at 77.

[6] H. Gary Knight, *The 1971 United States Proposals on the Breadth of Territorial Sea and Passage through International Straits,* 51 OREGON L. REV. 759 (1971-1972); Frank Nolta, *Passage through International Straits: Free or Innocent—The Interests at Stake,* 11 SAN DIEGO L. REV. 815 (1974); *but see* Horace B. Jr. Robertson, *Passage through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea,* 20 VIRGINIA J. INTL'L. 801 (1979).

[7] William L. Jr. Schachte & J. Peter A. Bernhardt, *International Straits and Navigational Freedoms* 33 VIRGINIA J. INT'L L. 527 (1993). Please note that this also affects aircraft which do not have the right of innocent passage over the territorial sea. DAVID JOHN HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 353–354 (1991); MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 177 (1992).

The heated debates mirrored the centuries-old conflicting theories of free seas (*mare liberum*) versus closed seas (*mare clausum*).[8] The opposing sides come from two conflicting interests: on the one hand, the interests of the maritime States; and on the other, the interests of the coastal States. The maritime States claim the free usage of the seas while the coastal States assert their exclusive sovereignty over maritime areas adjacent to their coastlines.[9]

The interests of the coastal States in the extension of their jurisdiction over the sea area along their coastlines can be summed up into three: first, the protection of their security; second, the furtherance of their economic interests; and third, the protection of the marine environment.[10] The maritime powers, for their part, sought to preserve and protect freedom of these same areas for navigation, overflight, and the utilisation of the resources therein.[11] The law of the sea in general, and the *United Nations Convention on Law of the Sea* (LOSC)[12] in particular, developed to strike a balance between these interests.[13]

In order to trace the origin and development of the territorial sea concept, it is not necessary for the limited purposes of this paper, to give a detailed explanation of its foundations in Roman law,[14] through the maritime account of the Middle Ages,[15] to the comments of Hugo Grotius, and beyond through

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[8] Mónica Brito Vieira, *Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden's Debate on Dominion over the Seas,* 64 J. HISTORY IDEAS 361 (2003).

[9] In the words of E.D. Brown, "the history of the modern international law of the sea can perhaps be best understood by perceiving it as a continual conflict between two opposing, yet complementary, fundamental principles — territorial sovereignty and the freedom of the seas". E.D. Brown, *Maritime Zones: A Survey of Claims,* in 3 NEW DIRECTIONS IN THE LAW OF THE SEA: DOCUMENTS 157 (Robin Churchill, Myron H. Nordquist and S. Houston Lay eds., 1973).

[10] C. JOHN COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 87 (1967).

[11] Farhad Talaie, *Analysis of the Rules of the International Law of the Sea Governing the Delimitation of Maritime Areas under National Sovereignty,* 35 (PhD Thesis, University of Wollongong, 1998) (on file with the University of Wollongong Library system).

[12] *United Nations Convention on the Law of the Sea*, opened for signature Dec. 10, 1982, 1833 UNTS 3 (entered into force Nov. 16, 1994). Hereinafter, LOSC.

[13] Rudiger Wolfrum, *The Legal Order for the Seas and Oceans,* in ENTRY INTO FORCE OF THE LAW OF THE SEA CONVENTION 162 (Myron H. Nordquist & John Norton Moore eds., 1995).

[14] Percy Thomas Jr. Fenn, *Origins of the Theory of Territorial Waters,* 20 AM. J. INT'L L. 465 (1926).

[15] THOMAS W. FULTON, THE SOVEREIGNTY OF THE SEA: AN HISTORICAL ACCOUNT OF THE CLAIMS OF ENGLAND TO THE DOMINION OF THE BRITISH SEAS, AND OF THE EVOLUTION OF THE TERRITORIAL WATERS, WITH SPECIAL REFERENCE TO THE RIGHTS OF FISHING AND THE NAVAL SALUTE 3-6 (1911); PITMAN B. POTTER, THE FREEDOM OF THE SEAS IN HISTORY, LAW, AND POLITICS 36-56 (1924).

Bynkershoek,[16] State practice in the eighteenth and nineteenth centuries,[17] the wide Latin American claims, to the three Law of the Sea Conferences,[18] and finally into the LOSC and modern State practice.[19] This paper assumes a basic familiarity with the concept of the territorial sea and will go directly into a discussion on the issue of the breadth of the territorial sea in international law.

A. The Breadth of the Territorial Sea as a Rule of International Law

The right of a coastal State to a territorial sea[20] is automatic and inherent in sovereignty over the land.[21] In effect, its possession is "not optional, not dependent upon the will of the State, but compulsory."[22] The sovereignty of a coastal State

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[16] Wyndham L. Walker, *Territorial Waters: The Cannon Shot Rule,* 22 BRITISH Y.B. INT'L L. 210 (1945); Bernard G. Heinzen, *The Three-Mile Limit: Preserving the Freedom of the Seas*, 11 STANFORD L. REV. 597 (1958-1959) CORNELIS VAN BIJNKERSHOEK, DE DOMINIO MARIS DISSERTATIO 41 (1923).

[17] Thomas Baty, *The Three-Mile Limit,* 22 AM. J. INT'L L. 503 (1928); Heinzen, *supra* note 16, at 597; H. S. K. Kent, *Historical Origins of the Three-Mile Limit*, 48 AM. J. INT'L L. 537 (1954).

[18] Arthur H. Dean, *The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas,* 54 AM. J. INT'L L. 751 (1960); Myres S. McDougal & William T. Burke, *Community Interest in a Narrow Territorial Sea Inclusive Versus Exclusive Competence Over the Oceans,* 45 CORNELL L. Q. 171 (1960); Oda, *supra* note 4, at 7.

[19] JOHN ROBERT VICTOR PRESCOTT & CLIVE SCHOFIELD, THE MARITIME POLITICAL BOUNDARIES OF THE WORLD (2005); J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS (1996).

[20] *See e.g.*, 1972 Santo Domingo Declaration U.N. Doc. A/AC.138/80 approved by the Specialized Conference of the Caribbean Countries on Problems of the Sea, which formulated the following principle under the heading "territorial sea": "The sovereignty of a State extends, beyond its land territory and its internal waters, to an area of the sea adjacent to its coast, designated as the territorial sea, including the superjacent air space as well as the subjacent seabed and subsoil."

[21] "[T]he consequence of being a coastal State is that it possesses a territorial sea." REBECCA M. WALLACE, INTERNATIONAL LAW 148 (2005),

[22] This emerges clearly from the words of Lord McNair in the Anglo-Norwegian Fisheries Case: "To every State whose land territory is at any place washed by the sea, international law attaches a corresponding portion of maritime territory consisting of what the law calls territorial waters. International law does not say to a State: "You are entitled to claim territorial waters if you want them." No maritime State can refuse them. International law imposes upon a maritime State certain obligations and confers upon it certain rights arising out of the sovereignty which it exercises over its maritime territory. The possession of this territory is not optional, not dependent upon the will of the State, but compulsory." Anglo-Norwegian Fisheries (UK v. Norway), Judgment, 1951 I.C.J. Rep. 116 (Jan. 18) (McNair, J., dissenting).

over its territorial sea is well-settled in contemporary international law.[23] It is both a customary and a conventional rule of international law.[24]

The status of the maximum breadth of the territorial sea of twelve mile nautical miles is not as straightforward. While it is almost taken for granted by many modern international law commentators that the breadth of the territorial sea stands at twelve nautical miles, it has not always been the case.[25] In fact, throughout most of the twentieth century the issue remained unresolved.[26] The sovereignty of the coastal State over a maritime belt adjacent to its coast has been recognized in international law even before the codification of the law of the sea in the LOSC.[27] However, the contentious twin issues of its permissible extent and its method of delimitation have persisted.[28] A cursory survey of the historical development of the extent of the territorial sea will be instructive in understanding the current state of the law.[29]

Throughout history, maritime claims over territorial seas have been all but uniform and consistent.[30] The claims varied in width, dimension, and the rights claimed over such waters. In the sixteenth and seventeenth centuries, the "range of visibility" criterion determined the extent of the waters over which the coastal

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[23] In the words of Marston, writing before the LOSC: "That States have sovereignty over the bed and subsoil of their territorial seas is now an uncontroverted rule of customary international law, quite apart from the provisions of Article 2 of the Convention on the Territorial Sea ad the Contiguous Zone, 1958." Marston, *supra* note 4, at 332.

[24] MARK EUGEN VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 3363 (1985); VLADIMIR DURO DEGAN, SOURCES OF INTERNATIONAL LAW 206 (1997) citing the Judgment of the ICJ in Nicar. v. U.S., 1986 I.C.J. Rep. 111, ¶ 212.

[25] In 1958, when UNCLOS II was convened, "it faced an almost staggering range of claims" that "varied between three and two hundred miles." SAYRE A. SWARZTRAUBER, THE THREE-MILE LIMIT OF TERRITORIAL SEAS (1972) at 209.

[26] Churchill and Lowe even notes that "[D]oubts concerning the juridical nature of the territorial sea survived into the present century." ROBIN R. CHURCHILL & VAUGHAN LOWE, THE LAW OF THE SEA 73 (1999).

[27] *But see* comment by Churchill and Lowe who opine that to declare: "[A]lthough the legislation of several States, … declares that the State's sovereignty 'extends and has always extended to its territorial sea,' such statements are historically incorrect: the true picture of the development of the concept is rather more complex. *Id.* at 71.

[28] S. Whittemore Boggs, *Delimitation of the Territorial Sea,* 24 AM. J. INT'L L. 541 (1930).

[29] O'Connel, *supra* note 4, at 303; Shigeru Oda, *Territorial Sea and Natural Resources,* 4 INT'L. COMP. L. Q. 415 (1955).

[30] WALLACE, *supra* note 21, at 149.

State can claim jurisdiction.[31] Later, jurists like Grotius and Bynkershoek promoted the first physical method for the determination of the territorial sea limit: the cannon-shot rule.[32] In the eighteenth century, the range of the cannon was approximately equivalent to a marine league or three nautical miles.[33]

It was the Italian jurist Galiani in 1782 who suggested that fixing three miles along the coast as a limit beyond which no cannon could possibly reach would be reasonable rather than determining the range of a cannon particularly positioned along any coast.[34] In 1793, the United States adopted, for the purposes of neutrality, the first zone of uniform breadth along its coast of three miles.[35] The three-mile limit soon gained rapid and widespread acceptance largely due to the adherence

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[31] This is also called the "line-of-sight doctrine" with State claims varying from three miles to as wide as fifty miles. SWARZTRAUBER, *supra* note 25, at 36 – 49

[32] CHURCHILL AND LOWE, *supra* note 26, at 77. *But see* Walker, *supra* note 16, at 210. Walker actually challenges the generally-accepted notion that the three-mile limit of the territorial sea originated from the cannon shot rule. In Walker's words: "it seems not altogether improbable that the two rules never had any real historical connection, they may well have been wholly distinct rules having their roots in different parts of Europe." *Id* at 213. *See also*, Heinzen, *supra* note 16, at 602. This is also argued by Daniel Wilkes who argues that the following statement is a myth: "The concept of the territorial sea originated from the distance a cannon could shoot from land. Thus, with increased capabilities of military control, we have an increased territorial sea." *See* Daniel Wilkes, *The Use of World Resources without Conflict: Myths about the Territorial Sea,* 14 WAYNE L. REV. 441, 443 (1967-1968). He traces it instead to Hugo de Groot's famous 1609 work, *Mare Liberum*.

[33] Heinzen, *supra* note 16, at 604-605, also disputes the connection between the cannon-shot rule and the three-mile territorial sea limit, in this wise: "Finally, the cannon-shot rule could not have applied to a distance of three miles from shore because an examination of gunnery tables shows that no cannon had a range of as much as three miles during the eighteenth century. Indeed, during this period, most coastal cannons had an accurate range of no more than one mile, while a few mortars unsuited for use as coastal artillery, had a maximum range of no more than two and a half miles."

[34] Heinzen, *supra* note 16 at 616. CHURCHILL AND LOWE, *supra* note 26, at 78.

[35] SWARZTRAUBER, *supra* note 25, at 58.

to it by the major maritime States.[36] The three-mile limit was however, "never unanimously accepted" according to Churchill and Lowe.[37]

It was not until the 1930 Hague Codification Conference that doubts over the juridical status of the territorial sea were finally dispelled.[38] The 1930 Hague Codification Conference formally enshrined the principle of the coastal State's sovereignty over the territorial sea, which to this day remains unchallenged.[39] Corollary to this, sovereignty over the superjacent air space,[40] and eventually over the bed of the territorial sea,[41] became firm principles of international law.[42] But

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[36] Great Britain, which was the greatest power in the early nineteenth century, was the champion of the three-mile limit and chiefly responsible for its rise to status as a rule of international law. Other major powers soon commenced to follow suit: France, Canada, Austria, Prussia, Russia; the lesser powers of Europe: Belgium, Netherlands, Greece, Italy, Egypt; the Orient: Japan and Hawaii; and in the Western hemisphere: Chile, Ecuador, El Salvador, Argentina, Honduras and the United States. *See* SWARZTRAUBER, *supra* note 25, at 64–72.

[37] CHURCHILL & LOWE, *supra* note 26, at 78; *See also*, FRANCIS NGANTCHA, THE RIGHT OF INNOCENT PASSAGE AND THE EVOLUTION OF THE INTERNATIONAL LAW OF THE SEA: THE CURRENT REGIME OF "FREE" NAVIGATION IN COASTAL WATERS OF THIRD STATES 15 (1990), who states that "the threemile rule was not universally accepted as the limit of the territorial waters in international law."

[38] CHURCHILL & LOWE, *supra* note 26, at 74.

[39] It must be emphasized though that the consolidation of the sovereignty theory over in respect of the waters is distinct from the claim over sovereignty over the superjacent air space and seabed in the same maritime zone, which developed independently. Convention for the Regulation of Aerial Navigation, art. 1, Oct. 13, 1919, 11 LNTS 173 provides: "The High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the air space above its territory. For the purpose of the present Convention, the territory of a State shall be understood as including the national territory…and the territorial waters adjacent thereto." Churchill and Lowe observes that: "[T]his Convention was also a significant step towards the general recognition of sovereignty over the territorial sea itself.

[40] *See e.g.*, Convention on International Civil Aviation, art. 2, Dec. 7, 1994, 15 U.N.T.S. 295; Convention on the Territorial Sea and the Contiguous Zone, art. 2, Apr. 29, 1958, 516 UNTS 205; LOSC art. 2(2), *supra* note 12.

[41] Art. 2, LOSC, *supra* note 12, establishes that the coastal State [and an archipelagic State] exercises sovereignty over their territorial sea, including the air space above the territorial sea and its bed and subsoil. Nordquist, opines that this Article evolved from Articles 1 and 2 of the Convention on the Territorial Sea and the Contiguous Zone. *See* NORDQUIST, *supra* note 1, Vol. 1 at 66.

[42] In the words of Marston: "the rule for the bed and subsoil of the territorial sea was conceived later than the corresponding rule for the superjacent waters and later even than that for the superjacent airspace, although the subsequent crystallization process resulted in a unitary customary rule and three separate rules." Marston, *supra* note 4, at 332.

certainly, the notion of the territorial sea preceded the 1930 Hague Codification Conference.[43]

The 1930 Hague Conference failed to reach an agreement on the maximum width of the territorial sea.[44] This merely reflected the divergence of State practice at that time. For instance, there were claims of four nautical miles by Scandinavian countries such as Finland, Iceland, Norway and Sweden;[45] claims of six nautical miles by such countries as Italy, Greece, Portugal and Spain;[46] and the three nautical mile claims of the United States, Great Britain, Belgium, Canada, Denmark, Germany and Japan.[47] In 1900, twenty of the twenty-one States which claimed or acknowledged a territorial sea had positively adopted or acknowledged as law the three-mile or one-league limit.[48] State practice in the nineteenth century shows that there was no claim of less than three nautical miles. Therefore, even at

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[43] In 1926, a draft code produced by the German Society of International Law mentioned: "The sovereignty of the coastal State extends over the territorial sea, subject to the generally recognized rules of international law, or a treaty providing for exceptions." In the same year, the American Institute of International Law also produced a draft Project on the National Domain, Article I of which read: "Every nation exercises sovereignty in an area of land and water within definite boundaries and in the space above the said area." The Japanese Association of International Law, also writing in 1926, produced a Code which stated that "every State has the right of sovereignty over its littoral waters." In 1928, the *Institut de Droit International* produced a new draft which used the term "sovereignty" abandoning the previously used "a right of sovereignty" in the 1894 draft. The 1929 Harvard Law School draft also used the term "sovereignty" with the Commentary stating that: "the sovereignty of the State is in all respects like its sovereignty over land territory and subject to the same limitations," and that "the enjoyment of sovereignty over the marginal sea is so dependent upon the State's sovereignty over its land territory that perhaps the conception of marginal seas should be treated as an independent conception." *See*, O'Connel, *supra* note 4, at 348. Eventually, the Second Committee on Mar. 20, 1930 adopted the following text: "Article 1. The territory of a State includes a belt of sea described in this Convention as the territorial sea. Sovereignty over this belt is exercised subject to the conditions prescribed by the present Convention and the other rules of international law."

[44] SHIGERU ODA, INTERNATIONAL CONTROL OF SEA RESOURCES 36 (1989).

[45] Boggs, *supra* note 28, at 542.

[46] Talaie, *supra* note 11, at 278.

[47] CHURCHILL & LOWE, *supra* note 26, at 78; Shigeru Oda, *International Control of Sea Resources* (1989) at 14.

[48] Heinzen, *supra* note 16, at 632. The twenty States claiming a territorial sea with a maximum breadth of one league were Argentina, Austria-Hungary, Belgium, Brazil, Chile, Denmark, Ecuador, El Salvador, France, Germany, Great Britain, Greece, Honduras, Italy, Netherlands, Norway, Russia, Sweden, Turkey, and the United States. *Id* at 632–634, citations omitted

that time, whilst the minimum breadth of the territorial sea was not in dispute, the maximum breadth was a raging controversy.[49]

In a study on the attempts to establish a uniform rule concerning the extent of the territorial sea, Shigeru Oda, writing in 1955, came to the conclusion that "not only is there no uniform rule, but also it is very difficult, if not impossible, to enact generally acceptable international legislation on the breadth of the territorial sea."[50] Truly, "it is meaningless to speak of a single limit for territorial sea claims at any one time."[51] Subsequent attempts at arriving at a global consensus on the breadth of the territorial sea through the First Conference on the Law of the Sea (UNCLOS I) in 1958, and in the Second Conference on the Law of the Sea (UNCLOS II) in 1960, likewise failed.[52] At both UNCLOS I and UNCLOS II, as it was in the 1930 Codification Conference, no article on the breadth of the territorial sea was adopted.[53] It was not until the Third Conference on the Law of the Sea (UNCLOS III) that the breadth of the territorial sea was finally codified in the LOSC.[54]

1. Conventional Rule of International Law

The codification of the maximum permissible breadth of the territorial sea at twelve nautical miles is one of the major achievements of the LOSC.[55] The wording of the LOSC on the maximum breadth of the territorial sea is clear and unambiguous in Article 3: "Every State has the right to establish the breadth of its

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[49] Talaie, *supra* note 11, at 278.

[50] Shigeru Oda, *Territorial Sea and Natural Resources, 4 INT'L COMP L. Q.* 417 (1955).

[51] CHURCHILL & LOWE, *supra* note 26, at 78 - 79.

[52] *See,* Convention on the Territorial Sea and Contiguous Zone, *supra* note 40; Convention on the Continental Shelf, Apr. 29, 1958, 499 U.N.T.S. 311, which came out of UNCLOS II contain no provision on the breadth of the territorial sea since no proposal during the 1958 Conference received the required majority.

[53] For a discussion at UNCLOS I, *see* Report of the First Committee, A/CONF.13/L.28 Rev.1 (1958), paras. 3–25, UNCLOS I, II Off. Rec. 115; and further discussions at the 14th and 15th plenary meetings, II Off. Rec. 35–47. At UNCLOS II, the only substantive agenda was "Consideration of the questions of the breadth of the territorial sea and fishery limits in accordance with resolution 1307 (XIII) adopted by the General Assembly on 10 December 1958" (see Volume I of this series, at 159). For a summary of the discussion in the Committee of the Whole see A/CONF.19/L.4 (1960), UNCLOS II, Off. Rec. 169. The verbatim record of the general debate in the Committee of the Whole is reproduced in A/CONF.19/9, UNCLOS II, Off. Rec. (U.N. Sales No. 1962.V3 (1962)).

[54] DONALD R ROTHWELL AND TIM STEPHENS, THE INTERNATIONAL LAW OF THE SEA 71-73 (2010).

[55] NORDQUIST, *supra* note 1, at 77.

territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention."[56]

The LOSC in Article 2 declares that "the sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.[57] This provision imposes two restrictions on the right of the coastal State over its territorial sea: a special limitation (subject to this Convention); and a general limitation (other rules of international law). This affirms that the LOSC constraints are not exhaustive that it is necessary to refer also to other rules of international law.[58] The Hague Codification Commission, which first considered the draft article on this matter, explains the limitation:

> Obviously, sovereignty over the territorial sea, like sovereignty over the domain on land, can only be exercised subject to the conditions laid down by international law. As the limitations which international law imposes on the power of the State in respect of the latter's sovereignty over the territorial sea are greater than those it imposes in respect of the domain on land, it has not been thought superfluous to make special mention of these limitations in the text of the article itself.[59]

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[56] LOSC art. 3, *supra* note 12. This provision substantially reproduced Article I of the 1958 Convention on the Territorial Sea and the Contiguous Zone, which was based on Article 1 of the draft of the International Law Commission.

[57] LOSC art. 2(3), *supra* note 12. According to Professor Jesse Reeves, the reference to the "other rules of international law" in the wording of the final draft article "indicate that the draft did not include or enumerate all of the limitations which might exist upon the sovereign exercise of power by the littoral State, and suggest at least the possibility of additional limitations." Further, he mentioned that the wording "seems to emphasize the reluctance which the Commission had to recognize sovereignty over the territorial sea in any absolute or unqualified sense." Jesse S. Reeves, *The Codification of the Law of Territorial Waters,* 24 AM. J. INT'L L. 486, 489 (1930).

[58] In the words of the 1930 Hague Codification Commission: "These limitations are to be sought in the first place in the present Convention; as, however, the Convention cannot hope to exhaust the matter, it has been thought necessary to refer also to other rules of international law. LON Doc. C.230.M.117.1930.V, p.6; Final Act of the Conference for the Codification of International Law, Doc. C.251.M.145.1930.V, p.126, as cited in NGANTCHA, *supra* note 37, at 7. *See also, Report of the International law Commission to the General Assembly*, [1956] 2 Y.B. INT'L L. COMM'N 253, at 265, U.N. Doc. A/CN.4/SER.A/1956/Add.l

[59] NORDQUIST, *supra* note 1, Volume III, at 467.

The International Law Commission (ILC), in its commentary on draft Article 1 which covers this matter intimated that there could be rights already existing under treaty or customary law which are "in excess of the rights recognised in the present draft" which are not limited by the present draft. In the words of the ILC:

> It may happen that, by reason of some special relationship, geographical or other, between two States, rights in the territorial sea of one of them are granted to the other in excess of the rights recognised in the present draft. It is not the Commission's intention to limit in any way any more extensive right of passage or other right enjoyed by States by custom or treaty.[60]

While it is arguable that the Philippine territorial sea claim can potentially though tenuously fall in both exceptions, i.e., as a special case covered by treaty law and/or custom, still the special limitation applies: the maximum breadth of twelve nm imposed by the LOSC. Moreover, the twin-limitations operate conjunctively, following basic rules of statutory construction.[61]

The text of the LOSC is always the starting point for its interpretation. In the words of Reisman: "[s]ince UNCLOS will produce a complex convention, an essentially textual approach to construction, as conceived by the Vienna Convention on the Law of Treaties, would appear required because of the Vienna Convention's directives, and ineluctable owing to the absence of a formal record of the *travaux*. The alternative hardly recommends itself."[62] Nevertheless, if a strictly textual analysis left any ambiguity, recourse may be had to supplementary means of interpretation according to the Vienna Convention.[63] Statutory interpretation, in this case, does not seem necessary since the wording of the ILC draft, from which the present provision of the LOSC traces its origin, is equally clear and unambiguous: "[T]he Commission considers that international law does

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[60] *Report of the International Law Commission to the General Assembly*, *supra* note 58, at 265.

[61] MYRES S. MCDOUGAL, JAMES C. MILLER & HAROLD D. LASSWELL, THE INTERPRETATION OF INTERNATIONAL AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE 337-339 (1994).

[62] W. Michael Reisman, *The Regime of Straits and National Security: An Appraisal of International Lawmaking,* 74 AM. J. INT'L. L. 55-56 (1980).

[63] Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331.

not permit an extension of the territorial sea beyond twelve miles.[64] The ILC Commentary on the same article is categorical: "international law did not justify an extension of the territorial sea beyond twelve miles" for in its opinion, "such an extension infringed the principle of the freedom of the seas, and was therefore contrary to international law."[65]

Thus, even when the regime of the territorial sea was at its incipient stages, the breadth of the territorial sea contemplated in international law was at a maximum of twelve nautical miles.[66] It is safe to assume, and clearly indicated by the Commentary, that a territorial sea extension in excess of 12 nm is a breach of international law. So, what is the status of a claim of more than twelve nautical miles? In the words of Dupuy:

> In the system of the LOS Convention the maximum limit of the territorial sea, and therefore of the sovereignty of the coastal State, is 12 nautical miles. A claim for, for example, a 200-mile territorial sea would accordingly not be valid and would consequently not transform the area in question into "territorial sea" for the purposes

[64] *Report of the International Law Commission to the General Assembly*, *supra* note 58, at 265.

[65] *Report of the International Law Commission to the General Assembly*, *supra* note 58, at 265. The Commission it took no decision as to the breadth of the territorial sea up to the limit of twelve miles although it did not succeed in reaching agreement on any other limit. The Commentary mentions that although the following view was not supported by the majority of the Commission: "Some members held that as the rule fixing the breadth at three miles had been widely applied in the past and was still maintained by a number of important maritime States, it should, in the absence of any other rule of equal authority, be regarded as recognized by international law and binding on all States." And further: "The extension by a State of its territorial sea to a breadth of between three and twelve miles was not characterized by the Commission as a breach of international law. Such an extension would be valid for any other State which did not object to it, and *a fortiori* for any State which recognized it tacitly or by treaty or was a party to a judicial or arbitral decision recognizing the extension. A claim to a territorial sea not exceeding twelve miles in breadth could be sustained *erga omnes* by any State, if based on historic rights. But, subject to such cases, the Commission by a small majority declined to question the right of other States not to recognize an extension of the territorial sea beyond the three-mile limit." International Law Commission, ILC Yearbook 1956, Vol. 2, at 266.

[66] *Report of the International Law Commission to the General Assembly*, *supra* note 58, at 266. The Commentary states: "The Commission noted that the right to fix the limit of the territorial sea at three miles was not disputed. It states that international law does not permit that limit to be extended beyond twelve miles."

> of the Convention. This again means that the area must be considered as an exclusive economic zone under Article 55 — as "an area beyond and adjacent to the territorial sea". And this again means that the "rights and jurisdiction of the coastal State and the rights and freedoms of other State are governed by the relevant provisions of this Convention". There is no basis for declaring the coastal State's exercise of jurisdiction in the extended zone as null and void in its entirety.[67]

In international law, a legal norm can be binding upon States as a conventional or as a customary rule of international, or both. It is not uncommon for a treaty provision to be declaratory of, or to pass into customary international law.[68] The International Court of Justice in the *North Sea Continental Shelf* Cases noted that a conventional rule can pass into and be accepted by the *opinio juris* into the general corpus of international law and thus "become binding even for countries which had never, and do not, become parties to the Convention"; and added that such "constitutes indeed one of the recognized methods by which new rules of customary rules of international law may be formed".[69] In fact, a customary rule of international law can emerge even when the agreement upon which it is based has not even been ratified.[70]

Treaties impact upon customary international law in three ways: a treaty may restate customary international law, it may crystallize customary international law, or it may serve as a step for the development of customary international law.[71] Short of this, the 1969 Vienna Convention on the Law of Treaties in Article 38 provides that "nothing … precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law,

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[67] A HANDBOOK ON THE NEW LAW OF THE SEA 1050 (Rene Jean Dupuy & Daniel Vignes eds., 1991).

[68] MARK EUGEN VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES (1997)

[69] North Sea Continental Shelf (Federal Republic of Germany v. Denmark v. Netherlands), Judgment, 1969 I.C.J. Rep. 3 at 41 (Feb. 20).

[70] In the words of Professor Sohn: "If a sufficient number of States having a special interest in the application of a new rule start acting in accordance with it, and no States object to it, there is a clear presumption that the rule agreed on at the conference, although the agreement has not yet been ratified, has become an accepted rule of customary international law." Louis B. Sohn, *Law of the Sea: Customary International Law Developments,* 34 AM. U. L. R. 279 (1984-1985).

[71] G. M. DANILENKO, *Law-Making in the International Community* (1993) at 147.

recognized as such," and Article 43 of the same Convention acknowledges the duty of a State to fulfil any treaty obligation "to which it would be subject under international law independently of the treaty."[72] The next section will discuss the breadth of the territorial sea as a customary rule of international law.

2. *Customary Rule of International Law*

While conventional or treaty-based international law cannot constitute universal international law, customary law binds all States except those who have specifically objected to the creation of a particular rule.[73] The relationship between treaties and custom in the law of the sea not being a novel subject, has attracted a fair amount of scholarship.[74] The position of the vast majority of scholars who have written on this subject is that the LOSC generally codifies existing customary international law which may therefore be invoked by non-States parties as a source of rights as well as obligations.[75] In the words of Boyle and Chinkin:

> Whatever the position may have been when it was adopted, the 1982 Convention on the Law of the Sea has become accepted, in most respects, as a statement of contemporary international law on nearly all matters related to the oceans. Most of its provisions, including those that were new or emerging law in 1982, are not only treaty law

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[72] Vienna Convention on the Law of Treaties art. 38 & 43, *supra* note 63.

[73] ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1968). *See also*, MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES (2000); CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW (2005); ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW (2006).

[74] John King Jr. Gamble & Maria Frankowska, *Observations, a Framework, and a Warning: The 1982 Convention and Customary Law of the Sea,* 21 SAN DIEGO LAW REV. 491 (1984); Lawrence A. Howard, *The Third United Nations Conference on the Law of the Sea and the Treaty/Custom Dichotomy,* 16 TEXAS INT'L L. J. 321 (1981); Luke T. Lee, *The Law of the Sea Convention and Third States,* 77 AM. J. INT'L L. 541 (1983); Leslie M. MacRae, *Customary International Law and the United Nations' Law of the Sea Treaty,* 13 CAL. WES. INT'L L. J. 181 (1983). *See also,* R.R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRITISH Y.B. INT'L L. 275 (1965) (an excellent discussion of the traditional relationship between treaties and custom).

[75] Wolfrum, *supra* note 13; W.E. Butler, *Custom, Treaty, State Practice and the 1982* Convention, 12 MAR. POL'Y 182 (1988); A. L. Kolodkin, V. V. Andrianov and V. A. Kiselev, *Legal Implications of Participation or Non-Participation in the 1982 Convention,* 12 MAR. POL'Y 187 (1988); Luke T. Lee, *The Law of the Sea Convention and Third States,* 77 AM J. INT'L L 541 (1983).

> for the large number of States parties, but customary law for all or nearly all States.[76]

Thus, it is clear that there are provisions of the LOSC which codify existing customary international law.[77] The basic legal concept of State sovereignty in customary international law, expressed in, *inter alia*, Article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory.[78] There is little debate about the customary legal right of coastal States unilaterally to claim a territorial sea to the maximum extent of twelve nautical miles.[79] The question presents itself, then: is the twelve-mile limit customary international law? As one commentator remarked: "As UNCLOS has attained near-universality and has become binding upon important maritime States, it can be said that the breadth of a territorial sea has been stabilized and, as such, is considered declaratory of customary international law."[80]

It can be asserted that a 12 nautical mile territorial sea is established under customary international law.[81] The crystallisation of certain provisions of the LOSC into customary international law has been declared by the International Court of Justice. For instance, in the *Nicaragua v. Colombia I* case, with respect to the breadth of the territorial sea, the Court stated that "[w]hatever the position might have been in the past, international law today sets the breadth of the territorial sea which the coastal State has the right to establish at 12 nautical miles. Article 3 of UNCLOS reflects the current state of customary international law on this point."[82]

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[76] Alan Boyle and Christine Chinkin, *UNCLOS III and the Process of International Law Making,* in LAW OF THE SEA, ENVIRONMENTAL LAW, AND SETTLEMENT OF DISPUTES: LIBER AMICORUM JUDGE THOMAS A. MENSAH 376 (Thomas A. Mensah and Tafsir Malick Ndiaye eds., 2007).

[77] MALCOLM N. SHAW, INTERNATIONAL LAW 492-493 (2003), who states that "[M]any of the provisions in the 1982 Convention … have since become customary rules" which *prima facie* bind all States.

[78] Nicar. v. U.S., Merits, 1986 I.C.J. at 14

[79] DOUGLAS M. JOHNSTON & PHILLIP M. SAUNDERS, OCEAN BOUNDARY MAKING: REGIONAL ISSUES AND DEVELOPMENTS 17-18 (1988).

[80] HUI-GWON PAK, THE LAW OF THE SEA AND NORTHEAST ASIA: A CHALLENGE FOR COOPERATION 30 (2000) at 30.

[81] William T. Burke, *Submerged Passage through Straits: Interpretations of the Proposed Law of the Sea Treaty Text,* 52 WASHINGTON L. REV. 194 (1976-1977).

[82] Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, 2012 I.C.J. Rep. 624, at 690,

The best evidence of customary international law is State practice.[83] International law is created when there is consistent practice by a substantial number of States over a period of time.[84] In the case of the LOSC, as of 31 December 2019, there are 168 States parties to the Convention.[85] The import of this is clear in the following words of Louis Sohn: "Once a convention is signed by a vast majority of the international community, its stature as customary international law is thereby strengthened, as such signatures are a clear evidence of an *opinio juris* that the convention contains generally acceptable principles."[86]

The State practice of territorial sea claims has become stable and in line with the customary international law reflected in the LOSC.[87] The next section will discuss the current State practice of territorial sea claims.

B. Territorial Sea Claims

The consensus reached at UNCLOS III on the maximum breadth of the territorial sea steadily aligned national legislation with Article 3 of the Convention.[88] The adoption of the LOSC has significantly influenced State practice. Prior to 1982, there were as many as 25 States claiming a territorial sea broader than 12 nautical miles; while 30 States, including the United States, claimed a territorial sea of less than 12 nautical miles.[89] After the LOSC was opened for signature in, notes Roach and Smith, "State practice in asserting territorial sea

¶ 177 (Nov. 19). The concept of the exclusive economic zone (EEZ) is another example in point. *See*, Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. Rep. 13, at 33, ¶ 34 (June 3). See also, Maritime Delimitation and Territorial Questions (Qatar v. Bahrain), Merits, 2001 I.C.J. Rep. 40, at 91, ¶ 167 (Mar. 16).

[83] MARK EUGEN VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 4 (1985) at 4.

[84] MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL Law 16 -18 (1992) at 16-18.

[85] United Nations Division for Ocean Affairs and the Law of the Sea (UN DOALOS), *Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements,* https://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm (May 29, 2021).

[86] Louis B. Sohn, *Law of the Sea: Customary International Law Devel*opments, 34 AM. UNIV. L. REV. 279 (1985).

[87] J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS 148 (1996).

[88] ROBERT W. SMITH, EXCLUSIVE ECONOMIC ZONE CLAIMS: AN ANALYSIS AND PRIMARY DOCUMENTS 6-8 (1986).

[89] ROACH & SMITH, *supra* note 87, at 540.

claims has largely coalesced around the 12 mile maximum breadth set by the LOSC."[90] This trend is clearly discernible from an analysis of territorial sea claims from a historical perspective.[91]

As of 31 December 2019, 140 States claim a territorial sea of 12 nautical miles or less.[92] Out this number, one State claims a territorial sea of three nautical miles: Jordan, and two States claim a territorial sea of six nautical miles: Greece and Turkey.[93] There are only seven States which claim a territorial sea in excess of 12 nautical miles, with five States claiming 200 nautical miles: Benin, Ecuador, El Salvador, Somalia and Peru; one State claiming 30 nautical miles: Togo; and the Philippines claiming a territorial sea of variable width defined by coordinates.[94] There are only a few States which still claim a territorial sea in excess of twelve nautical miles. In fact, Roach and Smith note that there is "a definite trend for

[90] *Id.*

[91] *Id.* at 149.

[92] *See* United Nations Division for Ocean Affairs and the Law of the Sea (UN DOALOS), *United Nations Division for Ocean Affairs and the Law of the Sea, Table of Claims to Maritime Jurisdiction* https://www.un.org/depts/los/LEGISLATIONANDTREATIES/claims.htm (Dec. 31, 2019). The following States claim a territorial sea of 12 miles or less: Albania, Algeria, Angola, Antigua and Barbuda, Argentina, Australia, Bahamas, Bahrain, Bangladesh, Barbados, Belgium, Belize, Brazil, Brunei, Bulgaria, Cambodia, Cameroon, Canada, Cape Verde, Chile, People's Republic of China, Republic of China, Colombia, Comoros, Cook Islands, Costa Rica, Cote d'Ivoire, Croatia, Cuba, Cyprus, Democratic People's Republic of Korea, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Egypt, Equatorial Guinea, Eritrea, Estonia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Kenya, Kiribati, Kuwait, Latvia, Lebanon, Libya, Lithuania, Madagascar, Malaysia, Maldives, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia, Monaco, Morocco, Mozambique, Myanmar, Namibia, Nauru, Netherlands, New Zealand, Nicaragua, Nigeria, Niue, Norway, Oman, Pakistan, Panama, Papua New Guinea, Poland, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, São Tomé and Príncipe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Slovenia, Solomon Islands, South Africa, Spain, Sri Lanka, Sudan, Suriname, Sweden, Syria, Thailand, Timor-Leste, Tonga, Trinidad and Tobago, Tunisia, Turkey (in the Black sea and Mediterranean), Tuvalu, Ukraine, United Arab Emirates, United Kingdom, United Republic of Tanzania, United States of America, Uruguay, Vanuatu, Venezuela, Vietnam, Yemen.

[93] *Ibid*. Please note that Turkey claims a territorial sea of six nautical miles in the Aegean Sea, and 12 nautical miles in the Black Sea.

[94] *Ibid.*

States to reduce excessive territorial sea claims to the norm of 12 miles set forth in the LOSC."[95] The United States, which operates a Freedom of Navigation Program, has challenged territorial claims on the world's oceans and airspace that it considers excessive using diplomatic protests and/or by interference.[96] Although the United States has yet to ratify the LOSC,[97] and despite its longstanding claim of a three-mile territorial sea,[98] insists that all States must obey the international law of the sea as embodied in the LOSC.[99]

The next section will discuss and analyze the Philippine territorial sea claim in international law.

II. The Philippine Territorial Water Claim in International Law

The Philippine historic claim to its extensive territorial waters first came to the attention of the world in 1955 through a *Note Verbale* to the United Nations[100] which claimed exclusive rights over the waters within the coordinates of the Treaty of Paris of 1898 and other treaties which ceded the Philippines from Spain

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[95] J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS 153 (1996).

[96] *Ibid*. at 153–161.

[97] *See* David A. Colson, *United States Accession to the United Nations Convention on the Law of the Sea* 7 GEORGETOWN INT'L ENV'L L. REV. 651 (1995); *Message from the President of the United States and Commentary Accompanying the United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of the Part XI upon Their Transmittal to the United States Senate for Its Advice and Consent*, 7 GEORGETOWN INT'L ENV'L L. REV. 77 (1994); John A. Duff, *A Note on the United States and the Law of the Sea: Looking Back and Moving Forward,* 35 OCEAN DEV. & INT'L. L. 195 (2004); ANN L. HOLLICK, U.S. FOREIGN POLICY AND THE LAW OF THE SEA (1981) (for a discussion on the issues with respect to the accession of the United States to the LOSC).

[98] Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988). Since 1988, the United States has claimed a 12 nautical mile territorial sea. Since the President's Ocean Policy Statement of Mar. 10, 1983, the United States has recognized territorial sea claims of other States up to a maximum breadth of 12 nautical miles. *See* Bruce E. Alexander, *The Territorial Sea of the United States: Is It Twelve Miles or Not,* 20 J. MAR. L. & COM. 449 (1989); Arruda, *supra* note 4; John E. Noyes, *United States of America Presidential Proclamation No. 5928: A 12-Mile U.S. Territorial Sea,* 4 I.J.M.C.L. 142 (1989).

[99] Duff, *supra* note 97, at 199.

[100] *Report of the International Law Commission Covering the Work of its Seventh Session*, [1955] 2 Y.B. Int'l L. Comm'n 52-53, U.N. Doc. A/CN.4/94.

to the United States.[101] The Philippine view is that the cession involved the cession of both maritime as well as land territory.[102]

The validity of the Philippine territorial waters claim in international law can be judiciously argued both ways. The first position is that the Philippine territorial water claim is valid in international law on the following grounds: recognition by treaty, devolution of treaty rights, and historic rights.[103] The second position is that the Philippine territorial water claim is not valid in international law on the following grounds: first, the Philippine claim does not conform with the LOSC; second, it breaches customary international law; third, it proceeds from a flawed treaty interpretation; and lastly, the acquiescence required for the claim to be valid in international law will not be met due principally to the protests by the United States.

The issue on the breadth of the Philippine territorial sea claim which exceeds 12 nautical miles can also be viewed from two perspectives: from a conventional international law and from a customary international law point of view. In analyzing the issue, one can also take a strictly literal or narrow view, i.e., conventional and customary international law prescribes a maximum limit of 12 nautical miles and the Philippine territorial sea claim exceeds this limit; therefore, it is not valid in international law. Or a more relaxed and practical view, i.e., the maximum breadth of the territorial sea in international law allows of exceptions and the Philippine territorial sea claim can fall within this exception; thus, it is valid in international law. These can be in the form of historic title and as persistent objector, which are valid exceptions in international law.[104]

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[101] Arturo Tolentino, *The Philippine Territorial Sea,* 3 PHIL. Y.B. INT'L L. 46 (1974); Arturo M. Tolentino, *The Philippine Archipelago and the Law of the Sea,* 7 PHIL. L. GAZETTE 1 (1983); ARTURO M. TOLENTINO, THE PHILIPPINES AND THE LAW OF THE SEA: A COLLECTION OF ARTICLES, STATEMENTS AND SPEECHES (1982).

[102] Tommy T. B. Koh, *The Territorial Sea, Contiguous Zone, Straits and Archipelagoes under the 1982 Convention on the Law of the Sea*, 29 MALAYA L. R. 190 (1987).

[103] These legal bases were extensively discussed in detail in Bautista, *supra* note 2.

[104] *See* L.F.E. Goldie, *Historic Bays in International Law: An Impressionistic Overview*, 11 SYRACUSE J. INT'L L. & COM. 211 (1984); D. H. N. Johnson, *Consolidation as a Root of Title in International Law*, 1955 C. L. J. 215; Alexander A. Murphy, *Historical Justifications for Territorial Claims,* 80 ANNALS ASS'N AM. GEOGPRAPHERS 531 (1990); Donat Pharand, *Historic Waters in International Law with Special Reference to the Arctic*, 21 U. TORONTO L.J. 1 (1971). ; YEHUDA Z. BLUM, HISTORIC TITLES IN INTERNATIONAL LAW (1965) (for discussion on historic waters in international law). For academic literature on the concept of the persistent objector in international law, *See* Jonathan I. Charney,

Whilst the Philippine territorial water claim is ostensibly divergent from the rules of the breadth of the territorial sea under conventional and customary international law, it could still be internationally recognized.[105] This is not necessarily only a legal issue. Further, it must be noted that Article 15 of the LOSC makes reference to historic title in the delimitation of the territorial sea between two States.[106] The reference to historic title in the second sentence of this article impliedly recognized the existence, if not the exceptional character, of a territorial sea held under historic title.[107]

The starting point of the inquiry can be simply stated: is there an existing rule of international law that limits the maximum breadth of the territorial sea? This is the crucial question and the answer no doubt settles the international legal status of the Philippine territorial water claim. If such a positive rule of international law does exists, is it possible and on what grounds can the Philippines argue that the same rule does not apply in the case at hand?

The Persistent Objector Rule and the Development of Customary International Law, 56 BRITISH Y.B. INT'L L. 1 (1985); David A. Colson, *How Persistent Must the Persistent Objector Be,* 61 WASHINGTON L. REV. 957 (1986); Holning Lau, *Rethinking the Persistent Objector Doctrine in International Human Rights Law,* 6 CHINESE J. INT'L L. 495 (2006) ; Lynn Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework,* 2 U. CALIFORNIA DAVIS L. REV. 147 (1996); Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law,* 26 HARVARD INT'L L. J. 457 (1985).

[105] R. Douglas Brubaker, *The Legal Status of the Russian Baselines in the Arctic,* 30 OCEAN DEV. INT'L L. 207 (1999). Brubaker, who made a study on the legal status of the Russian baselines in the arctic observes that: "…while initially the straight baselines established at variance with the criteria noted may have been legally invalid under international conventional and customary law, most appear to be on the way to being internationally recognized." He adds though that "[T]his is, however, except with respect to the United States, which has consistently objected, and the smattering of other objecting States.

[106] LOSC art. 15, *supra* note 12, reads: "Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith."

[107] CLIVE R. SYMMONS, HISTORIC WATERS IN THE LAW OF THE SEA: A MODERN RE-Appraisal 25 -26, 36 (2008).

A. The Philippine Claim and the LOSC

In international law, a treaty becomes binding and in force for its parties.[108] The only way for a State which enters into a treaty to limit the range of application of a treaty with respect to itself, is to make a reservation.[109] However, this is possible only if the treaty explicitly permits States to make reservations.[110] The *Vienna Convention on the Law of Treaties* in Article 19 provides that a State may make a reservation save in the following instances:

> (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.[111]

Many major multilateral treaties contain specific provisions specifying the type of reservations which are permissible, and those which are not.[112] In the case of the LOSC, Article 309 is clear that "[n]o reservations or exceptions may be made to this Convention unless expressly permitted by other articles of the Convention." The prohibition being clear, the State party making the reservation must prove that such is specifically permitted by a provision in the Convention.[113] If the

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[108] ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 131 (2000) at 131.

[109] Vienna Convention on the Law of Treaties art. 2, *supra* note 63, describes a reservation as: "[A] unilateral statement, however phrased or named, made by a country, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."

[110] AUST, *supra* note 108, at 105-116.

[111] Vienna Convention on the Law of Treaties art. 19, *supra* note 63.63.

[112] *See e.g.,* D. W. Bowett, *Reservations to Non-Restricted Multilateral Treaties*, 48 BRITISH Y.B. INT'L L. 67 (1976); John King Jr. Gamble, *Reservations to Multilateral Treaties: a Macroscopic View of State Practice,* 74 AM. J. INT'L L. 372 (1980); Laurence R. Helfer, *Not Fully Committed - Reservations, Risk, and Treaty Design*, 31 YALE J. INT'L L. 367 (2006); William A. Schabas, *Reservations to the Convention on the Rights of the Child,* 18 HUM. RTS. Q. 472 (1996).

[113] S. K. N. Blay, R. W. Piotowicz and B. M. Tsamenyi, *Problems with the Implementation of the Third United Nations Law of the Sea Convention: The Question of Reservations and Declarations,* 11 AUSTRALIAN Y.B. INT'L L. 67 (1984-1987). In their words: "Since none of the articles permit reservations, it follows that no party to the LOSC may lawfully make a reservation. This prohibition was considered appropriate by the framers of the LOSC because it was thought that

Convention does not state that a particular provision allows a reservation, then, it is implied that a reservation is not permitted.[114]

The LOSC provision on the breadth of the territorial sea in Article 3 of the Convention does not state that a reservation is allowed.[115] This means that the extent of the territorial sea cannot be subject of a reservation by a State party to the Convention. Moreover, taking due regard to the "package deal" nature of the Convention,[116] a reservation made to Article 3 being "incompatible with the object and purpose of the LOSC is also not permitted by the Vienna Convention on the Law of Treaties."[117]

> Any general convention relating to the territorial sea will necessarily take into account existing treaty and other arrangements, and existing situations in "historic waters." These arrangements and situations are believed to affect only the landward base-line from which the territorial waters are delimited.[118]

The LOSC is a product of political compromise among various groups of competing interests and, because of this, it contains many provisions which are vague, ambiguous, and subject to multiple interpretations. But the rule on the

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reservations were inconsistent with the consensus approach adopted at the Third Law of the Sea Conference."

[114] However, the LOSC in Articles 287, 298, and 310, allow States to make declarations or statements regarding application and interpretation of the Convention at the time of signature, ratification, accession, or succession, or at any time thereafter, but these must not purport to exclude or modify the legal effect of the provisions of the Convention. *See* L.D. M. Nelson, *Declarations, Statements and 'Disguised Reservations' with respect to the Convention on the Law of the Sea,* 50 INT'L COMP. L. Q. 767-786 (2001); Yann-huei Song, *Survey of Declarations or Statements Made by the Parties to the Law of the Sea Convention: 30 Years after Adoption*, 28 INT'L J. MAR. COASTAL L. 5-59 (2013).

[115] LOSC art. 3, *supra* note 12, reads in full: "Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention."

[116] Barry Buzan, *Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea,* 75 AM. J. INT'L L. 324 (1981); Hugo Caminos and Michael R. Molitor, *Progressive Development of International Law and the Package Deal,* 79 AM. J. INT'L L. 871 (1985).

[117] Vienna Convention on the Law of Treaties art. 19(c), *supra* note 63.

[118] Boggs, *supra* note 28, at 543.

breadth of the territorial sea does not appear to be one of these provisions. The fact that the LOSC was conceived, negotiated, and eventually offered for signature and ratification as a "package deal" and the very wording of the treaty itself did not permit reservations indicates the legal obligation upon States parties to embrace the treaty in its entirety. States cannot selectively choose provisions of the Convention it does not wish to comply with.

The signature and ratification of the Philippines of the LOSC carries the reasonable and logical expectation that it will act in conformity with, and not frustrate, the object of the Convention and State practice consistent with it. Further, it is naturally expected that the Philippines has to amend its domestic laws and regulations which are not in conformity with the LOSC. In the words of ITLOS President Wolfrum, "National legislation of States Parties has to conform to the restrictions established by the LOS Convention as far as the extension of areas under national sovereignty or jurisdiction is concerned." [119]

On 10 December 1982, when the Philippines signed the LOSC, it submitted a Declaration which it confirmed upon ratification on 8 May 1984, which among others contained the following:

> Such signing shall not in any manner affect the sovereign rights of the Republic of the Philippines as successor of the United States of America, under and arising out of the Treaty of Paris between Spain and the United States of America of 10 December 1898, and the Treaty of Washington between the United States of America and Great Britain of 2 January 1930.[120]

Further, the Philippines declared in the same instrument that the signing of the LOSC "shall not in any manner impair or prejudice the sovereign rights of the Republic of the Philippines under and arising from the Constitution of the Philippines"[121] and "over any territory over which it exercises sovereign authority … and the waters appurtenant thereto."[122] The Philippine Declaration was

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[119] Wolfrum, *supra* note 13.

[120] *See,* RAPHAEL PERPETUO M. LOTILLA, THE PHILIPPINE NATIONAL TERRITORY: A COLLECTION OF RELATED DOCUMENTS 509-510 (1995). Philippine Declaration made upon signature (10 December 1982) and confirmed upon ratification (8 May 1984) of the LOSC.

[121] *Id.* ¶ 1.

[122] *Id.* ¶ 4.

protested by several nations including Australia, Bulgaria, Byelorussia, Czechoslovakia, the Ukraine and USSR.[123] The Philippine Declaration has been criticized for amounting to a prohibited reservation under the LOSC.[124]

On 26 October 1988, in response to the objection made by Australia,[125] the Government of the Philippines submitted a Declaration which signified its intent to "harmonize its domestic legislation with the provisions of the Convention" including an assurance that "the Philippines will abide by the provisions of the said Convention."[126] In its proper historical context, it must be remembered that the limits of the Philippine territorial sea were established under laws that were enacted prior to the LOSC. The baselines of the territorial Sea of the Philippines were defined by Republic Act No. 3046, approved on 17 June 1961, which was amended by Republic Act No. 5446, approved on 18 September 1968.[127] These legislation treated the waters enclosed by Treaty Limits as territorial sea, and the waters landward of the straight baselines as internal waters.[128] On 12 March 2009, the Philippines enacted a new archipelagic baselines law, Republic Act No. 9522, which amended Republic Act No. 3046 and Republic Act No. 5446.[129] Republic Act No. 9522 complies with the technical requirements of the LOSC pertaining to archipelagos, and part of the Philippine Government's efforts to align the national legal and policy frameworks on the various maritime jurisdictional zones with the

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[123] *See*, LOTILLA, *supra* note 120, at 541-547.

[124] Nelson, *supra* note 114, at 780-781.

[125] LOTILLA, *supra* note 120, at 547. The Australian protest submitted on Aug. 3, 1988, read in part: "Australia considers that [the] declaration made by the Republic of the Philippines is not consistent with article 309 of the Law of the Sea Convention, which prohibits the making of reservations, nor with article 310 which permits declarations to be made "provided that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of this Convention in their application to that State."

[126] *Id.* at 548.

[127] An Act Define the Baselines of the Territorial Sea of the Philippines, Rep. Act No. 3046, § 1 (June 17, 1961), *amended by* Rep. Act No. 5446 (1968).

[128] Rep. Act No. 3046, pmbl. ¶ 4.

[129] An Act to Amend Certain Provisions of Republic Act No. 3046, As Amended By Rep. Act No. 5446, to Define The Archipelagic Baselines Of The Philippines, and for Other Purposes, Rep. Act No. 9522, (Mar. 10, 2009). On Apr. 1, 2009, the Philippines deposited with the UN Secretary-General the list of geographical coordinates of points under RA 9522, pursuant to Article 47, paragraph 9 of the LOSC. The list of geographical coordinates of points is referenced to the World Geodetic System of 1984 (WGS84) and is available from the website of the UN Division on the Law of the Sea.

LOSC.[130] On 16 August 2011, the Philippine Supreme Court upheld the constitutionality of Republic Act No. 9522 in the case of *Magallona vs. Ermita.*[131]

B. The Philippine Claim and Customary International Law

There are commentators who opine that the rule prescribing the extent of the territorial sea is a customary rule of international law.[132] Some even argue that the twelve nautical mile limit in the LOSC has already attained the status of a customary norm of international law even before the LOSC came into being.[133] This proceed from the view that the LOSC is a codification of existing customary law on the breadth of the territorial sea. In this sense, Article 3 is regarded as declaratory of customary law.[134] Without a doubt, treaty provisions can reflect customary international law.[135] In fact, some treaties not only represent the codification of pre-existing customary rules,[136] they are also instrumental in the progressive development of international law.[137] It is actually possible that a treaty

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[130] Lowell B. Bautista, *International legal implications of the Philippine Treaty Limits on navigational rights in Philippine waters*, 1 AUSTL. J. MARIT. OCEAN AFF. 91 (2009).

[131] Magallona v. Ermita 655 S.C.R.A. 477, (Aug. 16, 2011) (Phil.).

[132] *But see*, S. K. VERMA, AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 297 (1998), who states that "Under customary international law, the breadth of the territorial sea has remained a thorny issue."

[133] Talaie, *supra* note 11, at 288.

[134] *Id.*

[135] SHAW, *supra* note 77, at 90-92.

[136] *See e.g.*, Geneva Convention on the High Seas, preamble, Apr. 29, 1958, 450 UNTS 11, states: "The States Parties to this Convention…adopted the following provisions as generally declaratory of established principles of international law.".

[137] The Vienna Convention on the Law of Treaties is an excellent example. As the International Law Commission noted when it submitted its final draft article on the law of treaties: "The Commission's work on the law of treaties constitutes both codification and progressive development of international law…" *Report of the International Law Commission to the General Assembly*, [1996] 2 Y.B. INT'L L. COMM'N 169, 177, U.N. Doc. A/CN.4/SER.A/1966/Add.1. The International Court of Justice has noted the customary status of provisions of the Vienna Convention. For example, Article 62 on the termination of a treaty by a fundamental change of circumstance in the Fisheries Jurisdiction (U.K. v. Iceland), Jurisdiction of the Court, 1973 I.C.J. Rep. 3, 18 (Feb. 2); and Article 60 on the termination of a treaty due to a material breach in Legal Consequences for States of the Continued Presence of South Africa in Namibia, Order, 1971 I.C.J Rep. 6, 47 (Jan. 26).

which has not yet come into force contains provisions which are declaratory of or a codification of existing customary international law.[138]

1. Historic Title

In international law, "a right contrary to the general rule on be subject may acquired by a particular State through the process of prescription."[139] This exceptional right, called historic right, is established on the basis of consistent and effective practice carried out for a sufficiently long period of time made not only in the presence of the explicit consent of other States, but also in the lack of objection of other States.[140] Specifically, the waters of a coastal State can be considered as historic waters under certain conditions in international law.[141] Historic waters usually refer to "the waters over which the coastal State, contrary to the generally applicable rule in international law, clearly, effectively, continuously, and over a substantial period of time, exercises sovereign rights with the acquiescence of the community of States."[142] In order to sustain a historic waters claim, three conditions must be fulfilled: (1) the exercise of the authority over the area; (2) the continuity over time of this exercise of authority; and (3) the acquiescence of foreign States to the claim.[143]

These are the hurdles that the Philippines must prove in order to establish its legal title over the territorial sea it claims on the basis of, among others, historic title. There are a few maritime territorial claims in international law based on

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[138] *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion 1971 I.C.J Rep. 16, 47 (June 21). Although the Convention on the Law of Treaties which came into force only in 1980, the International Court of Justice already declared in 1971 that the rules laid down in that convention "concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject.

[139] YUCEL ACER, THE AEGEAN MARITIME DISPUTES AND INTERNATIONAL LAW 115 (2003).

[140] *Id.*

[141] Secretariat of the International Law Commission, *Juridical Regime of Historic Waters Including Historic Bays,* [1962] 2 Y.B. INT'L L. CMM'N 1.

[142] L. J. BOUCHEZ, THE REGIME OF BAYS IN INTERNATIONAL LAW (1964) at 281.

[143] *See*, Lowell B. Bautista, *The South China Sea Arbitration and Historic Rights in the Law of the Sea*, 17 PHIL. Y.B. INT'L L 3-13 (2018) (discussion of historic rights in the law of the sea).

historic title, but none similar to the *sui generis* Philippine claim to its territorial sea.[144]

2. *Persistent Objector*

Since the doctrine of opposability effectively applies to historic maritime title, the Philippines could invoke the principle of the persistent objector which applies to "a State that has persistently objected to a rule of customary international law during the course of the rule's emergence is not bound by the rule."[145] The Philippine position, after all, predated all the Law of the Sea Conferences and all of the 1958 Geneva Conventions[146] and most certainly the LOSC, which codified the rule on the maximum breadth of the territorial sea at

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[144] *See e.g.*, Yehuda Z. Blum, *The Gulf of Sidra Incident,* 80 AM. J. INT'L L. 668 (1986); R. Douglas Brubaker, *Straits in the Russian Arctic,* 32 OCEAN DEV INT'L L. 263 (2001); Goodwin Cooke, *Historic Bays of the Mediterranean —A Conference Sponsored by Syracuse University and the University of Pisa,* 11 SYRACUSE J. INT'L L COM. 205 (1984); Francesco Francioni, *Status of the Gulf of Sirte in International Law,* 11 SYRACUSE J. INT'L L COM. 311 (1984); V. Kenneth Johnston, *Canada's Title to Hudson Bay and Hudson Strait*, 15 BRITISH Y.B. INT'L L 1 (1934); Zou Keyuan, *Maritime Boundary Delimitation in the Gulf of Tonkin*, 30 OCEAN DEV INT'L L. 235 (1999); Natalino Ronzitti, *Is the Gulf of Taranto an Historic Bay* 11 SYRACUSE J. INT'L L COM. 275 (1984); Gayl S. Westerman, *The Juridical Status of the Gulf of Taranto: A Brief Reply*, 11 SYRACUSE J. INT'L L. COM. 297 (1984).

[145] Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law,* 26 HARVARD INT'L L. J. 457 (1985). The International Court has recognized in several cases that a State which has consistently opposed from the beginning an emerging rule of customary law, that rule, although generally applicable, does not apply to the protesting State. *See*, U.K. v. Norway 1951 I.C.J. 116, where the ICJ held that the United Kingdom could not invoke against Norway the 10-mile limit on straight lines closing bays to foreign fishing that was included in the 1882 North Sea Fisheries Convention because Norway has consistently objected to the rule. *Id.* at 131, 139. In the *Asylum Case* (Colombia v. Peru), Judgment, 1950 I.C.J. 266, (Nov. 20) the Court applied this principle to a regional rule of customary international law and decided that the regional rule could not be invoked against Peru, which had repudiated it by refraining from ratifying the conventions that were the basis for that rule. *Id.* at 277-278. And most notably, the ICJ confirmed this principle in the North Sea Continental Shelf (Federal Republic of Germany v. Denmark v. Netherlands) 1969 I.C.J. 3 (Feb. 20), where the Court noted that the delimitation rule in the 1958 Convention on the Continental Shelf was not binding on the Federal Republic of Germany as customary international law because it clearly reserved its position on the subject as soon as that rule was applied in North Sea delimitations. *Id.* at 18-19, 27.

[146] *Convention on the High Seas*, 450 U.N.T.S. 11; C*onvention on the Territorial Sea and the Contiguous Zone*, 516 U.N.T.S. 205; *Convention on the Continental Shelf*, 499 U.N.T.S. 311; and the *Convention on Fishing and Conservation of the Living Resources of the High Seas*, 559 U.N.T.S. 285

twelve nautical miles. In international law, persistent objection is a valid defense against the application of customary international law unless that rule has attained the rare status of a peremptory norm or one of *jus cogens* character.[147] But it has been rarely invoked by States and even rarely has it reached international judicial adjudication.[148]

There are two conditions for a State to invoke this rule and opt out of a customary rule. First, the State must object to the rule at its nascent stage and continue to object afterwards.[149] Secondly, the objection must be consistent.[150] In order to rebut the presumption of acceptance, the objection of the State must be clear and not merely silence or failure to object, which will be interpreted as consent.[151] The first step in the inquiry on whether a State may validly invoke the persistent objector doctrine is to ask whether there is a treaty or convention applicable thereby removing the need to decide the issue on the basis of customary international law. The import of a State being party to a treaty is serious:

> If the objecting State has signed a treaty which covers the issue (even if they have signed and later withdraw) they are no longer a persistent objector. They have consented, at least for a time, and should be bound by the norm if it has status of international custom.[152]

In this regard, the signature and ratification of the Philippines of the LOSC preclude the invocation of the doctrine of persistent objector. Moreover, the overwhelming number of territorial sea claims of twelve nautical miles can be

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[147] Holning Lau, *Rethinking the Persistent Objector Doctrine in International Human Rights Law,* 6 CHINESE J. INT'L L. 495 (2006).

[148] Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law,* 26 HARVARD INT'L L. J. 459 (1985). The International Court of Justice only had the opportunity to discuss the matter on two cases: Colombia v. Peru 1950 I.C.J. 266 and in the Anglo-Norwegian Fisheries case (United Kingdom v. Norway), Judgment, 1951 I.C.J. Reports 116.

[149] MARK EUGEN VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 16 (1985) at 16.

[150] Jonathan I. Charney, *Universal International Law,* 87 AM. J. INT'L L. 539 (1993).

[151] Lynn Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework,* 2 UNIV. CAL. DAVIS L. REV. 151 (1996).

[152] *Id.*, at 163.

taken as sufficient evidence of custom,[153] and as such, binding upon the Philippines. It is not necessary to characterise the obligation as a norm of customary international law since there is a clear treaty provision in the LOSC which the Philippines as State party is bound to observe.

3. The Philippine Claim and Treaty Interpretation

The interpretation of treaties is resorted in instances when the wording or the language of a treaty is not clear, ambiguous or its meaning is not immediately apparent.[154] The *Vienna Convention on the Law of Treaties* states that treaties are to be interpreted "in good faith" according to the "ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose."[155] Disputes over treaty interpretations are often submitted to international courts and tribunals for resolution.[156] In order to establish the meaning in context, these judicial bodies may review the preparatory work (*trauvaux préparatoires*) from the negotiation and drafting of the treaty as well as the text of the final, signed treaty itself.[157] In approaching the interpretation of the treaties here in dispute, the rules prescribed for the interpretation of treaties in the 1969 *Vienna Convention on the Law of Treaties*, which in this respect has been acknowledged by the ICJ as declaratory of customary international law and so is applicable even to earlier

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[153] *See,* ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971). Customary international law is normally said to have two elements. First, there is an objective element consisting of sufficient State practice; and second, there is a subjective element requiring that the practice be accepted as law or followed from a sense of legal obligation, a requirement known as the *opinio juris* requirement.

[154] MALCOLM N. SHAW, INTERNATIONAL LAW 838-844 (2003); MYRES S. MCDOUGAL, JAMES C. MILLER AND HAROLD D. LASSWELL, THE INTERPRETATION OF INTERNATIONAL AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE (1994).

[155] Each of these elements guides the interpreter in establishing what the Parties actually intended, or their "common will," as Lord McNair put it in the *Palena* award. *See*, Argentina-Chile Frontier Case, 38 I.L.R. 10, at p. 89 (R.I.A.A. 1969).

[156] Gerald G. Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Other Treaty Points,* 28 BRITISH Y.B. INT'L L. 1 (1951).

[157] Vienna Convention on the Law of Treaties art. 32, *supra* note 63; ARNOLD DUNCAN MCNAIR, THE LAW OF TREATIES 411 (1961). *But see*, Jan Klabbers, *International Legal Histories: the Declining Importance of Travaux Preparatoires in Treaty Interpretation?,* 50 NETHERLANDS INT'L L. REV. 267 (2003).

treaties.[158] The relevant provision is Article 31(1): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[159]

The title of the Philippines to its territory is supported, in the first instance, by three treaties: the Treaty of Peace concluded at Paris on 10 December 1898,[160] Treaty signed at Washington on 7 November 1900,[161] and the Convention of 2 January 1930 between the United States and Great Britain delimiting the boundary between the Philippine Archipelago and the State of North Borneo.[162] All of these treaties are valid and binding. The definition of the boundary in the first of these treaties establishes that the territory demarcated by its defined boundary lines belongs to the Philippines.[163] The identification of the same boundary lines in the 1900 and 1930 treaties inescapably indicate that the territory identified belongs to the Philippines. The territory of the Philippines thus defined corresponds to the territory of the Philippines.

The meaning of the treaties from which the Philippines bases its title over its territorial sea is thus a central feature of this dispute. The 1898 Treaty of Paris is not only a treaty of cession of Spanish territory to the United States; it is also a

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[158] *See,* Kasikili/Sedudu Island (Botswana v. Namibia), Judgment, 1999 I.C.J. Rep. 1045 (Dec. 13), both contending parties, non-parties to the Vienna Convention, considered the Vienna Convention's rules to be applicable 'inasmuch as it reflects customary international law'. Judgment of Dec. 13, 1999, ¶. 18., where the ICJ declared: "The Court has itself already had occasion in the past to hold that customary international law found expression in Article 31 of the Vienna Convention." *See also,* Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, 2001 I.C.J. Rep. 575 (Dec. 17), the ICJ could only apply the Vienna Convention's rules by treating them as customary international law, as Indonesia is not a party to the Vienna Convention on the Law of Treaties. Even so, the Court felt the need to emphasise that Indonesia did 'not dispute that these are the applicable rules' (para. 37).

[159] Vienna Convention on the Law of Treaties art. 31 (1), *supra* note 63.

[160] LOTILLA, *supra* note 120, at 32-37. (Full text of Treaty of Peace between the United States of America and the Kingdom of Spain, Signed in Paris, Dec. 10, 1898.)

[161] LOTILLA, *supra* note 120, at 38. Treaty between the Kingdom Spain and the United States of America for the Cession of Outlying Islands of the Philippines (1900) Concluded Nov. 7, 1900; ratification advised by U.S. Senate 22 January 1901; ratified by the U.S. President Jan. 30, 1901; ratifications exchanged Mar. 23, 1901; proclaimed Mar. 23, 1901.

[162] Convention between the United States of America and Great Britain Delimiting the Boundary between the Philippine Archipelago and the State of Borneo (1930). See full text in: LOTILLA, *supra* note 120, at 134.

[163] Article III, Treaty of Paris of Dec. 10, 1898.

boundary treaty. The Philippines thus contends that the 1898 Treaty of Cession by which Spain ceded to the United States the territory known as the Philippine archipelago comprises the terrestrial and maritime domains. The rule is particularly clear and incontrovertible in the case of international boundaries established by treaty. In the *Libya/Chad* case,[164] where the International Court of Justice concluded that the relevant Franco-Libyan Treaty of 1955 determined a permanent frontier (*inter alia* as between colonial Chad and Libya) stated in clear terms that: "[T]he establishment of this boundary is a fact which, from the outset, had had a legal life of its own, independently of the fate of the 1955 Treaty. Once agreed, the boundary stands."[165] The boundary stands irrespective of the nature and status of the treaty itself. The Court further emphasized, "a boundary established by a treaty thus achieves a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary." [166]

This is also supported by the relevant application of the principle of *rebus sic stantibus*, according to which the rule relating to the termination of a treaty on the grounds of a fundamental change of circumstances does not apply where the treaty establishes a boundary.[167] It is also confirmed by Article 11 of the *Vienna Convention on Succession of States in Respect of International Treaties* 1978, which provides that "a succession of States does not as such affect: (a) a boundary established by a treaty..."[168]

The continuance of an international boundary after the independence of the entity territorially defined in whole or in part by such boundary applies even when the boundary has become established otherwise than by treaty, for example by way of recognition or acquiescence. As the International Court made clear in the *Burkina Faso/Mali* case,[169] "there is no doubt that the obligation to respect pre-

[164] Territorial Dispute, (Libya v. Chad), Judgment, 1994 I.C.J. Rep. 7.

[165] *Ibid.*, at ¶ 72-73.

[166] *Ibid.*

[167] *See* Vienna Convention on the Law of Treaties art. 62, *supra* note 63; Malcolm N. Shaw, *The Heritage of States: The Principle of Uti Possidetis Today*, 67 BRIT. Y.B. INT'L. L. 75 at 88 *et seq*. (1996).

[168] *Ibid,* at 89 *et seq*. *See also,* Contintental Shelf (Tunisia v. Libya), Judgment 1982 I.C.J. Rep. 18 (Feb. 24), at 66; the Frontier Dispute (Burkina Faso v. Mali) 1986 I.C.J. Rep. 556, ¶ 17 (Dec. 22) and Territorial Dispute (Libya v. Chad), Judge Ajibola's Separate Opinion, 1994 I.C.J. 7, ¶ 53. *See also*, Yugoslavia Peace Conference Opinion No 3 (1992) 92 I.L.R. 167, at 171.

[169] Burkina Faso v. Mali, 1986 I.C.J. Rep. 554, at 566.

existing international boundaries in the event of a state succession derives from a general rule of international law".[170]

The title of the United States and, since independence, of the Philippines is also sustained by considerations of customary international law. The Philippines acquired title to the territory of Spain and the United States by occupation beyond the limits of the colonial Treaties of 1898, 1900, and 1930 since the acquisition of independence by the Philippines in 1898 and in 1946.[171] Thus, there is basis for the Philippines to validly invoke the doctrine of *uti possidetis juris* in support of its claim.[172] The Philippines has occupied, possessed and administered this territory. In the period from 1898 to 1946, the Philippines consolidated its title to its territory by a process of historical consolidation of title or of acquisitive prescription both of which are fully recognised in international law.[173]

A party to a treaty cannot impose its particular interpretation of the treaty upon the other parties. However, consent may be implied, if the other parties fail to explicitly disavow that initially unilateral interpretation, particularly if that State has acted upon its view of the treaty without complaint.[174] The role of the subsequent practice or conduct of the Parties also plays a major part in the arguments of both sides.[175] The function of such practice is not relevant exclusively to treaty interpretation. It is possible that practice or conduct may affect the legal relations of the parties even though it cannot be said to be practice in the application of the Treaty or to constitute an agreement between them. As the Permanent Court of International Justice said in relation to loan agreements which, for present purposes, are analogous to treaties: "If the subsequent conduct

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[170] *See also,* Tunisia v. Libya, 1982 I.C.J. Rep. 18, at 65-66.

[171] June 12, 1898 from Spanish colonial rule and July 4, 1946 from American colonial rule.

[172] Tomas Bartos, *Uti Possidetis. Quo Vadis?*, 18 AUSTRALIAN Y.B. INT'L L. 37 (1997); Marcelo G. Kohen, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis*, 98 AM. J. INT'L L. 379 (2004); Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Border of New States* 90 AM. J. INT'L L. 590 (1996).

[173] D. H. N. Johnson, *Consolidation as a Root of Title in International Law,* 1955 CAMBRIDGE L. J. 215 (1955); Alexander A. Murphy, *Historical Justifications for Territorial Claims,* 80 ANNALS OF THE ASSOCIATION OF AMERICAN GEOGRAPHERS 531 (1990); YEHUDA Z. BLUM, HISTORIC TITLES IN INTERNATIONAL LAW (1965).

[174] Vienna Convention on the Law of Treaties art. 31 (2), *supra* note 63.

[175] Vienna Convention on the Law of Treaties art. 31 (3)(b), *supra* note 63.

of the Parties is to be considered, it must be not to ascertain the terms of the loans, but whether the Parties by their conduct have altered or impaired their rights."[176]

The United States has both actively and passively acquiesced in and accepted the Philippines' title during the period prior to the independence of the Philippines. The Philippines had dealings with the United States in relation to the same territory of the Philippines which could only have taken place on the basis of Philippine title.[177] Until relatively recently, the United States did not protest against the Philippine title.

The right of the Philippines to its territory is also supported by the principle of self-determination, a well-established norm of modern international law. The people of the Philippines are entitled to determine their future, and they did so at the time of independence in 1898, and in 1946. Their right to do so was recognised by the members of the United Nations and the Philippines was admitted as a member State of the United Nations with full knowledge of the Philippines' territorial sea claims. Other than the United States, no other State has vigorously contested the Philippine claim.

The title of the Philippines extends not only to the islands and islets lying off the mainland archipelago but to the maritime domain delimited by the above treaties. The right of the Philippines to the maritime area delimited by its international treaty limits flows from its title to the entirety of the archipelago as an indivisible whole to which the islands and the waters are appurtenant as well as from Spanish and American occupation over the same territory.

4. The Philippine Claim and the Acquiescence of the International Community

It is recognised in international law that State acts or measures which would otherwise be illegal as contrary to existing international law may in time, by reason of the failure of other States to lodge an effective protest may develop and consolidate as valid legal rights.[178] This is through the process of acquiescence.[179] In

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[176] Payment of Various Serbian Loans Issued in France (Fr. v. Yugo.), 1929 P.C.I.J. (ser. A) No. 20 (July 12), ¶ 79.

[177] TOLENTINO, *supra* note 101, at 16.

[178] Phil C. W. Chan, *Acquiesence/Estoppel in International Boundaries: Temple of Preah Vihear Revisited* 3 CHINESE J. INT'L L. 421 (2004) at 422.

[179] *Please see especially*, I. C. MacGibbon, *The Scope of Acquiescence in International Law,* 31 *BRITISH*

view of its potency in the creation of rules of customary international law and in the determination of title to territory and the delimitation of boundaries, acquiescence is, according to Kaiyan Kaikobad, "not to be lightly presumed"[180] and must "be interpreted strictly" maintains Prof. I.C. MacGibbon.[181]

In the case at hand, the Philippine archipelago as a distinct and cohesive entity was a notorious fact, the existence of which cannot be easily denied. The earliest maps depicting the archipelago reflect the current configuration of the Philippine territory. This was the same territory that was under Spanish colony for over three centuries, during which time no other foreign power contested said territorial boundaries. This is the same territory which passed from Spanish sovereignty to that of the United States in 1898 as embodied in the Treaty of Paris.[182]

This same territory, purposely delimited in metes and bounds, was further confirmed in subsequent treaties entered into by the United States with Spain in 1900,[183] and with Great Britain in 1930.[184] This same territory was administered by the United States as its colony for almost half a century until 1946, when the Philippines declared its independence.[185] The absence of any protest over a long period of time is incontrovertible. There was no protest subsequent or simultaneous to the ratification of the Treaty of Paris as with respect to the

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Y.B. INT'L L. 143 (1954); I.C. MacGibbon, *Customary International law and Acquiescence* 33 BRITISH Y.B. INT'L L. 115 (1957).

[180] Kaiyan Homi Kaikobad, *Some Observations on the Doctrine of Continuity and Finality of Boundaries*, 54 BRITISH Y.B. INT'L L. 126 (1983).

[181] MacGibbon, *supra* note 179, at 168-169.

[182] LOTILLA, *supra* note 120, at 32-37. (Provides full text of Treaty of Peace Between the United States of America and the Kingdom of Spain, Signed in Paris, Dec. 10, 1898.)

[183] LOTILLA, *supra* note 120, at 38. (Provides full text of Treaty between the Kingdom Spain and the United States of America for the Cession of Outlying Islands of the Philippines (1900) Concluded Nov. 7, 1900; ratification advised by U.S. Senate Jan. 22, 1901; ratified by the U.S. President Jan. 30, 1901; ratifications exchanged Mar. 23, 1901; proclaimed Mar. 23, 1901.)

[184] LOTILLA, *supra* note 120, at 134. (Provides full text of Convention between the United States of America and Great Britain Delimiting the Boundary Between the Philippine Archipelago and the State of Borneo (1930).

[185] *See e.g.*, KAREN WELLS BORDEN, PERSUASIVE APPEALS OF IMPERIALIST AND ANTI-IMPERIALIST CONGRESSMEN IN THE DEBATES ON PHILIPPINE INDEPENDENCE, 1912-1934 (1973); BERNARDITA REYES CHURCHILL, THE PHILIPPINE INDEPENDENCE MISSIONS TO THE UNITED STATES, 1919-1934 (1983); Raul P. De Guzman, *The Formulation and Implementation of the Philippine Independence Policy of the United States, 1929-1946* (Phd Thesis, University of Michigan, 1957).

exercise of sovereignty by the United States over all the land and sea territory embraced in that treaty. Neither was there any protest after the Philippines gained independence when it exercised sovereignty and jurisdiction over the same territory.[186] Never during the course of this long period did the United States, or any other foreign power for that matter, protested against the extent of the Philippine national territory.

When the Philippines tendered a *note verbale* to the Secretary General of the United Nations on 20 January 1956, it stated in clear terms the limits of its territorial seas, as follows:

> The Philippine Government considers the limitation of its territorial sea as referring to those waters *within the recognized treaty limits*, and for this reason it takes the view that the breadth of the territorial sea *may extend beyond twelve miles*. It may therefore be necessary to make exceptions, upon historical grounds, by means of treaties or conventions between States… (emphasis added)[187]

The Philippines also sent diplomatic notes of the same tenor to various States regarding the extent of its internal wares and territorial sea. Again, no protests were raised except that of the United States. The silence of these States can be taken as a tacit recognition of the Philippine claim.[188] As emphasised in the *Temple of Preah Vihear* case, "a State party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation."[189] This doctrine, called estoppel, precludes a party from putting forth claims or allegations inconsistent with its previous conduct.[190] The rationale behind this principle is to prevent a State from benefitting from its own

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[186] Miriam Defensor Santiago, *The Archipelago Concept in the Law of the Sea: Problems and Perspectives*, 49 PHIL. L. J. 363 (1974).

[187] *See* Whiteman, Digest of International Law, Vol. 4, pp. 282-283. See text of statements in 46 Phil. L. J. 628 (1971); 3 PHIL. Y.B. INT'L L. 28, 31 and 46 (1974).

[188] Defensor Santiago, *supra* note 186, at 363.

[189] Temple of Preah Vihear (Cambodia v. Thailand), Separate Opinion of Vice President Alfaro, 1962 I.C.J. Rep. 6, at 39.

[190] *See,* Nuno Sergio Marques Antunes, *Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement,* 2 BOUNDARY & TERRITORY BRIEFING (2000); D. W. Bowett, *Estoppel before International Tribunals and its Relation to Acquiescence,* 35 BRITISH Y. B. INT'L L. 176 (1957); Chan, *supra* note 178, at 421 (literature on estoppel in international law).

inconsistencies to the prejudice of another State.[191] The pronouncement of the PCIJ in the *Legal Status of Eastern Greenland* case on the import of the renunciations in favour of Denmark made by Norway in respect of Greenland is instructive on this point: "[I]n accepting these bilateral and multilateral agreements as binding upon herself, Norway reaffirmed that she recognised the whole of Greenland as Danish; and thereby she debarred herself from contesting Danish sovereignty over the whole of Greenland, and in consequence, from proceeding to occupy any part of it."[192]

In the same manner, the colonial treaties that the United States entered into which confirm the territorial limits of the Philippines should bar her from contesting the Philippine claim and claiming a position inconsistent with its previous acts. Moreover, the notoriety of the facts of the Philippine claim, the general tolerance of the international community coupled with the interest of the United States on the matter and her prolonged abstention would in any case warrant the enforcement of the Philippine position against the United States.[193]

An examination of international jurisprudence which deal with the related issues of acquiescence, recognition and estoppel, and their role in the settlement of boundary and territorial disputes will reveal that the probative or evidentiary value of specific acts depend largely on the interpretation of factual circumstances which are assessed subjectively, thereby obscuring any generalization.[194] This is the same situation at the case at hand.

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[191] BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 141-142 (1987).

[192] Legal Status of Eastern Greenland (Denmark v. Norway), Judgment, 1933 P.C.I.J. (ser. A/B) No. 53, p. 22 at 68 (Sept. 5)

[193] These are the very yardsticks used by the ICJ in the Fisheries Case to declare the Norwegian practice to be not contrary to international law. In the words of the ICJ: "[t]he notoriety of the facts of the Philippine claim, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom." United Kingdom v. Norway, 1951 I.C.J. at 139. In the Arbitral Award Case, the ICJ noted that after failing "to raise any question with regard to the validity of the Award for several years," Nicaragua was no longer in position to challenge its validity — only after a period of a little more than five years. Arbitral Award Made by the King of Spain on (Honduras v. Nicaragua), Judgment, 1960 I.C.J. Rep. 192, at 213-214 (Nov. 18).

[194] Antunes, *supra* note 190.

IV. Conclusion

The object of this paper was to determine the legal status of the Philippine territorial sea claim in international law. The Philippine territorial sea claim, however, much like most international territorial disputes, is both a legal and a political issue. As insightfully noted by Victor Prescott, "disputes based solely on legal arguments … are comparatively rare," and the truth is, the "largest number of territorial disputes lack any significant legal component."[195] Ultimately, the validity or invalidity of the Philippine claim may never actually rest upon a judicial adjudication at all.

A summary of the general and specific principles of international law drawn out from the discussions in this paper is in order. First, the juridical nature and the maximum breadth of the territorial sea was not absolute.[196] Contrary to prevailing opinion, the twelve nautical mile limit of the territorial sea, throughout most of history, was not generally considered a settled rule of customary international law, but one in *statu nascendi*.[197] Second, the positive rule on the maximum breadth of the territorial sea of twelve nautical miles was only codified as a conventional rule of international law in the LOSC which only came into force in 1994.[198] Third, the historical existence of the Philippines as a polity or nation State can be traced in antiquity.[199] The 1898 Treaty of Paris upon which the Philippine territorial waters claim is premised, is more than a century old. Fourth, there is adequate legal basis

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[195] JOHN ROBERT VICTOR PRESCOTT, POLITICAL FRONTIERS AND BOUNDARIES 107 (1987).

[196] As noted by Prof O'Connel, it was only "[A]fter 1900 [that] the controversy about the juridical nature of the territorial sea waned and scarcely any author took issue with the notion that the territorial sea is subject to sovereignty. O'Connel, *supra* note 4, at 343.

[197] "*In statu nascendi*" a Latin phrase which means in the state of inception, at the moment of emergence. Even the position of the United States was never absolute, which in the incipient stages of the development of the law on the territorial was both unsure "as to the extent of the space subject to the territorial supremacy of a State in its coast waters, or as to the nature and purport of that supremacy." *See,* Marston, *supra* note 4, at 324 *citing* H.A. SMITH, GREAT BRITAIN AND THE LAW OF NATIONS 202 (1935).

[198] LOSC art. 2, *supra* note 12.

[199] R. B. Fox, *The Philippines During the First Millennium B.C.* in EARLY SOUTH EAST ASIA: ESSAYS IN ARCHAEOLOGY, HISTORY AND HISTORICAL GEOGRAPHY 227 (Ralph Bernard Smith and William Watson eds., 1979); W. G. SOLHEIM, PHILIPPINE PREHISTORY in THE PEOPLES AND ARTS OF THE PHILIPPINES 16 (Casal et al. ed., 1981); THE FILIPINO NATION: A CONCISE HISTORY OF THE PHILIPPINES (Helen R. Tubangui et al eds., 1982); F. LANDA JOCANO, PHILIPPINE PREHISTORY: AN ANTHROPOLOGICAL OVERVIEW OF THE BEGINNINGS OF FILIPINO SOCIETY AND CULTURE (1975).

to argue the validity of the Philippine territorial sea claim under international law on the grounds of recognition by treaty, devolution of treaty rights, historic rights, acquiescence, and estoppel. Nonetheless, the contrary position is equally tenable.

The present weight of opinion considers the territorial sea as an integral part of the coastal State.[200] It is part of the territory of the State over which it exercises supreme authority.[201] Current international law recognises that "[a]s far as the territorial sea proper is concerned, its maximum breadth of 12 nautical miles is accepted almost globally."[202] It is hardly necessary to belabor this point since the twelve nautical mile limit on the breadth of the territorial sea is clearly embodied in a positive rule of conventional international law, i.e., the LOSC, to which the Philippines is a State party.[203]

A State's domestic policy falls within its exclusive jurisdiction, provided, that it does not violate any obligation of international law.[204] It is indisputable that the exercise of sovereignty is limited by the rules of international law. International law must be allowed to fulfil its function of regulating the interests of the community of States through the institution of mutually acceptable restraints. From time to time, these restraints may even be contrary to the national interests of States. The arguments in support of the Philippine claim to a territorial sea greater than twelve nautical miles in breadth may be logical and persuasive but such cannot be effectively maintained with the disagreement of the majority of States and against the letter and spirit of a treaty which the Philippines is a State

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[200] PHILIP C. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION XXIV (1927).

[201] In the words of Oppenheim: "Sovereignty is supreme authority, an authority which is independent of any other earthly authority." L. OPPENHEIM, INTERNATIONAL LAW, VOL.1, PEACE: A TREATISE 118-119 (1963). Of course, needless to state, coastal States exercise complete and absolute sovereignty over its internal waters as defined in Article 8(1), LOSC as they exercise over their land territory which by definition, quite interestingly, excludes archipelagic waters.

[202] NGANTCHA, *supra* note 37, at 195.

[203] The Philippines signed the LOSC on Dec. 10, 1982 and ratified the LOSC on May 8, 1984. The fundamental principle of the law of treaties rests on the proposition that treaties are binding upon the parties to them and must be performed in good faith. This is embodied in one of the oldest principle of international law, *pacta sunt servanda.* On the nature of this obligation in international law, *see*: Josef L. Kunz, *The Meaning and the Range of the Norm Pacta Sunt Servanda,* 39 AM. J. INT'L L. 180 (1945); I. I. Lukashuk, *The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law,* 83 AM. J. INT'L L.513 (1989); Hans Wehberg, *Pacta Sunt Servanda,* 53 AM. J. INT'L L. 775 (1959).

[204] Military and Paramilitary Activities (Nicaragua/United States of America), Merits, 1986 I.C.J. Rep. at 131.

party. A State cannot adopt a selective approach to the norms of international law. The LOSC is not a fruit basket from which it can pick only those that it fancies. The Convention is a single and indivisible instrument and a package of closely interrelated compromise solutions.[205] In the community of nations, the respect for and observance of the rule of law are paramount. Territorial claims, as well as domestic maritime legislation and policies, which are legally defensible, internationally accepted, and consistent with the country's international legal obligations, safeguard, advance, and serve Philippine national interests.

[205] It is well to remember that the LOSC was adopted by a strict process of consensus, underpinned by the idea that the instrument constitutes a "package deal." *See* Buzan, *supra* note 116.

RECOGNIZING THE EFFECTS OF SAME-SEX MARRIAGES: AN EXAMINATION OF DEPARTMENT OF JUSTICE OPINION NO. 11, SERIES OF 2019 ON THE ISSUANCE OF 9(E-1) VISAS TO SAME-SEX SPOUSES OF FOREIGN DIPLOMATS

J. Eduardo Malaya[*] and Anna Christina R. Iglesias[**]

Abstract

The Family Code does not provide for same-sex marriage, and until the issuance of Department of Justice (DOJ) Opinion no. 11, series of 2019, same-sex marriages solemnized overseas involving foreign diplomats were not recognized. Same-sex spouses of diplomats assigned in the Philippines were thus accorded a visa category lower than the 9(e-1) granted to opposite-sex spouses of other diplomats. This raised questions of unequal treatment which had vexed the diplomatic corps for years. This article examines from the perspectives of private international law, diplomatic law and Philippine diplomatic practice the DOJ Opinion's seeming recognition of the effects of same-sex marriages involving foreign diplomats. It also explores the Opinion's far-reaching implications and suggests areas for further inquiry.

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I. Introduction

An issue which had vexed segments of the diplomatic corps through the years was the visa and protocolar treatment of same-sex spouses of certain of its members. Same-sex marriages have been recognized in an increasing number of countries, and diplomats with same-sex spouses have inevitably been assigned to the foreign diplomatic missions and inter-governmental organizations in Manila.

Philippine law, specifically the Family Code,[1] does not provide for same-sex marriage, thus when diplomats and officials of international organizations with same-sex spouses took up their assignments, the diplomats and officials were issued the diplomatic 9(e-1) visas, but until recently their same-sex spouse were not issued such visa, but instead the 9(e-3) visa, a lower category one.[2]

As expected, representations were made by a number of foreign missions, mostly from Western countries, with the Department of Foreign Affairs ("DFA") for the issuance of 9(e-1) visas. A lot more was riding on the issue, notably the type of identification cards ("IDs") issued by the DFA Office of Protocol and the extent of the immunities and privileges to be extended. The DFA had wanted to be helpful, given its obligation to be a good host to the missions,[3] but had to politely turn down the requests, in light of the provision in the Family Code which states that "marriage is a special contract of permanent union between a man and a woman."[4]

To further complicate matters, a female Ambassador from a European country was assigned to Manila and was accompanied by her common-law male partner. Her embassy requested a 9(e-1) visa for him as her declared spouse. The DFA was informally told that the two intentionally decided to remain as an engaged couple because their sending state's tax laws and benefits are better for singles than for married couples. Regrettably, the DFA had to deny the request. The matter was raised by that country during a bilateral Political Consultations in 2017.

The DFA was on solid legal footing in its position on the above matters as these were discussed with the Department's Office of Treaties and Legal Affairs.

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1 Exec. Order No. 209 (1987) [hereinafter Family Code of the Philippines].

2 *Infra* notes 19, 20, and 21.

3 Vienna Convention on Diplomatic Relations art. 25 and related articles, Apr. 18 1961, 500 U.N.T.S. 95 [hereinafter VCDR].

4 Family Code of the Philippines, *supra* note 1, art. 1.

The DFA also sought guidance from the Department of Justice ("DOJ"),[5] and the latter issued Opinion No. 99, series of 2002, and Opinion No. 44, s. 2017 backing the DFA's stand.

In the 2002 opinion, the DOJ stated that a 9(e) visa may not be granted to a same-sex spouse of an officer of the Asian Development Bank since same-sex marriages are not allowed under Philippine law. The opinion further noted that the fact that the marriage was validly celebrated abroad did not render ineffective the provisions of Philippine laws for the purpose of granting the 9(e) visa, stating that same-sex marriage cannot be countenanced under Philippine laws for reasons of public policy.[6]

In 2016, the DFA again sought the DOJ's opinion, this time on the request of the United States Embassy seeking the grant of the same diplomatic privileges and immunities to spouses of same-sex married diplomatic couples that are being accorded to opposite-sex married diplomatic couples. The DOJ reiterated its earlier opinion, stating that "unless and until the Family Code is amended, there is no legal basis to recognize same-sex marriages or unions between persons of the same gender and much more to accord the same privileges to the same-sex spouses of diplomats."[7]

The issue would be raised occasionally, which prompted the DFA to consult the DOJ again.

Finally, in April 2019, the DOJ issued Opinion No. 11, series of 2019 (*"Opinion"*), effectively abandoning its earlier opinions. Secretary Menardo Guevarra laid the new rule as follows:

> … (it) is our opinion that if the marriage of a foreign government official assigned to the country and his or her foreign same-sex spouse is considered valid in the place where it was celebrated (lex loci celebrationis) and said spouses are also considered validly married under their laws of nationality (lex nationalii) or domicile (lex domicilii), a diplomatic 9(e-1) visa … may be issued to the foreign same-sex spouse of the said foreign government official. On the other hand, in view of the lack of a

[5] The Department of Justice is the "principal law agency of the government and the legal counsel and representative thereof," per the Administrative Code of 1987 (Title III, Chapter 1, Section 3).

[6] *See* Sec. of Justice Op. No. 99, s. 2002, at 2.

[7] *See* Sec. of Justice Op. No. 44, s. 2017, at 1.

> marriage bond between a foreign government official and his or her informal same-sex partner or common-law spouse or partner, a diplomatic 9(e-1) visa … may not be issued to such partner or spouse.[8]

On the above basis, the DFA issued a circular Note dated May 23, 2019 to the diplomatic and consular missions and international organizations informing them that –

> … dependent spouses, who are current holders of 9(e-3) visas may now apply for conversion to 9(e-1) dependent visas, provided that the subject marriage is considered valid in the place where it was celebrated and the parties are also considered validly married under their laws of nationality or domicile.
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> A copy of the marriage certificate, or any equivalent document, should be attached to the filled-out Application Form.

These developments merit closer examination in light of their importance.

II. Diplomatic Immunities and Privileges

The grant of immunities and privileges to diplomats and their staff dates back to the earliest relations between and among states, and the rules regulating the various aspects of diplomatic relations constitute one of the earliest expressions of international law.[9] These include, among others, the inviolability of the person of the ambassador and his residence, and immunity from criminal jurisdiction of the receiving state.[10] These are meant to accord them full facilities for the performance of their functions. The immunities and privileges would extend to the members of his family derivatively.[11]

The legal framework of modern diplomatic law is the 1961 Vienna Convention on Diplomatic Relations (VCDR) to which the Philippines is a state

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[8] *See* Sec. of Justice Op. No. 11, s. 2019, at 5-6. *See* pp. 153-157 for a copy of the Opinion.

[9] MALCOLM SHAW, INTERNATIONAL LAW 567 (8th ed., 2017).

[10] EILEEN DENZA, DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 233 (4th ed., 2016).

[11] *Id.* at 319.

party.[12] The VCDR is largely a codification of customary international law, having attained stability over long practice among states.

The VCDR, in Article 37(1), recognizes and provides for immunities and privileges to the family of the diplomat and the members of his or her household: "The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36." The treatment goes back to the second half of the 17th century when states began extending such immunities and privileges to the ambassador's spouse and children (as well as members of the household forming the "diplomatic suite") because they were viewed as extensions of his or her person, and their protection was equally necessary in order to ensure his or her independence.[13]

During the negotiations on the then proposed VCDR, attempts to define "members of the family" were made but ultimately failed, and the VCDR "was left without either a true definition or a procedure for settling differences of opinion between sending and receiving States."[14]

While practice varies from state to state, informal/domestic partners, as well as same-sex partners, are increasingly being accepted as falling within the term "members of the family."[15] In her authoritative book *Diplomatic Law*, Eileen Denza noted that in the subsequent years after the VCDR took effect:

> … The increasing number of States making legal provision for same-sex marriage has extended the number of spouses seeking acceptance as family members in other States which also make such provision or accept same-sex marriages valid under foreign laws. Article 10 of the Convention requires notification to the receiving State, inter alia, of '(b) … the fact that a person becomes or ceases to be a member of the family of a member of the mission'—and such a

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[12] The Vienna Convention on Diplomatic Relations was signed by the Philippines on Oct. 20, 1961; ratified by the President on Oct. 11, 1965; and concurred in by the Senate on May 3, 1965. It entered into force for the Philippines on Dec. 15, 1965. *See* J. EDUARDO MALAYA AND CRYSTAL GALE DAMPIL-MANDIGMA (EDS), PHILIPPINE TREATIES IN FORCE 2020 263 (University of the Philippines Law Center, 2021).

[13] DENZA, *supra* note 10, at 321.

[14] DENZA, *supra,* note 10, at 319-320.

[15] ANTHONY AUST, HANDBOOK OF MODERN INTERNATIONAL LAW 134 (2nd ed., 2010).

> notification will normally provide an appropriate context for resolution of differences between sending and receiving States. [16] (underscoring supplied)

III. Visa Categories, Protocol IDs, and their Corresponding Entitlements

Like other countries, the Philippines accords varying degrees of privileges and immunities to different categories of foreign government officials coming to the country for official purpose, including the issuance of visas classified as 9(e).

A visa is "a written endorsement made on a travel document or passport by the consular official denoting that the visa application has been properly examined and that the bearer is permitted to proceed to the country of his or her destination."[17]

Per the Codified Visa Rules and Regulations of 2002 ("CVRR") which is based on the Philippine Immigration Act of 1940 (Commonwealth Act no. 613), as amended,[18] visas relevant to diplomats are of three types, as follows:

> (1) The **9(e-1)** visa is issued to persons enjoying diplomatic immunities and privileges, specifically to the following:
>
> (a) Heads of States and Heads of Government and their personal representatives;
>
> xxx
>
> (d) Cabinet ministers and their deputies and officials with cabinet rank of ministers;
>
> (e) Presiding officers of national legislative bodies;
>
> (f) Justices of the highest judicial bodies;
>
> (g) Diplomats and consular officials;
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> xxx
>
> (i) Military, naval, air and other attaches assigned to a diplomatic missions;
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[16] DENZA, *supra* note 10, at 321.

[17] RONALDO LEDESMA, AN OUTLINE OF PHILIPPINE IMMIGRATION AND CITIZENSHIP LAWS 198 (Vol. 1, 2018) (citing Section 136 of the Foreign Service Code).

[18] Commonwealth Act No. 613 (1940), as amended, sec. 9(e).

> (k) Representatives of international organizations who have diplomatic status and are bearing diplomatic passports issued by their governments;
>
> xxx
>
> (n) Accompanying wives and unmarried minor children of aliens within the above mentioned categories.[19] (underscoring supplied)

> (2) The **9(e-2)** visa is issued to any other person not included in the foregoing list, who is an officer of a foreign government recognized by the Philippines, is a national of the country whose government he represents, and is proceeding to the Philippines in connection with the official business he represents.
>
> This visa category includes *inter alia* the members of an embassy or consulate, the staff of international organizations, and official students or participants in programs under the auspices of the Philippine Government or recognized international institutions. The family members of the above-mentioned persons are also issued 9(e-2).[20] (underscoring supplied)
>
> (3) The **9(e-3)** visa is issued to the members of the household, the attendants, servants and employees of persons to whom 9(e-1) and 9(e-2) visas have been granted, and to the members of families of such the attendants, servants and employees.[21] (underscoring supplied)

The term "family," as defined in Section 79(b) of the CVRR, refers to the "immediate family of the official consisting of his spouse and unmarried minor children" while Section 79(c) specifies "members of the household" as "other persons relying solely on the support of the official and regularly or permanently residing with him, like minor unmarried adopted children, minor unmarried stepchildren, dependent parents, and children who lost status of dependent."

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[19] Codified Visa Rules and Regulations (2002), sec. 81.

[20] *Id.* sec. 82.

[21] *Id.* sec. 83.

Furthermore, the DFA Protocol Handbook on Immunities and Privileges lists as "members of the family" the spouse (as defined under Philippine law) and unmarried sons and daughters less than 21 years of age, while "other recognized members of the household" are those physically residing with the diplomatic or consular agent and those subject to reciprocal arrangements including dependent parents/parents-in-law, common-law spouse; and other dependents subject to approval of the DFA.[22]

The visa classification has implications on the type of Protocol ID issued, which in turn denotes the entitlements of the individual, as follows:

> (1) Ambassadors and officials of diplomatic rank and qualified members of their families who are holders of diplomatic passports and 9(e-1) visas are issued **Diplomatic IDs.** Other qualified diplomatic officials under existing Headquarters Agreements are also issued Diplomatic IDs.
>
> (2) Administrative and technical staff of embassies and consulates (*i.e.*, those engaged in administrative, fiscal, security, clerical and other technical functions) who are holders of 9(e-2) visas, and the qualified members of their families, are issued **Official IDs.** The qualified personnel of international organizations, including their spouses and qualified dependents, are also issued Official IDs.
>
> (3) Members of the household and foreign private staff of members of foreign missions may also be issued official IDs if they are holders of official passports and 9(e-3) visas.[23]

As specified in the VCDR, the 1963 Vienna Convention on Consular Relations and relevant agreements and conventions,[24] ambassadors and those with diplomatic rank, and the members of their families (who are issued Diplomatic IDs), are entitled to absolute immunity from the criminal jurisdiction

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[22] DEPARTMENT OF FOREIGN AFFAIRS ("DFA") OFFICE OF PROTOCOL, HANDBOOK ON PRIVILEGES AND IMMUNITIES 5 (DFA, 2016).

[23] *Id.* at 7-8.

[24] E.g., 1946 Convention on the Privileges and Immunities of the U.N., 1947 Convention on the Specialized Agencies of the U.N., and the Headquarter Agreements to which the Philippines is a signatory.

of the host country. They may not be arrested nor detained, and are also immune from civil and criminal jurisdictions except in three cases.[25]

Administrative and technical staff and their families (who are also holders of Official IDs) enjoy immunity from criminal jurisdiction, but their immunity from civil jurisdiction does not extend to acts performed outside the course of their duties. Service staff enjoy immunity only in respect to acts performed in the course of their duties.[26]

Inasmuch as the three 9(e) visa categories correspond to varying degrees of immunities and privileges, the lumping of same-sex spouses and common-law partners of diplomats with "members of the household, attendants, servants" has been a source of discomfort among certain members of the diplomatic corps, particularly those who are or identify as lesbian, gay, bisexual, and transgender.

Until the DOJ issued the Opinion No. 11 in 2019, the DFA had only been issuing to both same-sex spouses and common-law spouses or partners the 9(e-3) visas. Same-sex spouses were not accorded the same status as opposite-sex spouses. The issuance of 9(e-3) visas to same-sex spouses, which places them in the same category as "attendants, servants and employees" of persons having a higher visa category, could have been taken as an affront by the sending state.

When the first co-author of these Notes was DFA Assistant Secretary for Treaties and Legal Affairs, his office did not object to the issuance of 9(e-1) visas to same-sex spouses of foreign diplomatic and consular officials, if such persons are conferred such status by their sending state. This position is consistent with the principle that the grant of diplomatic privileges and immunities, including the issuance of appropriate visas, depends not on the application of Philippine personal laws but the recognition of the status of such individuals under the Immigration Act, in the context of the VCDR.

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[25] VCDR, *supra* note 3, arts. 29, 31, and 37(1). Under Article 31 of the VCDR, the exceptions to immunity from civil and administrative jurisdiction are the following cases: (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission; (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending States; and (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

[26] VCDR, *supra* note 3, art. 37(2, 3).

IV. DOJ Opinion No. 11 and Its Reasoning

In Opinion No. 11, series of 2019, the DOJ framed the issue as:

whether the Philippines can consider these (same-sex) spouses or (common-law) partners as the legal spouses of said foreign government officials, for the purpose of issuance to them of diplomatic 9(e-1) visas under Section 81 (n) of the Codified Visa Rules and Regulations of 2002… in relation to the Philippine Immigration Act of 1940, as amended.[27]

It then discussed the issue in the following manner:

> The Philippines follows the nationality principle (lex nationalii) in the determination of status of a person, whether a Filipino or an alien. Article 15 of the Civil Code provides that "laws relating to family rights and duties, or to the status, condition and legal capacity of persons are binding upon citizens of the Philippines even though living abroad." In case of aliens, Philippine courts may also refer to the law of their domicile (lex domicilii), if they belong to a country that follows the domiciliary principle.
>
> xxx (W)hether or not a foreign government official assigned to the Philippines is considered married is determined by the law of his or her nationality (lex nationalii) or his or her domicile (lex domicilii), and not by Philippine law.
>
> Aside from Article 15 of the Civil Code, Article 26 of the Family Code is also relevant to the issue at hand. It deals with the validity of marriages celebrated outside the Philippines. A pertinent portion of said Article reads as follows:
>
> > Art. 26. All marriages solemnized outside the Philippines, in accordance with the laws in force in the country where they were solemnized, and valid there as such, shall also be valid in this country, except those

[27] Sec. of Justice Op. No. 11, *supra* note 8, at 1.

> prohibited under Articles 35 (1), (4), (5) and (6), 36, 37 and 38.

Pursuant to the above-quoted Article, the Philippines follows the principle of lex loci celebrationis with respect to the validity of marriages celebrated abroad, i.e., a marriage that is valid where it was celebrated would also be recognized as valid here in the Philippines. This principle is subject to certain exceptions, as specified in the said Article, such as if the marriage is considered incestuous or void by reason of public policy. These exceptions apply only to marriages solemnized abroad between Filipinos, and not to marriages solemnized outside the Philippines between aliens, such as between foreign government officials assigned to the Philippines and their foreign same-sex spouses. With respect to the latter, the validity of their marriages solemnized outside the Philippines is governed principally by the principle of lex loci celebrationis. The only instance when the validity of their marriages will not be recognized here in the Philippines is when their marriages are considered universally incestuous or highly immoral…

xxx

We note that same-sex marriages are valid in several countries around the world and may not, therefore, be considered to be universally immoral. Hence, same-sex marriages solemnized abroad between foreigners that are considered valid in the country where the marriages are solemnized may be recognized as valid here in the Philippines on the basis of Article 26 of the Family Code (lex loci celebrationis). The personal status of said foreigners as married may also be recognized here in the Philippines pursuant to Article 15 of the Civil Code (lex nationalii or domicilii).

One consequence of such recognition is the issuance of appropriate visas to the same-sex spouses of foreign government officials assigned to the country, such as diplomatic 9(e-1) visas under the CVRR and their enjoyment of the relevant privileges and immunities under the Vienna Convention on Diplomatic Relations. The other consequences of such recognition, such as the exercise of civil rights of guardianships, stepchild adoption and joint adoption of

Filipino child and commercial surrogacy, are governed by the pertinent prohibitions of Philippine law in order to prevent serious injury to the public interest."[28]

The DOJ emphasized that the discussion:

pertains to the recognition of the validity of the marriages solemnized outside the Philippines between foreign government officials assigned to the Philippines and their foreign same-sex spouses, as well as their personal status as being married to one another, such that these foreign same-sex spouses may be considered the 'accompanying wives (or husbands)' of such foreign government officials under Section 81(n) of the CVRR.[29] (underscoring supplied)

The DOJ then drew the line on common-law spouses:

With respect to informal same-sex partners as well as common-law spouses or partners of foreign government officials assigned to the Philippines, in view of the fact that there is no marriage bond between them, the same recognition cannot be given to these spouses or partners as they may not be considered the "accompanying wives (or husbands)" of such foreign government officials under the aforesaid Section 81(n) of the CVRR.[30]

[28] *Id.* at 2-5.

[29] *Cf.* Under the Civil Partnership Act 2004, the United Kingdom has accepted as members of the household same-sex partners of entitled members of the diplomats of diplomatic missions. The Marriage (Same Sex Couples) Act 2013 makes the marriage of same sex couples lawful. The practice of Canada, Australia and New Zealand is similar to that of the U.K. Since 2009, the U.S. State Department has included same-sex domestic partners as "members of the family forming part of the household." Opposite-sex domestic partners would, however, not be included. DENZA, *supra* note 10, at 321-323.

[30] Sec. of Justice Op. No. 11, *supra* note 8, at 5.

V. Application of Private International Law

The 2002 and 2017 opinions of the DOJ underscored the state interest in the institution of marriage, finding same-sex marriages as not being recognized in the Philippines due to public policy reasons. Marriage, after all, is no ordinary contract; under Philippine law, it is characterized as a special contract of permanent union between a man and a woman and a vital foundation of society. As such, Philippine domestic law does not permit same-sex marriages nor does it recognize common-law unions as equivalent to marriage, having instead provisions on property relations for unions without marriage to govern them. Notably, these "unions without marriage" again exclude same-sex unions since these only apply to a man and a woman who are capacitated to marry each other and live exclusively with each other as husband and wife without the benefit of marriage or under a void marriage.[31]

Nonetheless, the need to apply conflicts of law principles is evident here to ascertain the effect of the marriage of two foreign nationals abroad, one of whom is a diplomat, and the effect of their foreign marriage in the Philippines and the status thereof of the "diplomatic spouse."

In private international law, there is universal recognition of the proposition that the legal position of an individual should normally be determined by the law of the state with which s/he is connected to in a permanent way, instead of the divergent laws of states in which he or she may be physically present, to act or engage in various transactions. This proposition includes two parts: (a) that a person is attributed certain legal characteristics of a comparatively permanent character; and (b) that these permanent characteristics should be determined by one law for all purposes rather than on a case-to-case basis by different laws.[32]

An individual's nationality or domicile serves as a permanent connection between the individual and a state, and assigning him or her a personal law will allow a determination as to which courts may exercise jurisdiction or the choice-of-law rules to govern a specific situation or transaction. An individual's personal law follows him or her wherever s/he goes and it governs transactions which affect him or her most closely (e.g., marriage, divorce, legitimacy and capacity to transact). Under the nationality principle, it is the nationality or citizenship of the

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[31] *See* Family Code of the Philippines, *supra* note 1, arts. 147 and 148.

[32] JOVITO SALONGA, PRIVATE INTERNATIONAL LAW 153 (1995).

individual that regulates his civil status, capacity, condition, family rights, duties, laws on succession, and capacity to succeed.[33] On the other hand, under the domiciliary principle, domicile, or where one establishes a permanent home, provides the basis for the individual to exercise his rights and the state to impose duties on him.[34]

Thus, with respect to foreigners, the laws on marriage will depend on their law of nationality (*lex nationalii*) or law of domicile (*lex domicilii*), and not Philippine law.

A conflict of laws perspective also takes a broader view of marriage and not just of one under Philippine domestic law. As noted by Jovito Salonga:

> ... There are other marriages contracted in other legal systems that do not exactly conform to our notion of marriage; to deny validity to them in all cases would create chaos in many domestic relationships. Furthermore, where the question at issue in a given case is neither the celebration of the marriage nor the cohabitation of the spouses in the forum, the moral standards of the forum are not infringed by conceding validity to the incidents of a foreign marriage...[35]

The above rationale for recognizing the validity of marriages celebrated abroad between foreign nationals is clear and is also supported by Art. 220 of the Civil Code which states that "(i)n case of doubt, all presumptions favor the solidarity of the family. Thus, every intendment of law or facts leans toward the validity of marriage."[36]

On the other hand, the principle of *lex loci celebrationis*, or the law of the place of celebration, generally means that all states recognize as valid those marriages celebrated in foreign countries if these complied with the formalities of

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[33] COQUIA AND PANGALANGAN, CONFLICTS OF LAW: CASES, MATERIALS AND COMMENTS 154-155 (2000).

[34] *Id.,*at 212.

[35] SALONGA, *supra* note 32, at 260.

[36] Art. 220 of the Civil Code states: "In case of doubt, all presumptions favor the solidarity of the family. Thus, every intendment of law or facts leans toward the validity of marriage, the indissolubility of the marriage bonds, the legitimacy of children, the community of property during marriage, the authority of parents over their children, and the validity of defense for any member of the family in case of unlawful aggression."

marriages there.[37] The principle springs from the maxim *locus regit actum*, meaning "the place governs the act." This means that marriages that meet the "formal" (as opposed to "substantive") requirements for marriage where these are celebrated, are valid elsewhere.[38]

As Salonga opined:

> As a general rule, a marriage should be upheld if valid according to the place of celebration, unless the marriage itself or the enjoyment of the incidents of marital relationship would offend the strongly-held notions of decency and morality of a State that has a close relationship to the contracting parties.[39]

Examples of such marriages are those considered universally incestuous (e.g. marriage between brother and sister, parent and child, etc.) or highly immoral. Same-sex marriages, as the *Opinion* noted, "not being universally incestuous and which are validly recognized in other parts of the world, would not then be considered as highly immoral."[40]

In light of the application of the laws of nationality and domicile and the *lex loci celebrationis*, there is no cogent reason to deny recognition of the effects of same-sex marriage solemnized overseas between foreign nationals.

Thus, the official notification to the DFA by the sending state of the members of the family of the diplomat[41] and the certification that an individual is his or her spouse are *imprimatur* of the validity of the marriage and the legal status of the same-sex spouse.

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[37] SALONGA, *supra* note 32, at 262.

[38] *Lex loci celebrationis* is also embodied in Article 26 of the Family Code of the Philippines, which provides that all marriages solemnized outside the Philippines in accordance with the laws in force in the country where they were solemnized, and valid there as such, shall also be valid in this country, except certain marriages considered void due to public policy. Notably, Article 26 as an expression of the principle is only applicable to Filipinos and not foreign nationals. Note also Art. 17, paragraph 1 of the Civil Code which states that generally "(t)he forms and solemnities, wills, and other public instruments, shall be governed by the laws of the country in which they are executed." SALONGA, *supra* note 32, at 263.

[39] *Id.* at 273.

[40] Sec. of Justice Op. No. 11, *supra* note 8, at 5.

[41] VCDR, *supra* note 3, art. 10(b).

Having established that for as long as the same sex marriage is valid in the country where it was solemnized and is considered valid according to the personal law of the foreign government official and his or her same-sex spouse, the same-sex spouse should thus be recognized as the spouse of the foreign official in the Philippines,[42] and hence entitled to the diplomatic visa appropriate for a spouse, and the corresponding immunities and privileges for such status.

However, the *Opinion* stopped short of granting the same diplomatic 9(e-1) visa to the informal same-sex partner or common-law spouse or partner of foreign government officials due to the "lack of a marriage bond" between them.[43]

Salonga's earlier observations on the matter are insightful:

> The… odd situation occurs with reference to a common-law marriage, i.e., a marriage accomplished by cohabitation and agreement without formal ceremony. If valid in the State where the parties cohabited while holding themselves out as man and wife, it is given recognition in sister States which do not permit this informal method of entering into the marital status; the validity has also been upheld in England and also, for their respective nations, by courts of Belgium, France, Germany and Italy. In the recent case of *Eugenio v. Velez,* the Supreme Court reiterated the rule that common-law marriages are not recognized under Philippine internal law.[44] (citations omitted)

In her study of the practices among states, Denza noted that "(t)here are also signs that in many other capitals an unmarried partner is accepted as a 'spouse' in the context of defining the diplomat's family for the purpose of administering privileges, though this does not seem to have been widely acknowledged."[45]

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[42] *See* the U.S. case Obergefell v Hodges, 135 S. Ct. 2584 (2015) which upheld the validity of same-sex marriage.

[43] Sec. of Justice Op. No. 11, *supra* note 8, at 5-6.

[44] SALONGA, *supra* note 32, at 267 (citing Eugenio v. Velez, G.R. No. 85140, May 17, 1990).

[45] DENZA, *supra* note 10, at 323.

VI. A Case for Hope, and Areas for Further Inquiry

As expected, the issuance of DOJ Opinion No. 11 was greeted with elation by many in the diplomatic corps. Not only are same-sex spouses of foreign diplomats given better treatment visa-wise, they are also now issued protocol IDs and accorded immunities and privileges as family members. It also removed a sore point between the DFA and many foreign diplomats.

Following this development, it may be asked whether same-sex marriage may now be conducted in the Philippines by foreign embassies or consulates general, for instance? The *Opinion* did not address this point. However, it may be useful to recall that Philippine law does not have provisions on same-sex marriage nor its solemnization in the country. Furthermore, Philippine laws would govern the solemnities of marriage celebrated within the embassy or consulate premises, since these are deemed within the territorial jurisdiction of the Philippines.[46]

The same view was expressed by the Superior Court for the Commonwealth of the Northern Marianas Islands in a case which incidentally involved a marriage conducted between two Filipinos inside the Philippine Consulate in Saipan. The consular marriage was invalidated by the Saipan court on the ground that a marriage conducted in the Consulate should conform to its local laws, noting that for purposes of marriage, the Consulate is not a sovereign territory of the sending state, and only the Saipan governor and mayor, not foreign consular officials, are authorized to issue marriage licenses.[47]

The DOJ was careful to confine its *Opinio*n to the issue of the proper visa category that may be issued to same-sex spouses of foreign government officials assigned to the country, in light of the time-honored definition of marriage as being "between a man and a woman." The *Opinion* though used mostly civil law and private international law principles to reach its conclusions. This being so, can the *Opinion* apply to other foreigners with same-sex spouses and not just foreign diplomats, given that same or similar considerations and reasonings seem present in both cases? This is an aspect worthy of further examination.

The *Opinion* declined to authorize the issuance of 9(e-1) visa to "informal same-sex partner or common-law spouse." How about those in a "civil union"?

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[46] ELIZABETH AGUILING-PANGALANGAN, MARRIAGE AND UNMARRIED COHABITATION - THE RIGHTS OF HUSBANDS, WIVES, AND LOVERS 29 (2nd ed., 2019).

[47] *Id.* (citing the case *In Re Marriage of Antonia Reyes Medina vs. Gil Ramos Medina* (FCD case no. 18-0024) decided on Jan. 20, 2018).

Civil union, also known as civil partnership, is a marriage-like relationship, often between members of the same sex, recognized by civil authorities within a jurisdiction. Opposite-sex or same-sex couples can live together in accordance with the laws of the countries providing for such, but with no husband-wife relationship created between them.[48] If a couple is in a civil union, how are they to be treated? Would the "civil union" satisfy the requirement of a "bond of marriage"? The *Opinion* made no reference to civil union. As the *Opinion* didn't go that far, the issue is another aspect for further examination.

These and other related issues may have to await resolution by the DOJ in another opinion or the courts when raised in appropriate cases or by Congress through the enactment of appropriate legislation.

Finally, would this ruling apply to Philippine diplomats who may have entered into same-sex marriage overseas? The short answer is no. As noted earlier, the Philippines follows the nationality principle and its "(l)aws relating to family rights and duties, or to the status, condition and legal capacity of persons are binding upon citizens of the Philippines even though living abroad."[49]

The DOJ Opinion No. 11 took on an open-minded outlook when it acknowledged the increasing incidence of same-sex marriages in several countries and recognized them as valid between foreigners on the basis of the nationality and domiciliary principles and *lex loci celebrationis*. Being so, it has given much hope to those who have long wanted and waited for Philippine law to evolve and take into account the reality of the complexity of human relationships.

[48] *See* the U.S. case of Langan v. St. Vincent's Hospital of New York, 802 N.Y.S. 2d 476 (N.Y. App. Div. 2005) which stated that the relationship of parties in same-sex unions is still governed by the law creating the union, which does not grant the parties therein the same relationship as husband and wife.

[49] Rep. Act No. 386 (1949), art. 15.

REPORTS

INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR'S REPORT ON PRELIMINARY EXAMINATION ACTIVITIES – PHILIPPINES (SOUTH CHINA SEA)*

In early 2019, the Office received a communication alleging that Chinese officials have committed crimes against humanity within the Court's jurisdiction in connection with certain activities committed in particular areas of the South China Sea. The communication alleged that China has (i) intentionally and forcibly excluded Philippine nationals from making use of the resources in certain relevant areas of the sea (such as blocking Filipino fishermen's access to traditional fishing grounds at Scarborough Shoal); (ii) engaged in massive illegal reclamation and artificial island-building in the Spratly Islands, causing significant damage to the marine life in the area; and (iii) tolerated and actively supported illegal and harmful fishing practices by Chinese nationals, which likewise has caused serious environmental damage. The communication alleged that such conduct not only violates the law of sea but gives rise to crimes against humanity, namely other inhumane acts and persecution under articles 7(1)(k) and 7(1)(h) of the Statute. The communication alleged that the crimes fall within the Court's territorial jurisdiction as they occurred in particular within Philippines' exclusive economic zone ("EEZ") and continental shelf, including in Scarborough Shoal and the Kalayaan Island Group, and that the acts occurred within the period when the Philippines was a State Party to the Statute.

With respect to these allegations, the focus of the Office's analysis primarily turned on an initial threshold issue of whether the preconditions to the exercise of the Court's jurisdiction are met: i.e. whether a State's EEZ falls within the scope of its territory under article 12(2)(a) of the Statute.

The crimes referred to in the communication were allegedly committed by Chinese nationals in the territory of the Philippines. China is not a State Party to the Rome Statute. Accordingly, the Court lacks personal jurisdiction. However, the Court may exercise territorial jurisdiction over the alleged crimes to the extent that they may have been committed in Philippine territory during the period when the Philippines was a State Party, namely 1 November 2011 until 16 March 2019. The information available confirms that the alleged conduct in question occurred in

* December 5, 2019. Pages 14-16, Paragraphs 44-51.

areas that are outside of the Philippines' territorial sea (i.e., in areas farther than 12 nautical miles from its coast), but nonetheless within areas that may be considered to fall within its declared EEZ. In this context, the Office's analysis has been conducted ad arguendo without taking a position on the different disputed claims with respect to these areas. However, the Office has concluded that a State's EEZ (and continental shelf) cannot be considered to comprise part of its 'territory' for the purpose of article 12(2)(a) of the Statute.

Article 12(2)(a) of the Statute provides that the Court may exercise its jurisdiction in two circumstances: (i) if the "State on the territory of which the conduct in question occurred" is a State Party to the Statute, or (ii) if the "crime was committed" on board a vessel or aircraft registered in a State Party. In the present situation, only the first scenario is potentially applicable. While the Statute does not provide a definition of the term, it can be concluded that the 'territory' of a State, as used in article 12(2)(a), includes those areas under the sovereignty of the State, namely its land mass, internal waters, territorial sea, and the airspace above such areas. Such interpretation of the notion of territory is consistent with the meaning of the term under international law.

Notably, maritime zones beyond the territorial sea, such as the EEZ and continental shelf, are not considered to comprise part of a State's territory under international law. This follows from the consideration that under international law, State territory refers to geographic areas under the sovereign power of a State – i.e., the areas over which a State exercises exclusive and complete authority. As expressed in the Island of Palmas case, "sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular state."11 Coastal States, however, do not have sovereignty over maritime zones beyond the territorial sea, which essentially marks the seaward frontier of States. Instead, Coastal States may possess only a more limited set of 'sovereign rights' in respect of certain maritime areas beyond the territorial sea, such as the EEZ and continental shelf.

Under the law of the sea, a distinction is made in this regard between 'sovereignty' and 'sovereign rights', in terms of what powers a State may exercise in a particular maritime zone. In the context of the law of the sea, the sovereignty of a State implies its exclusive legal authority over all its internal waters and territorial sea (and where applicable, the archipelagic waters). By contrast, in maritime zones beyond the territorial sea (areas sometimes referred to as 'international waters'), international law confers certain prerogatives on a Coastal

State (and to the exclusion of others), such as fiscal, immigration, sanitary and customs enforcement rights in the contiguous zone and natural resource-related rights in the EEZ and the continental shelf. Such 'sovereign rights' are limited to specific purposes, as enumerated in UN Convention on the Law of the Sea ("UNCLOS"), but do not permit the State to exercise full powers over such areas, as sovereignty might allow.

Overall, in the Office's view, the EEZ (and continental shelf) cannot be equated to territory of a State within the meaning of article 12 of the Statute, given that the term 'territory' of a State in this provision should be interpreted as being limited to the geographical space over which a State enjoys territorial sovereignty (i.e., its landmass, internal waters, territorial sea and the airspace above such areas). Criminal conduct which takes place in the EEZ and continental shelf is thus in principle outside of the territory of a Coastal State and as such, is not encompassed under article 12(2)(a) of the Statute (unless such conduct otherwise was committed on board a vessel registered in a State Party). This circumstance is not altered by the fact that certain rights of the Coastal State are recognised in these areas. While UNCLOS confers functional jurisdiction to the State for particular purposes in such areas, this conferral does not have the effect of extending the scope of the relevant State's territory but instead only enables the State to exercise its authority outside its territory (i.e., extraterritorially) in certain defined circumstances.

In the present situation, the conduct alleged in the communication received did not occur in the territory of the Philippines, but rather in areas outside its territory, purportedly in its EEZ and continental shelf. Further, while article 12(2)(a) also extends the Court's jurisdiction to crimes committed on board vessels registered in a State Party, this condition likewise is not met, given that the alleged crimes were purportedly committed on board Chinese registered vessels. Finally, as previously highlighted, the remaining basis for the exercise jurisdiction (active personality) under article 12(2)(b) is also not met, given the Chinese nationality of the alleged perpetrators in question. Accordingly, the Office concluded that the crimes allegedly committed do not fall within the territorial or otherwise personal jurisdiction of the Court

INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR'S REPORT ON PRELIMINARY EXAMINATION ACTIVITIES – PHILIPPINES (EXTRAJUDICIAL KILLINGS)*

Procedural History

The situation in the Republic of the Philippines ("the Philippines") has been under preliminary examination since 8 February 2018. During the reporting period, the Office continued to receive communications pursuant to article 15 in relation to this situation.

On 13 October 2016, the Prosecutor issued a statement on the situation in the Philippines, expressing concern about the reports of alleged extrajudicial killings of purported drug dealers and users in the Philippines. The Prosecutor also recalled that those who incite or engage in crimes within the jurisdiction of the Court are potentially liable to prosecution before the Court, and indicated that the Office would closely follow relevant developments in the Philippines. 233. On 8 February 2018, following a review of a number of communications and reports documenting alleged crimes, the Prosecutor opened a preliminary examination of the situation in the Philippines since at least 1 July 2016.

Preliminary Jurisdictional Issues

The Philippines deposited its instrument of ratification to the Statute on 30 August 2011. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of the Philippines or by its nationals since 1 November 2011.

On 17 March 2018, the Government of the Philippines deposited a written notification of withdrawal from the Statute with the UN Secretary-General. In accordance with article 127, the withdrawal took effect on 17 March 2019. The Court retains jurisdiction over alleged crimes that have occurred on the territory of the Philippines during the period when it was a State Party to the Statute, namely from 1 November 2011 up to and including 16 March 2019. Furthermore, the

* December 5, 2019. Pages 60-65, Paragraphs 231-254.

exercise of the Court's jurisdiction (i.e. the investigation and prosecution of crimes committed up to and including 16 March 2019) is not subject to any time limit.

Contextual Background

From 1988-1998, 2001-2010 and 2013-2016, Mr Rodrigo Duterte served as Mayor of Davao City, one of the largest and most urban cities in the Philippines. Throughout his tenure as mayor, a central focus of his efforts was purportedly fighting crime and drug use. On different occasions, then-Mayor Duterte reportedly publicly supported and encouraged the killing of petty criminals and drug dealers in Davao City. During the mentioned period, it is reported that police officers in Davao City as well as the so-called Davao Death Squad carried out at least 1,000 killings in incidents that share a number of common features.

In 2016, Mr. Duterte ran as a candidate for President of the Philippines. As part of his campaign platform, he promised to launch a war on crime and drugs, inter alia, through replicating the strategies he implemented in Davao City during his time as mayor. On 9 May 2016, Mr. Duterte was elected President of the Philippines, and was sworn in on 30 June 2016. On 1 July 2016, the Philippine National Police ("PNP") launched a nationwide anti-drug campaign in line with President Duterte's pronouncement to eradicate illegal drugs during the first six months of his term. In the context of that campaign, PNP forces have reportedly conducted tens of thousands of operations to date which have reportedly resulted in the killing of thousands of alleged drug users and/or small-scale dealers. It is also reported that, since 1 July 2016, unidentified assailants have carried out thousands of attacks similarly targeting such individuals.

Since July 2016, President Duterte has repeatedly and publicly confirmed his commitment to the continuation of this anti-drug campaign. Other senior government and PNP officials have also reportedly made regular public statements in support of the operations and activities carried out pursuant to or in connection with the adopted anti-crime/drug policies.

The UN Secretary-General, UN bodies and experts, various States, international NGOs and national civil society representatives have expressed serious concern about the alleged extrajudicial killings and criticised statements by President Duterte which have been viewed as endorsing the killings and fostering an environment of impunity and violence. On 11 July 2019, the UN Human Rights Council adopted resolution 41/2, inter alia, (i) urging the Government of the

Philippines to take all necessary measures to prevent extrajudicial killings, to carry out impartial investigations and to hold perpetrators accountable, and (ii) requesting the High Commissioner to prepare a comprehensive written report on the situation of human rights in the Philippines, to be presented at the forty-fourth session of the Human Rights Council. President Duterte has reportedly stated that he will not be intimidated by international reactions, including a possible future ICC trial, and that his campaign against drugs will continue to be unrelenting and brutal.

Subject-Matter Jurisdiction

In conducting its subject-matter assessment in relation to the situation in the Philippines, the Office has examined several forms of alleged conduct and considered the possible legal qualifications open to it under the Rome Statute. The Office has focused in particular on whether the alleged conduct amounts to crimes against humanity. The descriptions below are without prejudice to the identification by the Office of any further alleged crimes.

The preliminary examination has focused on crimes allegedly committed in the Philippines between 1 July 2016 and 16 March 2019 in the context of the so-called "war on drugs" ("WoD") campaign launched nationwide by the government to fight the sale and use of illegal drugs. In particular, it focuses on allegations that President Duterte and senior members of law enforcement agencies and other government bodies actively promoted and encouraged the killing of suspected or purported drug users and/or dealers, and in such context, members of law enforcement, including particularly the PNP, and unidentified assailants have carried out thousands of killings throughout the Philippines.

Based on the information available, since the launch of the anti-drug campaign on 1 July 2016, thousands of individuals have been killed purportedly for reasons related to their alleged involvement in the use or selling of drugs, or otherwise due to mistaken identity or inadvertently when perpetrators opened fire on their apparent intended targets. Reportedly, over 5,300 of these killings were committed in acknowledged anti-drug operations conducted by members of Philippine law enforcement or in related contexts (such as while in custody or detention). Philippine officials have consistently contended that such deaths occurred as a result of officers acting legitimately in self-defence in the context of violent, armed confrontations with suspects. However, such narrative has been

challenged by others, who have contended that the use of lethal force was unnecessary and disproportionate under the circumstances, as to render the resulting killings essentially arbitrary or extrajudicial executions.

Thousands of killings were also reportedly carried out by unidentified assailants (sometimes referred to as 'vigilantes' or 'unknown gunmen'). According to the information available, authorities have often suggested that such killings are not related to the WoD, contending that they occurred in the context of love triangles or, alternatively, feuds or rivalries between drug gangs and criminal organisations. Nevertheless, other information available suggests that many of the reported killings by unidentified assailants took place in the context of, or in connection to, the government's anti-drug campaign. In this regard, it has also been alleged that some of these vigilante-style executions committed by private citizens or groups were planned, directed and/or coordinated by members of the PNP, and/or were actually committed by members of law enforcement who concealed their identity and took measures to make the killings appear to have instead been perpetrated by vigilantes.

In addition to killings, it has been alleged that some individuals have been subjected to serious ill-treatment and abuses prior to being killed by state actors and other unidentified assailants, such as after being arrested or abducted and while being held in custody prior their deaths. It has also been alleged that in several incidents, relatives (such as spouses, parents or children) of the victims witnessed the killings, thereby sustaining serious mental suffering. Further, it has been reported that in at least a few incidents, members of law enforcement raped women who were apparently targeted because of their personal relationships to individuals alleged to have been involved in drug activities.

Overall, reportedly, most of the victims of the alleged crimes in question were persons suspected or known, by authorities, to purportedly be involved in drug activities, that is, individuals allegedly involved in the production, use, or sale (either directly or in support of such activities) of illegal drugs, or in some cases, individuals otherwise considered to be associated with such persons. The majority of the victims have notably been from more impoverished areas and neighbourhoods, especially those within urban areas, such as in locations within the Metro Manila, Central Luzon, Central Visayas, and Calabarzon regions, among others. In addition, it has been reported that some public officials, including civil servants, politicians, mayors, deputy mayors and barangay-level officials, and current and former members of law enforcement were allegedly killed because of

their purported links to the illegal drug trade. According to the information available, many of the persons targeted overall by the alleged acts had been included on drug watch lists compiled by national and/or local authorities, and some of those targeted also included persons who had previously 'surrendered' to the police in connection to Oplan Tokhang. In a number of cases, notably, the alleged acts were committed against children or otherwise affected them. For example, reportedly, a significant number of minors (ranging in age from a few months old to 17 years old) were victims of apparent WoD-related killings, and in this respect, were killed in a number of circumstances, including as direct targets, as a result of mistaken of identity or as collateral victims.

Admissibility Assessment

Following a thorough legal assessment of the information available, the Office has sought to finalise its analysis on the admissibility of potential cases arising from the situation. As set out in article 17(1) of the Statute, admissibility requires an assessment of complementarity and gravity.

Open source information indicates that a limited number of investigations and prosecutions have been initiated (and, in some cases, completed) at the national level in respect of direct perpetrators of certain criminal conduct that allegedly took place in the context of, or connection to, the WoD campaign. For example, Philippine government officials and bodies have provided sporadic public updates on the number of investigations conducted by various authorities into killings that occurred during law enforcement operations. The information available also indicates that criminal charges have been laid in the Philippines against a number of individuals – typically low-level, physical perpetrators – with respect to some drug-related killings. Based on the information available, one WoD-related case has proceeded to judgment in the Philippines, that of three police officers who were convicted by the Caloocan City Regional Trial Court in November 2018 for the murder of 17-year-old Kian Delos Santos.

While in principle, only national investigations that are designed to result in criminal prosecutions can trigger the application of article 17(a)-(c) of the Statute, out of an abundance of caution the Office is also examining national developments which appear to fall outside the technical scope of the term 'national criminal investigations', including Senate Committee hearings into extrajudicial killings.

OTP Activities

During the reporting period, the Office sought to finalise its subject-matter analysis of such alleged conduct as well as attendant admissibility assessments concerning complementarity and gravity. It gathered, received, and analysed information from a wide range of sources. The Office reviewed hundreds of media and academic articles, reports, databases, legal submissions, primary documents, press releases and public statements by intergovernmental, governmental and non-governmental organisations, and other relevant sources, including such that was received through article 15 communications submitted directly to the Office. Consistent with standard practice, the Office has subjected such information to rigorous source evaluation, including an independent and thorough assessment of the reliability of sources and credibility of information received. In connection with this process, the Office has continued to take steps to verify the seriousness of information received and corroborate a number of relevant factual issues.

In the context of its assessment of subject-matter jurisdiction, the Office further examined particular features of the WoD campaign and implementation, independently documented and analysed relevant individual alleged incidents, and conducted an analysis of relevant patterns and trends. With respect to the legal assessment, the Office has analysed the information available to determine whether the alleged conduct of State actors and/or other individuals (such as vigilantes) amounts to the crimes against humanity of murder, torture, other inhumane acts or rape. Such analysis was conducted with a view to identifying potential cases likely to arise from any potential investigation into the situation and the persons or groups of persons who may bear the greatest responsibility for the identified alleged crimes.

In addition, the Office has gathered information relevant to the determinations on admissibility. For example, the Office has collected and assessed open source information on any relevant national proceedings being conducted by Philippine authorities. The Office has also monitored proceedings that appear to remain ongoing and taken steps to obtain further information pertinent to the complementarity assessment.

Throughout the reporting period, the Office continued to engage and consult with relevant stakeholders in order to address a range of matters relevant to the preliminary examination and to seek further information to inform its assessment of the situation. For example, the Office held a number of meetings

and was in contact with such stakeholders, including various civil society organisations.

The Office has also been following with concern reports of threats and other measures apparently taken against human rights defenders, including those who have criticised the WoD campaign. The Office will continue to closely monitor such reports, as well as other relevant developments in the Philippines.

Conclusion and Next Steps

During the reporting period, the Office significantly advanced its assessment of whether there is a reasonable basis to proceed under article 15(3) of the Statute. During 2020, the Office will aim to finalise the preliminary examination in order to enable the Prosecutor to reach a decision on whether to seek authorisation to open an investigation into the situation in the Philippines.

TREATIES & AGREEMENTS

SUMMARY OF
BILATERAL TREATIES AND AGREEMENTS
(2019)

ALBANIA

Agreement Between the Government of the Republic of the Philippines and the Council of Ministers of the Republic of Albania on the Waiver of Visa Requirements for Holders of Diplomatic, Service and Official Passports

Objective/s:

The Agreement aims to enhance the bilateral relations between the Parties by exempting from the obligation to obtain visas for the entry and stay in the territory of the other Party the nationals of either Party, who are holders of valid diplomatic, service, and official passports, whose stay does not exceed ninety (90) days from the first date of entry or when transiting through that territory on their way to a third State, as well as those entering and staying in the territory of the other Party for the duration of their assignment, provided that the other Party was given written notification of at least thirty (30) days prior to their assumption of Post.

Obligation/s of the Parties:

a. Both Parties exempts the other Party from the obligation to obtain visas for the entry and stay in the territory of the other Party the nationals of either Party, who are holders of valid diplomatic, service, and official passports, whose stay does not exceed ninety (90) days from the first date of entry or when transiting through that territory on their way to a third State, as well as those entering and staying in the territory of the other Party for the duration of their assignment, provided that the other Party was given written notification at least thirty (30) days prior to their assumption of Post.
b. Nationals of both Parties who are holders of valid diplomatic, service, and official passports may extend the duration of their stay after the expiration

of the period mentioned in Article II upon the written approval of the competent authorities of the other Party in accordance with its laws.

c. Both Parties shall exchange, through diplomatic channels, their respective valid passport specimens within thirty (30) days after the signing of this Agreement. The Parties shall inform each other about the introduction of new types and classifications of passports as well as any changes or modification to those currently in use and shall furnish relevant specimens within thirty (30) days from their adoption for use.

d. Notwithstanding the exemption from obtaining visas under this Agreement, it is the duty of persons benefiting therefrom to comply with the laws and regulations on entry, stay in, and exit from the other Party's territory.

e. Both Parties reserve the right to refuse admission to persons designated as undesirable or considered likely to endanger the public peace, public order, public health, or national security.

f. Disputes between the States arising from the interpretation or application of the Memorandum will be settled by consultations and negotiations through diplomatic channels.

Effectivity:

The Agreement took effect on Mar. 26, 2019. It shall be valid for an indefinite period. Either Party may terminate the Agreement by giving written notice to the other Party through diplomatic channels.

CZECH REPUBLIC

Memorandum of Understanding on the Establishment of Political Consultation Mechanism between the Department of Foreign Affairs of the Republic of the Philippines and the Ministry of Foreign affairs of the Czech Republic

Objective/s:

To establish a mutually beneficial cooperation through consultations and exchanges of opinions at different levels on matters of bilateral relations and international issues.

Obligation/s of the Parties:

The Parties shall hold political consultations every two (2) years or at any time mutually convenient to both Parties to review their bilateral relations and to exchange views on regional and international issues of common interest. It shall be carried out alternately in Manila and Prague or in a third country on the occasion of an international conference or meeting, participated in by both Parties.

Effectivity:

The MOU took effect on Jan. 21, 2019 the date it was signed by the Parties. It shall last for a period of five years and shall be automatically renewed for similar periods unless one of the Parties notifies the other Party of its desire to terminate the MOU.

ISRAEL

Agreement on Temporary Employment of Filipino Home-Based Caregivers Between the Government of the Republic of the Philippines and the Government of the State of Israel

Objective/s:

To establish a government-to-government arrangement to improve systems and processes concerning the recruitment and temporary employment of Filipino home-based caregivers in Israel.

Obligation/s of the Parties:

1. The Ministry of Interior, through the Population and Immigration Authority ("PIBA") in the Ministry of Interior of the State of Israel shall take, *inter alia*, reasonable steps:

    a. To ensure that the home-based caregivers recruited under this Agreement and its implementation Protocol shall receive an

employment contract signed by the employer or his representative, which shall be binding upon the employer and the home-based caregiver, the standard text of which shall have been agreed upon by the Implementing Bodies;

b. To ensure that the prospective employers hold valid permits issued by the PIBA allowing them to employ foreign home-based caregivers as per the PIBA's regulations and procedures; and

c. To promote the protection of the rights of Filipino home-based caregivers recruited and employed in accordance with this Agreement and its implementation Protocol, under relevant Israel laws and regulations, including their living and working conditions, in cooperation with other relevant Israeli Ministries.

2. The Department of Labor and Employment, through Philippine Overseas Employment Administration shall take, *inter alia*, reasonable steps:

a. To ensure that the recruitment and deployment of Filipino home-based caregivers under this Agreement shall be in accordance with the implementation Protocol;

b. To ensure that the prospective caregivers have no derogatory record; and

c. To ensure that only Filipino home-based caregivers who possess the necessary qualifications and skills, and are physically and mentally fit to perform the work and who have been provided with the proper orientation with regard to the terms and conditions of the employment contract, relevant laws, rules, regulations, policies, procedures, norms cultures, and practices in Israel prior to their deployment, shall be deployed.

Effectivity:

The Agreement entered into force on June 28, 2019 and shall remain in full force for three (3) years and shall be deemed renewed automatically for similar periods unless a Party notifies the other Party through diplomatic channels, of its desire to terminate the Agreement four (4) months prior to the requested termination date.

Agreement on Temporary Employment of Filipino Workers in the Hotel Sector in the State of Israel Between the Government of the Republic of the Philippines and the Government of the State of Israel

Objective/s:

To establish government-to-government systems and processes for the recruitment and temporary employment of Filipino hotel workers in Israel, in accordance with the current Israeli governmental resolution requiring that the deployment of foreign hotel housekeepers for work in the hotel sector in Israel shall be implemented solely through government-to-government agreements or arrangements.

Obligation/s of the Parties:

1. The Ministry of Interior, through the Population and Immigration Authority ("PIBA") in the Ministry of Interior of the State of Israel shall take, *inter alia*, reasonable steps:

    a. To ensure that the hotel workers recruited under this Agreement and its implementation Protocol shall receive an employment contract signed by the employer through his authorized representative, which shall be binding upon the employer and the hotel workers, the standard text of which shall have been agreed upon by the Parties;
    b. To ensure that the prospective employers hold valid permits issued by the PIBA allowing them to employ foreign hotel workers as per the PIBA's regulations and procedures; and
    c. To promote the protection of the rights of Filipino home-based caregivers recruited and employed in accordance with this Agreement and its implementation Protocol, under relevant Israeli laws and regulations, including their living and working conditions, in cooperation with other relevant Israeli Ministries.

2. The Department of Labor and Employment, through the Philippine Overseas Employment Administration, shall take, *inter alia*, reasonable steps:

a. To ensure that the recruitment and deployment of Filipino hotel workers under this Agreement shall be in accordance with the implementation Protocol;
b. To ensure that the prospective hotel workers have no derogatory record; and
c. To ensure that only Filipino hotel workers who possess the necessary qualifications and skills, and are physically and mentally fit to perform the work and who have been provided with the proper orientation as regards to the terms and conditions of the employment contract, relevant laws, rules, regulations, policies, procedures, norms cultures, and practices in Israel prior to their deployment, shall be deployed.

Effectivity:

The Agreement entered into force on June 28, 2019 and shall remain in full force for three (3) years and shall be deemed renewed automatically for similar periods unless a Party notifies the other Party through diplomatic channels, of its desire to terminate the Agreement four (4) months prior the requested termination date.

NEPAL

Memorandum on the Establishment of Bilateral Consultation Mechanism Between the Government of the Republic of the Philippines and the Government of Nepal

Objective/s:

To promote cooperation and implementation of joint activities as may be mutually agreed upon, through diplomatic channels.

To further strengthen bilateral relations, develop cooperation, and facilitate exchange of visits as well as to hold consultations in fields of mutual interest including agriculture, forestry, education, trade, investment, infrastructure, technology, tourism, economic, and cultural cooperation.

Obligation/s of the Parties:

The Participants will hold consultations between their representatives at the mutually agreed level every three (3) years or earlier if necessary, alternately in the Philippines and Nepal, to review all aspects of bilateral relations, explore new areas of cooperation and share views on regional and global issues of mutual concern. The consultations may take place in a third country on the occasion of an international conference or meeting which both sides are participating in.

Effectivity:

The Memorandum of Understanding entered into force on Dec. 1, 2019, the date of its signature, and shall remain in force for a period of five (5) years and shall be considered as automatically renewed for consecutive periods of five (5) years unless terminated by one of the Participants by sending written notice six (6) months in advance through diplomatic channels.

QATAR

Memorandum of Understanding for the Establishment of Political Consultations on Issues of Common Interest Between the Department of Foreign Affairs of the Republic of the Philippines and the Ministry of Foreign Affairs of the State of Qatar

Objective/s:

To establish regular political consultations on bilateral relations and international issues of common interest in order to exchange information and views about developments that affect the Parties' respective countries.

Obligation/s of the Parties:

The Participants shall have consultations on the following issues:

1. The Participants will determine and agree on the dates, venue, level of representation, and agenda of each round of consultations, which

will be held alternately in the Republic of the Philippines and in the State of Qatar. The Participants may also decide to hold consultations at the sidelines of official meetings of international organization fora;

2. The two Participants agree, when necessary, to hold meetings between diplomatic personnel of each Participant. The Agreement on the terms and conditions of these meetings will be agreed upon through diplomatic channels, and the focus of these meetings will be on the issues identified in Paragraph (1) of this MOU; and
3. The Participants will intensify contacts among diplomatic missions of both Participants accredited to a third State, as well as among their Permanent Missions to the United Nations and other international organizations, for the purpose of exchanging views on the areas specified in Paragraph (1) of this MOU and in accordance with the terms and conditions already stated through diplomatic channels.

Effectivity:

The MOU took effect when it was signed in Manila on the Dec. 3, 2019. It will remain valid for five (5) years and will be renewed for a similar period unless one Participant notifies the other of its intention to terminate the Memorandum at least six (6) months before the date of termination.

Memorandum of Understanding on Cooperation in the Field of Health Between the Republic of the Philippines and the Government of the State of Qatar

Objective/s:

To enhance the two countries' cooperation on health in areas including, but not limited to, medical research, disease prevention and control, application of new technologies, and medicine and medical equipment.

Obligation/s of the Parties:

The Parties shall cooperate on the following areas:

(a) Research in the healthcare field, including implementation of healthcare tasks, biomedical research, technology and healthcare delivery systems, the economics of long-term healthcare services, and alternative ways of extending healthcare beyond institutional settings;
(b) Exchange expertise in the health field including communication, statistical methods, quality standards, and healthcare financing;
(c) Exchange of scientists, experts and other healthcare professionals, facilitating internships and advanced courses for both Filipino Citizens and Qatari Nationals to promote the principles of reciprocity and mutual benefit;
(d) Nursing and first aid;
(e) Exchange of healthcare practitioners technology between the two Parties;
(f) Compliance with quality, specifications, and the high standards when delivering healthcare services;
(g) Exchange of scientists and healthcare professionals, including the exchange visits between medical officers and specialists, based on the need and requirements of each Party, with the aim of sharing expertise and information in the relevant medical and health fields as need be; and
(h) Any other fields to be agreed upon by the Parties.

Effectivity:

The MOU took effect on July 14, 2019. It shall remain in effect for a period of one (1) year and will be renewed for a similar period unless one Participant notifies the other of its intention to terminate the MOU at least six (6) months before the date of its termination or expiration.

Memorandum of Understanding for the Cooperation in the Field of Technical Vocational Education and Training Between the Government of the Republic of the Philippines and Government of the State of Qatar

Objective/s:

The Parties in accordance with the laws and regulations in force in their countries will endeavor to sustain and develop cooperation in the areas of Technical Vocational Education and Training ("TVET").

Obligation/s of the Parties:

The Parties will endeavor to carry out TVET activities related to the technical cooperation, which will include the following:

(a) Hosting joint conferences, symposia, workshops, and exhibitions for trainees, employees, trainers, and technology institute administrators;
(b) Recommend conducting joint research and technical studies which promote TVET;
(c) Recommend joint training programs for employees, trainers, and technology institute administrators;
(d) Exchange of professionals in technical areas to allow conducting training programs and studies;
(e) Exchange of experts in the area of managing technology institutes;
(f) Exchange and publish research, studies, and other relevant materials;
(g) Exchange of technology programs among private sector organizations and technology institutes;
(h) Exchange of information on mutual recognition of skills and qualifications awarded in disciplines to be identified and given priority by both Parties; and
(i) Other forms of technical cooperation as may be agreed upon in the future.

Effectivity:

The MOU took effect on July 24, 2019. It shall remain in effect for three (3) years and will be renewed for a similar period unless either Party notifies the other in writing of its intention to terminate the MOU.

SWEDEN

Agreement on Social Security Between the Republic of the Philippines and the Kingdom of Sweden

Objective/s:

The SSA aims to reduce or entirely eliminate nationality-based restrictions on social security. Applying the principle of reciprocity, the following are the salient features:

1. Equality of treatment, which entitles a covered Filipino worker, including his family members and survivors, to social security benefits under the same conditions as nationals of SE (Article 4);
2. Export of benefits, which allows a covered Filipino worker to continue receiving his social security benefits wherever he decides to reside, whether in PH, in SE or even in a third State (Article 5);
3. Totalization of insurance periods, which provides for combining creditable periods (excluding overlaps) of covered workers under the social security schemes of PH and SE, to determine eligibility to benefits and the manner of calculation of benefit payment on a proportional-sharing basis (Articles 12 and 15); and
4. Mutual administrative assistance, which facilitates coordination between the designated liaison agencies of PH and SE in extending assistance to covered workers and handle matters pertaining to the implementation of the SSA (Article 18).

Obligation/s of the Parties:

The SSA covers the following laws (Article 2):

1. With regard to Sweden, it covers legislation on: 1) sickness compensation and activity pension; ii) income-based old-age and guarantee pensions; iii) survivor's pension and surviving children's allowance; iv) accidents at work and occupational diseases; and v) social security contributions; and
2. With regard to the Philippines, it covers legislation on: i) the Social Security Law and regulations made thereunder as they relate to retirement, disability, and death benefits; ii) the Government Service Insurance Act and the regulations made thereunder as they relate to retirement, disability, death, and survivorship benefits; iii) the Portability Law as regards aggregation of periods of insurance under SSS and GSIS laws; and iv) Employees' Compensation and State Insurance Fund, as amended, as it relates to work-related injury, sickness, and death.

Effectivity:

The Agreement entered into force on Nov. 1, 2019 and shall remain in full force without limitation on its duration. It may be terminated by either Contracting state by giving a twelve-month prior notice through the other Party through an Official Note to the other Contracting State.

TURKEY

Memorandum of Understanding on Defense Industry Cooperation Between the Department of National Defense of the Republic of the Philippines and the Presidency of Defence Industries of the Republic of Turkey

Objective/s:

The MOU aims to develop cooperation between the Parties, particularly in the defense industry, through government-to-government acquisition of defense materiel and products from companies within the Turkish Defence Industries and related activities, on the basis of friendship reciprocity and common interest, and in accordance with the respective Constitutions and national laws of the Parties.

Obligation/s of the Parties:

The Participants will exert their best efforts to promote and facilitate the participation of their respective country's defense industry in each other's acquisition and procurement as well as, in joint research, development, and production, and co-production of defense articles.

The forms of cooperation covered by this MOU will include the following:

a. Cooperation in the development, production, co-production, operation, and management of defense materials;
b. Cooperation in transfer of technology, articles, materiel, and its corresponding Logistics Support, Supplies, and Services (LSSS);
c. Exchange of personnel for cross-training purposes related to defense industry;
d. Joint Research and Development on subject of mutual interest;
e. Exchange of information and data on defense industry and other related matters;
f. Convening of joint seminars and meetings on defense industry and other related matters; and
g. Others as may be mutually agreed upon.

Effectivity:

The MOU took effect on Aug. 1, 2019. It shall be effective for five (5) years and shall be renewed automatically for a similar period, unless one Participant notifies the other in writing, through diplomatic channels, of its intention to suspend or terminate this MOU, at least ninety (90) days prior to the intended date of termination.

SUMMARY OF
ASEAN TREATIES AND AGREEMENTS

PROTOCOL TO IMPLEMENT THE TENTH PACKAGE OF COMMITMENTS ON FINANCIAL SERVICES UNDER THE ASEAN FRAMEWORK AGREEMENT ON SERVICES

Objective/s:

To affirm the commitment to finalize the Tenth Package of Commitments ("Tenth Package") meeting the thresholds agreed at the 44th Meeting of the ASEAN Economic Ministers held on Aug. 28, 2012, and to implement the Tenth Package by the timelines specified.

Obligation/s of the Parties:

Member states shall accord preferential treatment to one another on a Most-Favored-Nation basis. Each member state shall submit its Schedule of Specific Commitments, Schedule of Horizontal Commitments, and List of Most-Favored-Nation (MFN) Exemptions at the time of signing of this Protocol.

Effectivity:

The Treaty was signed on Nov. 11, 2018, and came into force ninety days thereafter, or on February 9, 2019.

PROTOCOL 7 ON CUSTOMS TRANSIT SYSTEM

Objective/s:

The Treaty was signed on Nov. 11, 2018, and came into force ninety days thereafter, or on Feb. 9, 2019.

Obligation/s of Parties:

1. Contracting parties shall allow goods to be transported across its territory under the ACTS procedure.
2. In general, the goods placed under the ACTS procedure shall be exempt from:

    a. Routine physical customs inspections other than inspection of seals and non-intrusive inspection
    b. Custom escorts
    c. The requirement to provide any security or bond in addition to that prescribed under this Protocol

3. Contracting parties shall use information technology to manage risk and register, control, monitor, and exchange data concerning the ACTS procedure.
4. Contracting parties shall render assistance to each other with respect to inquiries and the investigation and/or recovery of claims arising or in connection with a transit operation.

Effectivity:

The treaty entered into force on Feb. 19, 2019.

PROTOCOL 3 ON DOMESTIC CODE-SHARE RIGHTS BETWEEN POINTS WITHIN THE TERRITORY OF ANY OTHER ASEAN MEMBER STATES

Objective/s:

To further the ASEAN Multilateral Agreement on the Full Liberalization of Passenger Air Services and to remove restrictions on air services.

Obligation/s of the Parties:

Designated airline(s) of each contracting party may exercise domestic code-share rights as marketing airline(s), provided there is no exercise of cabotage rights. The designated airline(s), in operating or holding out the code-share services on the specified route(s), may market and sell other points within the territory of the respective contracting party. The operating marketing airline may be required to file for approval any cooperative marketing arrangements before the aeronautical authorities of each contracting party. Capacity, frequency, and aircraft type with regard to air passenger services operated under this Protocol exercising the code-share rights shall not be limited.

Effectivity:

The Treaty took effect on Mar. 6, 2019.

2017 ASEAN-HONG KONG, CHINA FREE TRADE AGREEMENT

Objective/s:

To progressively liberalize and facilitate trade in goods and services; promote and enhance investment opportunities; strengthen, diversify, and enhance trade, investment, and economic links; and provide special and differential treatment to ASEAN member states to facilitate their more effective economic integration.

Obligation/s of Parties:

The Agreement covers obligations of the parties in liberalizing trade of goods and services. The contracting parties shall eliminate/reduce their customs duties on originating goods of other contracting parties. Each party shall accord national treatment to the goods of other parties in accordance with GATT 1994. Each party shall make its relevant laws, regulations, decisions, and rulings available on the internet. No party shall adopt or maintain any prohibition or quantitative restriction on the importation of any good of any other party or on

the exportation of any good destined for any other party (with exceptions). Each party shall ensure that all automatic and non-automatic import licensing measures are implemented in a transparent and predictable manner. Each party shall designate a contact point to facilitate communication among the parties on any matter relating to the Agreement.

Effectivity:

The agreement entered into full force on June 11, 2019.

2017 AGREEMENT ON INVESTMENT AMONG GOVERNMENTS OF HONG KONG SPECIAL ADMINISTRATIVE REGION OF PEOPLE'S REPUBLIC OF CHINA AND THE MEMBER STATE OF THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS

Objective/s:

To create a business-friendly environment conducive to the stimulation of business initiative for greater investment among the parties.

Obligation/s of Parties:

The treaty generally provides that parties give investors from other parties the Most-Favoured-Nation Treatment. The parties are also to make publicly available or provide upon request of another party its laws, regulations, procedures and administrative guidelines of general application as well as any of its international investment agreements in force. The treaty also provides the rules for expropriation and compensation of covered investments of investors of any other party. Each party shall also allow the transfers relating to a covered investment to be made freely and without delay into and out of its Area. parties are to cooperate in promoting and increasing awareness of the region as an investment area.

Effectivity:

The treaty became effective on June 11, 2019.

SECOND PROTOCOL AMENDING THE REVISED MEMORANDUM OF UNDERSTANDING ON THE ESTABLISHMENT OF THE ASEAN FOUNDATION

Objective/s:

To enhance the effectiveness and efficiency of the ASEAN Foundation in achieving its objectives in accordance with ASEAN's priorities.

Obligation/s of the Parties:

The Parties agreed to the amendments to Paragraph 1 of Article X of the Memorandum of Understanding on the establishment of the ASEAN Foundation. The amended provision now reads that the executive director shall be an ASEAN member state national and shall be appointed by the Board for a term of three years, with renewal of another three years subject to Board approval. The recruitment of the executive director shall be based on merit.

Effectivity:

The Treaty took effect on June 17, 2019.

PROTOCOL 4 ON CO-TERMINAL RIGHTS BETWEEN POINTS WITHIN THE TERRITORY OF ANY OTHER ASEAN MEMBER STATES

Objective/s:

To further the ASEAN Multilateral Agreement on the Full Liberalization of Passenger Air Services and to remove restrictions on air services.

Obligation/s of the Parties:

Designated airline(s) of each contracting party may exercise co-terminal rights, provided there is no exercise of cabotage rights. The designated airline(s), when exercising co-terminal rights, may serve any additional points with international airports within the territory of other Contracting Parties. Capacity, frequency, and aircraft type with regard to air passenger services operated under this Protocol exercising co-terminal rights shall not be limited.

Effectivity:

The Treaty entered into force on Aug. 6, 2019.

PROTOCOL 2 FOR DESIGNATION OF FRONTIER POSTS

Objective/s:

To encourage and facilitate inter-state and transit transport operations among Brunei, Cambodia, Indonesia, Lao, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.

Obligation/s of the Parties:

The contracting states agree to formalize the initial respective frontier posts, as the basis for the designation of frontier posts for the transport of goods in the region. The Protocol lists the designated frontier posts for each contracting party.

Effectivity:

The Protocol was signed on May 4, 2018 and entered into force on Oct. 6, 2019.

SUMMARY OF
MULTILATERAL TREATIES AND AGREEMENTS

MARRAKESH TREATY TO FACILITATE ACCESS TO PUBLISHED WORKS FOR PERSONS WHO ARE BLIND VISUALLY IMPAIRED, OR OTHERWISE PRINT DISABLED

Objective/s:

To enhance access to education, research, and information for persons with visual impairments or other print disabilities

Obligation/s of Parties:

Contracting parties shall provide for limitations and exemptions to the right of reproduction, distribution, and making available to the public to facilitate the availability of works in accessible format copies for visually impaired persons. These should permit changes to make the work accessible in the alternative format.

Effectivity:

The treaty was adopted on June 27, 2013 and entered into force in the Philippines on Mar. 18, 2019.

AGREEMENT ON THE ESTABLISHMENT OF THE ASIAN FOREST COOPERATION ORGANIZATION (AFOCO)

Objective/s:

To contribute to the expansion of forestlands, the advanced study of forests, forestry, and forest rehabilitation, as well as to strengthen the capacities of the parties in coping with global climate change issues, and to recognize the significant roles of the parties in restoring and rehabilitation degraded lands,

promoting sustainable forest management, and combating desertification and land degradation.

Obligation/s of the Parties:

The parties agree to form the Asian Forest Cooperation Organization (AFoCO). Each party shall appoint one representative to the Assembly of the Organization. The Organization shall promote and undertake action-oriented forest cooperation programs in Asia. These include, but are not limited to, programs for sustainable forest management, biodiversity, climate change mitigation, reduction of deforestation, capacity building of stakeholders, education and exchange, and partnerships between the parties and other entities to carry out cooperative activities.

Effectivity:

The Treaty entered into force in the Philippines on Mar. 22, 2019.

CONVENTION ABOLISHING THE REQUIREMENT OF LEGISLATION FOR FOREIGN PUBLIC DOCUMENT (APOSTILE CONVENTION)

Objective/s:

To abolish the requirement of diplomatic or consular legalization for foreign public documents.

Obligation/s of the Parties:

Contracting states shall exempt from legalization public documents which have to be produced in its territory. Legalization refers to the formality by which the diplomatic or consular agents of the country in which the document is to be produced certify the authenticity of the signature, the capacity of the signer, and the identity of the seal or stamp which it bears. The only formality that may be required to certify the preceding is the addition of a certificate from a competent authority so designated by the contracting state.

Contracting states shall take necessary steps to prevent legalizations by their diplomatic or consular agents in cases where the Convention provides for exemptions.

Effectivity:

The Treaty entered into force in the Philippines on May 14, 2019.

CONVENTION ON CLUSTER MUNITIONS

Objective/s:

To put an end for all time to the suffering and casualties caused by cluster munitions, and to contribute effectively in an efficient, coordinated manner to resolving the challenges of removing cluster munition remnants.

Obligation/s of the Parties:

The state parties shall never under any circumstance: use cluster munitions; develop, produce, otherwise acquire, stockpile, retain, or transfer cluster munitions; and assist, encourage, or induce anyone to engage in any activity prohibited to a state party under this Convention.

The Convention does not apply to mines.

Effectivity:

The Philippines deposited its instrument of ratification on Jan. 3, 2019, and the Treaty entered into force in the Philippines on July 1, 2019.

STATUES OF THE ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION (REVISED AND ADOPTED AT THE BALI SESSION, 2004)

Objective/s:

The Asian-African Legal Consultative Organization ("AALCO") has the following objectives: to consider and deliberate issues on international law; to exchange views, experience, and information on matters of common concern; to communicate the views of AALCO on matters of international law referred to it; to examine subjects that are under consideration by the International Law Commission and to forward the views of AALCO to the Commission; and to consider the reports of the Commission and make recommendations thereon.

Obligation/s of the Parties:

The member states shall undertake activities that may be deemed appropriate for the fulfillment of the objectives of AALCO. The Organization shall meet once a year. Member states shall nominate a legal expert to serve AALCO as a member.

Effectivity:

The Treaty entered into force in the Philippines on July 27, 2019.

JUDICIAL DECISIONS

JUDICIAL DECISIONS

EDCEL C. LAGMAN, et. al., Petitioners vs. HON. SALVADOR C. MEDIALDEA, EXECUTIVE SECRETARY, et. al., Respondents

EN BANC

[G.R. No. 243522, Feb. 19, 2019.]

DECISION

CARANDANG, J.:

Facts

These are consolidated petitions filed under Section 18, Article VII of the Constitution, assailing the constitutionality of the third extension from Jan. 1, 2019 to Dec. 31, 2019, of the declaration of martial law and suspension of the privilege of the writ of habeas corpus in the entire Mindanao. On May 23, 2017, President Rodrigo Roa Duterte issued Proclamation No. 216, declaring a state of martial law and suspending the privilege of the writ of habeas corpus in the whole of Mindanao to address the rebellion mounted by members of the Maute Group and Abu Sayyaf Group ("ASG"), for a period not exceeding sixty (60) days.

One of the arguments of the petitioners is that the third extension of martial law will lead to further violation of citizens' political, civil, and human rights. The respondents contend that the alleged human rights violations do not warrant the nullification of martial law and the suspension of the privilege of the writ of habeas corpus. There are sufficient legal safeguards to address human rights abuses. The Supreme Court held that there were adequate remedies in the ordinary course of law against abuses and violations of human rights committed by erring public officers in addition to the safeguards provided by the Constitution by citing the Universal Declaration of Human Rights ("UDHR") and other international law instruments relevant to law enforcement.

RULING

The allegations of human rights violations in the implementation of martial law in Mindanao is not sufficient to warrant a nullification of its extension.

A declaration of martial law does not suspend fundamental civil rights of individuals as the Bill of Rights enshrined in the Constitution remain effective. Civil courts and legislative bodies remain open. While it is recognized that, in the declaration of martial law and the suspension of the privilege of the writ of habeas corpus, the powers given to officials tasked with its implementation are susceptible to abuses, these instances have already been taken into consideration when the pertinent provisions on martial law were drafted. Safeguards within the 1987 Constitution and existing laws are available to protect the people from these abuses.

In Lagman v. Medialdea, the Court emphasized that: It was the collective sentiment of the framers of the 1987 Constitution that sufficient safeguards against possible misuse and abuse by the commander-in-chief of his extraordinary powers are already in place and that no further emasculation of the presidential powers is called for in the guise of additional safeguards.

In addition to the safeguards provided by the Constitution, adequate remedies in the ordinary course of law against abuses and violations of human rights committed by erring public officers are available including the following:

1. R.A. No. 7438 (An Act Defining Certain Rights of Persons Arrested, Detained or Under Custodial Investigation as Well as the Duties of the Arresting, Detaining and Investigating Officers, and Providing Penalties for Violations Thereof);
2. R.A. No. 9372 or the Human Security Act of 2007;
3. R.A. No. 9745 or the Anti-Torture Act of 2009; and
4. Writs of Amparo (A.M. No. 07-9-12-SC) and Habeas Data (A.M. No. 08-1-16-SC); and
5. UDHR.

In relation to the international human rights principles established under the UDHR, the law enforcement officials are also guided by the principles and safeguards declared in the International Covenant on Civil and Political Rights.

Soft law instruments of particular relevance to law enforcement include United Nations' ("UN") Basic Principles [o]n the Use of Force and Firearms by Law Enforcement Officials ("BPUFF"), Code of Conduct for Law Enforcement Officials ("CCLEO"), Standard Minimum Rules for the Treatment of Prisoners ("SMR"), Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment ("Body of Principles"), and Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power ("Victims Declaration"). These instruments uphold the principles of legality, proportionality, necessity, and accountability in situations involving the use of force by law enforcers.

WHEREFORE, the Court FINDS sufficient factual bases for the issuance of Resolution of Both Houses No. 6 and **DECLARES it as CONSTITUTIONAL.** Accordingly, the consolidated petitions are hereby **DISMISSED. SO ORDERED.**

DEPARTMENT OF EDUCATION, Petitioners vs.
RIZAL TEACHERS KILUSANG BAYAN FOR CREDIT INC., represented by TOMAS L. ODULLO, Respondents

DECISION
[G.R. No. 202097, July 3, 2019.]

LAZARO-JAVIER, J:

Facts

For the benefit of public school teachers, The Department of Education ("DepEd") devised and implemented a payroll deduction scheme for the loans they secured from DepEd's duly accredited private lenders. Rizal Teachers Kilusang Bayan for Credit, Inc. ("RTKBCI") was among DepEd's accredited private lenders which availed of the latter's payroll deduction scheme. However on July 4, 2001, DepEd Undersecretary Pangan directed that the salary deduction scheme for RTKBCI be suspended pending resolution of the teachers' numerous complaints against RTKBCI's alleged unauthorized excessive deductions and connivance with some DepEd's personnel.

RTKBCI then filed a petition for mandamus before the RTC to compel DepEd to remit to RTKBCI the loan collections and continue with the salary deduction scheme pursuant to its standing arrangement to avail of the payroll deduction scheme under Codes 209 and 219. The trial court granted the writ of mandamus prayed for and ordered DepEd to release to RTKBCI the collections. The CA affirmed the alleged clear legal right of RTKBCI to receive the payments which DepEd had already collected through the payroll deduction scheme. The Supreme Court reversed this holding that there was no practice, continued or otherwise, that would establish and validate such clear legal duty and clear legal right.

RULING

The petition for the writ of mandamus to compel DepEd to collect and remit on RTKBCI's behalf loan payments from public school teachers is denied.

For the writ of mandamus to prosper, the applicant must prove by preponderance of evidence that "there is a clear legal duty imposed upon the office or the officer sought to be compelled to perform an act, and when the party seeking *mandamus* has a clear legal right to the performance of such act."

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Continued practice in domestic legal matters does not rise to the level of a legal obligation. The first sentence of Article 7 of the Civil Code states, "[l]aws are repealed only by subsequent ones, and their violation or non-observance shall not be excused by disuse, or custom or practice to the contrary." There can be no clear legal duty and clear legal right where to do so would compel DepEd to violate its power, duties, and functions under Section 7 of RA 9155, specifically toward the protection and promotion of the teachers' welfare. In the latter case, no practice, continued or otherwise, would establish and validate such clear legal duty and clear legal right.

In terms of international law where practice could give rise to a legally binding rule, the court affirmed the ruling in Bayan Muna v. Romulo which explained:

> **Customary international law or international custom is a source of international law as stated in the Statute of the ICJ.** It is defined as the "**general and consistent practice of states recognized and followed by them from a sense of legal obligation."** In order to establish the customary status of a particular norm, two elements must concur: State practice, the objective element; and opinio juris sive necessitates, the subjective element.
>
> State practice refers to the continuous repetition of the same or similar kind of acts or norms by States. It is demonstrated upon the existence of the following elements: (1) generality; (2) uniformity and consistency; and (3) duration. While, opinio juris, the psychological element, requires that the state practice or norm "be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."

RTKBCI has failed to show that DepEd's alleged practice of acting as a collector and remitter of loan payments on its behalf was general and consistent, much less, that DepEd did so as a sense of legal obligation. DepEd, on the contrary, has been adamant that it acted as collector and remitter only by way of accommodation and privilege.

ACCORDINGLY, the petition for review on certiorari is **GRANTED.** And the Complaint for Mandamus and Damages **DISMISSED. SO ORDERED.**

COMMISIONER OF INTERNAL REVENUE, Petitioner vs. INTERPUBLIC GROUP OF COMAPNIES INC., Respondent

DECISION

[G.R. No. 207039, Aug. 14, 2019]

J.C. REYES, JR., J:

Facts

Respondent Interpublic Group of Companies, Inc. ("IGC") is a non-resident foreign corporation duly organized and existing under and by virtue of the laws of

the State of Delaware, United States of America. In 2008, the IGC filed an administrative claim for refund or issuance of tax credit certificate ("TCC") in the amount of P12M, representing the alleged overpaid FWT on dividends paid by McCann to IGC. The present case is a petition for review on certiorari filed by the CIR before the SC arguing that the IGC failed to file a Tax Treaty Relief Application ("TTRA") with the International Tax Affairs Division ("ITAD") of the BIR fifteen days before it paid tax on dividends in accordance with RMO No. 1-2000. The SC ruled that failure to file the TTRA should not operate to divest entitlement to the relief as it would constitute a violation of the duty required by good faith in complying with a tax treaty.

RULING

IGC is entitled to a tax refund or TCC despite non-compliance with the documentary requirements provided under RMO No. 1-2000.

As it is recognized, the application of **the provisions of the National Internal Revenue Code ("NIRC") must be subject to the provisions of tax treaties entered into by the Philippines with foreign countries**. It remains only to note that under the Philippines-US Convention "With Respect to Taxes on Income," the Philippines, by a treaty commitment, reduced the regular rate of dividend tax to a maximum of 20% of the gross amount of dividends paid to US parent corporations.

The RP-US Tax Treaty, at the same time, created a treaty obligation on the part of the US that it "shall allow" to a US parent corporation receiving dividends from its Philippine subsidiary a tax credit for the appropriate amount of taxes paid or accrued to the Philippines by the said Philippine subsidiary. The US allowed a "deemed paid" tax credit to US corporations on dividends received from foreign corporation.

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Specifically, the RP-US Tax Treaty is just one of a number of bilateral treaties which the Philippines has entered into and to which we are expected to observe compliance therewith in good faith. As explained by the Court**, the purpose of these international agreements is to reconcile the national fiscal legislations of the contracting parties in order to help the taxpayer avoid simultaneous taxation in two different jurisdictions.** More precisely, the tax conventions are drafted with a

view towards the **elimination of international juridical double taxation**, which is defined as the imposition of comparable taxes in two or more states on the same taxpayer in respect of the same subject matter and for identical periods.

xxx

The objective of RMO No. 1-2000 in requiring the application for treaty relief with the ITAD before a party's availment of the preferential rate under a tax treaty is to avert the consequences of any erroneous interpretation and/or application of treaty provisions, such as claims for refund/credit for overpayment of taxes, or deficiency tax liabilities for underpayment.

The Supreme Court held that this apparent conflict was previously settled in the case of Deutsche Bank AG Manila Branch v. Commissioner of Internal Revenue, where the Court lengthily discussed that the obligation to comply with a tax treaty must take precedence over the objective of RMO No. 1-2000, thus:

> x x x We recognize the clear intention of the BIR in implementing RMO No. 1-2000, but the CTA's outright denial of a tax treaty relief for failure to strictly comply with the prescribed period is not in harmony with the objectives of the contracting state to ensure that the benefits granted under tax treaties are enjoyed by duly entitled persons or corporations.
>
> Bearing in mind the rationale of tax treaties, the period of application for the availment of tax treaty relief as required by RMO No. 1-2000 **should not operate to divest entitlement to the relief as it would constitute a violation of the duty required by good faith in complying with a tax treaty.** The denial of the availment of tax relief for the failure of a taxpayer to apply within the prescribed period under the administrative issuance would impair the value of the tax treaty. **At most, the application for a tax treaty relief from the BIR should merely operate to confirm the entitlement of the taxpayer to the relief.**
>
> **The obligation to comply with a tax treaty must take precedence over the objective of RMO No. 1-2000. Logically, noncompliance with tax treaties has negative implications on international relations, and unduly discourages foreign investors.**

> While the consequences sought to be prevented by RMO No. 1-2000 involve an administrative procedure, these may be remedied through other system management processes, e.g., the imposition of a fine or penalty. But we cannot totally deprive those who are entitled to the benefit of a treaty for failure to strictly comply with an administrative issuance requiring prior application for tax treaty relief.

Since the RP-US Tax Treaty does not provide for any other prerequisite for the availment of the benefits under the said treaty, to impose additional requirements would negate the availment of the reliefs provided for under international agreements.

At any rate, the application for a tax treaty relief from the BIR should merely operate to confirm the entitlement of the taxpayer to the relief. This is only applicable to taxes paid on the basis of international agreements and treaties. Once it was settled that the taxpayer is entitled to the relief under the tax treaty, then by all means it could pay its tax liabilities using the tax relief provided by the treaty. In other words, the requirements under RMO No. 1-2000 applies only to a taxpayer who is about to pay their taxes on the basis of tax reliefs provided by international agreements and treaties and to confirm its entitlement to the said reliefs.

WHEREFORE, the Petition is **DENIED. SO ORDERED.**

OSCAR B. PIMENTEL. et. al., Petitioners vs. LEGAL EDUCATION BOARD, as represented by its Chairperson, HON. EMERSON B. AQUENDE, et.al., Respondents

DECISION

[G.R. No. 230642, Sept. 10, 2019.]

J.C. REYES, JR., J:

Facts

To improve the system of legal education on account of performance of law students and law schools in the bar examinations, the Congress, on Dec. 23, 1993

passed R.A. No. 7662 into law. As one of the act's reforms in legal education, R.A. No. 7662 created the Legal Education Board ("LEB"), an executive agency which was made separate from the Department of Education, Culture and Sports ("DECS"), but attached thereto solely for budgetary purposes and administrative support. The LEB was provided the powers of administering the legal education system in the country and prescribing the minimum standards for law admission, among others. Pursuant to its authority to prescribe the minimum standards for law schools, the LEB issued several orders, circulars, resolutions, and other issuances. Among the orders issued by the LEB was LEBMO No. 7-2016 which requires all those seeking admission to the basic law course to take and pas a nationwide uniform law school admission test, known as the Philippine Law School Admission Test ("PhiLSAT").

Various petitions for certiorari and prohibition were filed before the Supreme Court averring that R.A. No. 7662 and the PhiLSAT are offensive to the Court's power to regulate and supervise the legal profession pursuant to Sec. 5 (5), Art. VIII of the Constitution. Petitioners further argue that PhiLSAT violates academic freedom as it interferes with the law school's exercise of freedom to choose who to admit. In holding that R.A. No. 7662 was constitutional insofar as it gives the LEB the power to set the standards of accreditation of law schools and to prescribe minimum requirements for admission for legal education, the SC discussed the right to education under various international human rights law instruments such as the International Covenant on Economic, Social and Cultural Rights ("ICESCR").

RULING

R.A. No. 7662 is constitutional insofar as Sec. 7(c) and Sec. 7(e) are concerned which gives the LEB the power to set the standards of accreditation of law schools and the power to prescribe the minimum requirements for admission to legal education and minimum qualifications of faculty members.

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Apart from the Constitution, **the right to education is also recognized in international human rights law under various instruments** to which the Philippines is a state signatory and to which it is concomitantly bound.

For instance, **Article 13 (2) of the ICESCR recognizes the right to receive an education** with the following interrelated and essential features: (a) availability; (b) accessibility; (c) acceptability; and (d) adaptability.

In particular, accessibility is understood as giving everyone, without discrimination, access to educational institutions and programs. Accessibility has three overlapping dimensions:

1. **Non-discrimination** – education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds x x x;
2. **Physical accessibility** – education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location ([e.g.] a neighborhood school) or [via] modern technology ([e.g.] access to a "distance learning" programme); [and]
3. **Economic accessibility** – education has to be affordable to all. This dimension of accessibility is subject to the differential wording of [A]rticle 13(2) in relation to primary, secondary and higher education: whereas primary education shall be available "free to all," States parties are required to progressively introduce free secondary and higher education[.]

Pertinent to higher education, the elements of quality and accessibility should also be present as the Constitution provides that these elements should be protected and promoted in all educational institutions.

Nevertheless, the right to receive higher education is not absolute.

WHEREFORE, the petitions are **PARTLY GRANTED.** The jurisdiction of the Legal Education Board over legal education is **UPHELD.** The Court further declares as constitutional R.A. No. 7662 is constitutional insofar as Sec. 7(c) and Sec. 7(e) are concerned which gives the LEB the power to set the standards of accreditation of law schools and the power to prescribe the minimum requirements for admission to legal education and minimum qualifications of faculty members. **SO ORDERED.**

MANILA INTERNATIONAL AIRPORT AUTHORITY, Petitioner vs. COMMISSION ON AUDIT, Respondent

EN BANC
[G.R. 218388, Oct. 15, 2019]

DECISION

BERSAMIN, C. J.:

Facts

The Manila International Airport Authority ("MIAA") and the Aeroports de Paris-Japan Airport Consultants, Inc. Consortium (Consultant for brevity) entered into an Agreement for Consulting Services (Agreement for, brevity) for the Ninoy Aquino International Airport ("NAIA") Terminal 2 Development Project on Apr.15, 1994. However, the duration of the services was extended and the number of man-months increased, due to a prolonged process of prequalification, bidding and awarding stages; delayed Department of Environment and Natural Resources approval and contractor's site possession, as well as numerous additional construction works. The extension was covered by three (3) Supplementary Agreements (SAs) entered into by the MIAA and the Consultant. The relevant issue is whether or not Loan Agreement No. PH-136 is equivalent to an executive agreement. The petitioner argues **that the loan agreement was equivalent to an executive agreement based on the ruling in *Abaya v. Ebdane* (G.R. No. 167919, February 14, 2007);** that as an executive agreement, the loan agreement should control the determination of payments charged to contingency; that the 5% ceiling for payments charged to contingency under the National Economic and Development Authority ("NEDA") Guidelines did not apply because the normal practice of international financial institutions was to provide a 10% contingency.

In this case, the Supreme Court held that a loan agreement executed in conjunction with an exchange of notes between the Republic of the Philippines and a foreign government **shall be governed by international law, with the rule on pacta sunt servanda as the guiding principle.** Any subsequent agreement adjunct to the loan agreement shall be similarly governed.

RULING

PH-136 should be treated as an executive agreement and the parties' intention as to how the payments would be charged to contingency should govern as it should be construed and interpreted in accordance with the doctrine of pacta sunt servanda. A similar treatment should be extended to the three Supplemental Agreements entered into by the petitioner and the ADP-JAC Consortium.

The Supreme Court stated that pursuant to the pronouncement in *Abaya v. Ebdane, supra*, **a loan agreement executed in conjunction with the Exchange of Notes between the Philippine Government and a foreign government is an executive agreement, and should be governed by international law.** This pronouncement has been consistently applied in succeeding rulings, including those in *DBM Procurement Service v. Kolonwel Trading*,*Land Bank of the Philippines v. Atlanta Industries, Inc.*, and *Mitsubishi Corporation-Manila Branch v. Commissioner of Internal Revenue*.

Consequently, we see no justification to treat Loan Agreement No. PH-136 differently, particularly as its preambular paragraph expressly made reference to the Exchange of Notes between the Philippines and Japan on Aug. 16, 1993.

We point out that Loan Agreement No. PH-136, which financed the NAIA Terminal 2 Development Project, stemmed from the Aug. 16, 1993 Exchange of Notes whereby the Government of Japan agreed to extend loans in favor of the Philippines to promote economic development and stability. Thusly, the loan agreement was the adjunct of the Exchange of Notes and should thus be treated as an executive agreement. **In other words, international law should apply in the implementation and construction of the terms and conditions of Loan Agreement No. PH-136. Accordingly, the Philippine Government was bound to faithfully comply with the provisions of the loan agreements in accordance with the doctrine of *pacta sunt servanda*.** Needless to indicate, the doctrine has been incorporated in the 1987 Constitution pursuant to Section 2 of its Article II, which declares:

> Sec. 2. The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the

policy of peace, equality, justice, freedom, cooperation, and amity with all nations.

Logically, the Agreement for Consulting Services ("ACS") executed by and between the petitioner and the ADP-JAC Consortium, being a mere accessory of Loan Agreement No. PH-136, should likewise be treated as an executive agreement, and construed and interpreted in accordance with the **doctrine of *pacta sunt servanda*.**

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A similar treatment should be extended to the three Supplemental Agreements entered into by the petitioner and the ADP-JAC Consortium.

Accordingly, the Commission on Audit ("COA") could not validly insist that the NEDA Guidelines, particularly that on applying a 5% interest on contingency, should find application because the contracting parties did not stipulate on the applicable law. The pronouncement in *Abaya v. Ebdane, supra*, and its **progeny that international law applies in interpreting and implementing contracts executed in conjunction with executive agreements was controlling. No express stipulation by the contracting parties to that effect was necessary.**

Having settled the issue of the governing law in interpreting and implementing the agreements, we next determine whether or not the COA properly disallowed the amounts disbursed for the additional man-months for the consulting services as provided in the supplemental agreements.

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It appears, however, that in disallowing the disbursements for the additional man-months, the COA charged the disallowance against the contingency, and thus concluded that the same exceeded the 5% ceiling (or ¥53 million and P3.2 million) fixed under the NEDA Guidelines by ¥398 million and P45.5 million. Considering that ND No. (FMT) 99-00-44 only disallowed ¥53 million and P3.2 million, the COA ordered an additional disallowance of ¥344 million and P42 million to be charged against the liable officials of the petitioner.

The Court finds the action of the COA not only erroneous but also in contravention of the **doctrine of pacta sunt servanda** and, most importantly, contrary to the intention of the parties in entering into the supplemental agreements.

To reiterate, the applicable law in interpreting and construing the agreements should be the canons of international law, particularly the doctrine of pacta sunt servanda. Yet, in affirming the NDs, the COA proposed that the Government negate its accession to the executive agreements without any valid justification. Obviously, this approach should not be adopted. In *Agustin v. Edu*,[47] we stressed that "[i]t is not for this country to repudiate a commitment to which it had pledged its word. The concept of *pacta sunt servanda* stands in the way of such an attitude, which is, moreover, at war with the principle of international morality."

WHEREFORE, the Court GRANTS the petition for *certiorari*; and **REVERSES** and **SETS ASIDE** Decision by the Commission on Audit. **SO ORDERED.**

ANDREWS MANPOWER CONSULTING, INC., Petitioner vs. FLAVIO J. BUHAWE, JR., Respondent

DECISION

[G.R. No. 249633, December 4, 2019]

Facts

This case involved a complaint for illegal dismissal filed by Flavio Buhawe (respondent) against Andrews Manpower Consulting, Inc. (petitioner), a pipe fabricator and his principal employer Gulf Piping Co. W.L.L ("Gulf Piping") based in United Arab Emirates ("UAE"). In affirming the ruling that the respondent was illegally dismissed, the SC stated the while the Philippines adopts the generally accepted principles of international law as part of its domestic law, the principles of international law and comity have no application in this case because the petitioner was failed to prove that the respondent actually violated any labor law of the UAE. The alleged safety violations and disrespectful encounter with an engineer were never established by the petitioner.

RULING

The respondent was illegally dismissed.

It is important to emphasize that, contrary to the insinuations of the petitioner, the Philippines has a profound regard for international law as illustrated by the provisions of **Article II, Section 2 of the 1987 Constitution where the Philippines expressly adopted the generally accepted principles of international law as part of its domestic law**, to wit:

> Section 2. The Philippine renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nation.

As international law is founded largely upon the principles of reciprocity, comity, independence, and equality of States, which were adopted as part of the law of our land under Article II, Section 2 of the 1987 Constitution, the Philippines also has a keen respect for international comity. However, the principles of international law and comity have no application in this case because, to begin with, the petitioner was never able to prove that the respondent actually violated any labor law of the UAE. The alleged safety violations and disrespectful encounter with an engineer were never established by the petitioner. Instead, the factual findings of both the LA and NLRC, as affirmed by the CA, consistently showed that the allegations against the respondent are mere unsubstantiated conjectures. They all found the testimonies and evidence presented by the respondent more credible than that of the petitioner.

WHEREFORE, the Petition is **DENIED.** The decision declaring that the respondent was illegally dismissed is **AFFIRMED. SO ORDERED.**

DOJ ISSUANCES

DOJ ISSUANCES

DOJ OPINION NO. 011, s. 2019
March 6, 2019

MENARDO I. GUEVARRA

Facts

This DOJ Opinion was issued in reference to the requests for opinion by the Office of the Undersecretary for Civilian Security and Consular Concerns and the Office of Consular Affairs of the Department of Foreign Affairs ("DFA").

The request for opinion pertains to DFA's receipt of requests from diplomatic missions and international organizations based in the Philippines for the issuance of diplomatic 9(e-1) visas to the same-sex spouses or partners of foreign government officials assigned to the country. On the other hand, the request for opinion by the Office of Consular Affairs pertains to DFA's receipt of requests from diplomatic missions and international organizations based in the Philippines for the issuance of diplomatic 9(e-1) visas to the common law spouses or partners of foreign government officials assigned to the country.

At issue is **whether the Philippines can consider these spouses or partners as the legal spouses of said foreign government officials, for the purpose of issuance to them of diplomatic 9(e-1) visas under Section 81 (n) of the Codified Visa Rules and Regulations of 2002 (CVRR), in relation to the Philippine Immigration Act of 1940, as amended.**

The DOJ concluded that that if the marriage of a foreign government official assigned to the country and his or her foreign same-sex spouse is considered valid in the place where it was celebrated (lex loci celebrationis) and said spouses are also considered validly married under their laws of nationality (lex nationalii) or domicile (lex domicilii), a diplomatic 9(e-1) visa under Section 81 (n) of the CVRR may be issued to the foreign same-sex spouse of the said foreign government official. However, in view of the lack of a marriage bond between a foreign government official and his or her informal same-sex partner or common-law spouse or partner, a diplomatic 9(e-1) visa under Section 81 (n) of the CVRR may not be issued to such partner or spouses.

RULING

It appears from both requests for opinion that DFA issues to the same-sex spouses or partners and common law spouses or partners of foreign government officials assigned to the country diplomatic 9(e-3) visas "as they are considered household members of such officials entitled to 9(e-3) visas under the Codified Visa Rules and Regulations ("CVRR") of 2002, which emanated from the Philippine Immigration Act of 1940, as amended;' and that, however, a number of diplomatic missions and international organizations have asked for the issuance of diplomatic 9(e-1) visas, which DFA only issues to officials specifically listed in Section 81 of the CVRR and "accompanying wives and unmarried minor children."

It also appears from the request for opinion of the Office of the Undersecretary for Civilian Security and Consular Concerns that the United Nations ("UN") Secretary-General promulgated bulletin ST/SGB/2004/ 13/Rev.1 dated June 26 , 2014, which states that "[t]he personal status of staff members for the purpose of entitlements under the Staff Rules and Staff Regulations of the UN will be determined by reference to the law of the competent authority under which the personal status has been established."

xxx

The Philippines follows the **nationality principle (lex nationalii)** in the determination of status of a person, whether a Filipino or an alien. Article 15 of the Civil Code provides that "[l]aws relating to family rights and duties, or to the status, condition and legal capacity of persons are binding upon citizens of the Philippines, even though living abroad."

In case of aliens, Philippine courts may also refer to the law of their domicile (lex domicilii), if they belong to a country that follows the domiciliary principle.

We note that the abovementioned **UN Secretary-General's Bulletin No. ST/SGB/2004/13/Rev.1**, which provides that personal status "will be determined by reference to the law of the competent authority under which the personal status has been established" is in line with Article 15 of our Civil Code. Hence, whether or not a foreign government official assigned to the Philippines is considered married is determined by the law of his or her nationality (lex nationalii) or the law of his or her domicile (lex domicilii), and not by Philippine law.

Aside from Article 15 of the Civil Code, Article 26 of the Family Code is also relevant to the issue at hand. It deals with the validity of marriages celebrated outside the Philippines. A pertinent portion of said Article reads as follows: **All marriages solemnized outside the Philippines, in accordance with the laws in force in the country where they were solemnized, and valid there as such, shall also be valid in this country**, except those prohibited under Articles 35(1), (4), (5) and (6), 36, 37 and 38.

Pursuant to the above-quoted Article, the Philippines follows the **principle of lex loci celebrationis** with respect to the validity of marriages celebrated abroad, i.e., a marriage that is valid where it was celebrated would also be recognized as valid here in the Philippines. This principle is subject to certain exceptions, as specified in the said Article, such as if the marriage is considered incestuous or void by reason of public policy. These exceptions apply only to marriages solemnized abroad between Filipinos, and not to marriages solemnized outside the Philippines between aliens, such as between foreign government officials assigned to the Philippines and their foreign same-sex spouses. With respect to the latter, the validity of their marriages solemnized outside the Philippines is governed principally by the principle of lex loci celebrationis. The only instance when the validity of their marriages will not be recognized here in the Philippines is when their marriages are considered universally incestuous or highly immoral, based on the writings of distinguished authors on conflict of laws.

For your reference we quote hereunder the views of these distinguished authors on conflict of laws.

According to Sempio-Diy, with respect to marriages between foreigners solemnized abroad, "[w]**e still apply the rule of lex loci celebrationis , but not the exceptions in the first par. of Art. 26 of the Family Code, which apply only to Filipinos**. But universally considered incestuous marriages are excepted; i.e., marriages between ascendants and descendants, and brothers and sisters; and marriages that are highly immoral (bigamous or polygamous marriages in Christian countries that prohibit such marriage)." (emphasis supplied)

According to Paras, "[if] the marriage between foreigners is celebrated validly abroad, the same will be recognized as valid here (in accordance with the principle of lex loci celebrationis), provided that it is not highly immoral (bigamous, polygamous, etc.) and provided it is not UNIVERSALLY considered incestuous." He gave the following example to illustrate the principle as applied to foreigners married abroad:

> A marriage in California between American first cousins will be recognized as valid here if valid in the place of celebration because it is neither immoral nor universally considered incestuous. **It is true that were we to apply Art. 26 of the Family Code, it would be 'incestuous' [under] Philippine law but then Art. 26 applies only to Filipinos, not to foreigners (despite the lack of express distinction in the law), otherwise it is as if our Family Code were to rule the world.**
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> xxx

Lastly, Coquia and Pangalangan also explained in this wise why the Philippines should recognize the validity of marriages of foreigners solemnized abroad:

> . . . Many countries do not consider marriage of first cousins as incestuous. x x x It is submitted that our prohibition against marriage of first cousins should be limited only to Filipino nationals. The marriage between foreigners whose national laws allow marriage of first cousins should be considered as valid in the Philippines **under the principle that the lex nationalii control capacity** and the presumption in favor of validity of marriage, as expressed in Article 220 of the Civil Code.

The above principles and explanations of the pertinent provisions of the Civil Code and the Family Code can apply to the recognition by relevant Philippine authorities of the validity of same-sex marriages solemnized abroad between foreigners, or in this case, between foreign government officials assigned to the country and their foreign same-sex spouses.

We note that same-sex marriages are valid in several countries around the world and may not, therefore, be considered to be universally immoral. Hence, same-sex marriages solemnized abroad between foreigners that are considered valid in the country where the marriages are solemnized may be recognized as valid here in the Philippines on the basis of Article 26 of the Family Code (lex loci celebrationis). The personal status of said foreigners as married may also be

recognized here in the Philippines pursuant to Article 15 of the Civil Code (lex nationalii or domicilii).

One consequence of such recognition is the issuance of appropriate visas to the same-sex spouses of foreign government officials assigned to the country, such as diplomatic 9(e-1) visas under the CVRR, and their enjoyment of the relevant privileges and immunities under the Vienna Convention on Diplomatic Relations. The other consequences of such recognition, such as the exercise of civil rights of guardianship, stepchild adoption and joint adoption of Filipino child and commercial surrogacy, are governed by the pertinent prohibitions of Philippine law in order to prevent serious injury to public interest.

It has to be emphasized that the discussion above pertains to the recognition of the validity of the marriages solemnized outside the Philippines between foreign government officials assigned to the Philippines and their foreign same-sex spouses, as well as their personal status as being married to one another, such that **these foreign same-sex spouses may be considered the "accompanying wives [or husbands]" of such foreign government offiicials under Section 81 (n) of the CVRR.**

With respect to informal same-sex partners as well as common-law spouses or partners of foreign government officials assigned to the Philippines, in view of the fact that there is no marriage bond between them, the same recognition cannot be given to these spouses or partners as they may not be considered the "accompanying wives [or husbands]" of such foreign government officials under the aforesaid Section 81 (n) of the CVRR.

In sum, it is our opinion that if the marriage of a foreign government official assigned to the country and his or her foreign same-sex spouse is considered valid in the place where it was celebrated (lex loci celebrationis) and said spouses are also considered validly married under their laws of nationality (lex nationalii) or domicile (lex domicilii), a diplomatic 9(e-1) visa under Section 81 (n) of the CVRR may be issued to the foreign same-sex spouse of the said foreign government official. On the other hand, in view of the lack of a marriage bond between a foreign government official and his or her informal same-sex partner or common-law spouse or partner, a diplomatic 9(e-1) visa under Section 81 (n) of the CVRR may not be issued to such partner or spouses.

Books

BOOK WRITEUPS

PROBLEMS AND PROSPECTS IN INTERNATIONAL LAW

Author: Merlin M. Magallona,
Quezon City, U.P. Law Complex.

In this collection of essays and articles, Dean Merlin Magallona probes into the dimensions of international law tracking its ever-broadening scope and development and examines the nuances of its application to Philippine jurisprudence.[1]

His essays on "Stages in the Derogation of Philippine Territory"; "The American Containment Pivot and the Chinese Territorialization Regime"; and "The South China Sea and the World Economy" provide context to the volatile situation surrounding Philippine maritime entitlements.

Other papers, such as "Reflections on the International Public Order in the Changing Dimension of International Law" and "The International Legal System: Its Dynamics of Transformation in Transition" are indispensable waypoints for both the student starting his journey in international law, as well the seasoned practitioner retracing his steps. The breadth and depth of the scholarship contained in this book is testament to Dean Magallona's dedication to the subject.

Problems and Prospects in International Law is part of the UP Law Complex Faculty Scholarship Series, which publishes the collective articles and essays on a given subject by the UP Law Faculty.

[1] Fides C. Cordero Tan, *Preface*, *in* MAGALLONA, MERLIN M., PROBLEMS AND PROSPECTS IN INTERNATIONAL LAW xi (2019).

ENHANCING INTERNATIONAL LEGAL COOPERATION: EXTRADITION, MUTUAL LEGAL ASSISTANCE, TRANSFER OF SENTENCED PERSONS, AND COOPERATION ON TRANSNATIONAL ORGANIZED CRIMES AND NARCOTIC DRUGS (TREATIES, LAWS & PROCEDURES)

Authors: Malaya, J. Eduardo, Sheila Monedero-Arnesto, and Ricardo V. Paras III

Quezon City, U.P. Law Complex.

This book is written by officials of the Department of Foreign Affairs ("DFA") and the Department of Justice ("DOJ"), the agencies involved in the negotiation and implementation of legal cooperation agreements with other countries, namely Ambassador Malaya and Atty. Monedero-Arnesto of the DFA Office of Treaties and Legal Affairs and DOJ Chief State Counsel Paras.

In his Foreword, Secretary of Foreign Affairs Teodoro Locsin Jr. wrote, "rigorously researched, procedural in approach and engagingly written, the book sheds much light on this field of study and practice most relevant in the campaign against criminality… This book should serve as a handy and useful reference to law enforcement and judicial authorities which deal with criminality and cross-border crimes in their daily work."

For his part, Secretary of Justice Menandro Gueverra wrote, "by expounding on the concepts, tools and processes of international legal cooperation, the authors of this book – all experts from the Department of Foreign Affairs and the Department of Justice – impart valuable knowledge and wisdom culled from their years of experience in their respective fields."[2]

[2] *Book on Enhancing PH International Legal Cooperation Launched,* DEPARTMENT OF FOREIGN AFFAIRS, https://dfa.gov.ph/dfa-news/dfa-releasesupdate/23269-book-on-enhancing-ph-int-l-legal-cooperation-launched (last visited August 20, 2021).

EVENTS

EVENTS

ICC JUDGE PANGALANGAN ELECTED TRIAL DIVISION PRESIDENT

On Mar. 18, 2019, Judge Raul C. Pangalangan of the International Criminal Court ("ICC") at The Hague was elected President of the ICC Trial Division. ICC judges are assigned to three judicial divisions, which hear matters at different stages of the proceedings: Pre-Trial, Trial and Appeals. The divisions perform their work through judicial chambers comprising three judges in Pre-Trial and Trial, and five judges in Appeals.

Judge Pangalangan was elected as ICC Judge on June 24, 2015 and was sworn into office on July 13, 2015. On May 3, 2016, he was elected Presiding Judge of Trial Chamber VIII, which heard the landmark case The Prosecutor v. Al Mahdi, the first ICC trial involving the war crime of attacking religious and cultural heritage. He currently sits in The Prosecutor v. Dominic Ongwen, involving alleged child soldiers and forced marriages. He previously sat in the Pre-Trial Chamber in the Situation in the Republic of Burundi which held that, even after Burundi withdrew from the Rome Statute, the Court retained jurisdiction over crimes committed during the time in which Burundi was party to the Statute. He also sat ad hoc in Appeals Chambers on murder, rape, and sexual slavery as war crimes or as crimes against humanity.

The ICC consists of 18 judges who are elected by the Assembly of States Parties ("ASP"), composed of representatives of the States that have signed the Rome Statute. The current composition of the Court is geographically distributed as follows: five from Western European and other States; four from Africa; three from Latin American and Caribbean States; three from Asia-Pacific; and three from Eastern Europe. The Rome Statute also calls for the "representation of the principal legal systems of the world" in the composition of the Court. The Philippine legal system draws from its history as a former colony of both Spain and the United States, and accordingly has characteristics from both the continental and the common law traditions.

The ICC was created to punish the "most serious crimes of concern to the international community as a whole" and "to put an end to impunity for the perpetrators of these crimes" (Preamble, Rome Statute). It is an "independent permanent … Court [created] in relationship with the United Nations system", and

its jurisdiction is "complementary to national criminal jurisdictions", that is to say, it comes into play only as a court of last resort, when the State which has jurisdiction to punish the crime is "unwilling or unable genuinely to carry out the investigation or prosecution" (Article 17, Rome Statute). Judge Pangalangan is also a Member of the Permanent Court of Arbitration (The Hague).

APOSTILLE CONVENTION IN A NUTSHELL

Elizabeth Aguiling-Pangalangan

The **Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents**, otherwise known as the Apostille Convention, was concluded on Oct. 5, 1961 and entered into force on Jan. 21, 1965. It is an international treaty facilitating the circulation of public documents executed by one Contracting Party and which have to be produced in another. The Philippines deposited its instrument of accession on Sept. 12, 2018 and the Convention entered into force for the Philippines on May 14, 2019. The Apostille Convention has 117 Contracting Parties.

The purpose of the Convention is to replace the complicated and expensive legalization process of chain certification, with the mere issuance of a single Apostille certificate. Hence, as a party to the Hague Apostille Convention, public documents issued by another Contracting Party need not undergo the authentication process by the Philippine Embassy or Consulate General in that foreign country.

The scope of the Convention covers only public documents, with the law of the State of origin of the document determining the public nature of documents. Article 1 of the Convention nonetheless specifies what are deemed public documents for purposes of the Convention. These are court documents, administrative documents, notarial acts, and "official certificates which are placed on documents signed by persons in their private capacity."[1]

Examples of administrative documents are birth, marriage and death certificates, medical and health certificates, police records, and grants of patents. Notarial acts on the other hand include contracts and affidavits which are authenticated by the signature and seal of a notary public. Court documents necessarily include the decisions and decrees issued by courts and tribunals. To illustrate, in the case of Republic vs. Orbecido III,[2] the Court held that Article 26, paragraph 2 of the Family Code allows a "Filipino citizen, who has been divorced by a spouse who had acquired foreign citizenship and remarried, also to remarry." However, the Court was unable to rule that Orbecido could remarry since Villanueva had been naturalized as an American citizen and had obtained a

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[1] Hague Conference on Private International Law, Outline of the Apostille Convention, at 1.

[2] GR No 154380, 5 October 2005.

divorce decree. The Court expounded that "the records are bereft of competent evidence duly submitted by respondent concerning the divorce decree and the naturalization of respondent's wife. It is settled rule that one who alleges a fact has the burden of proving it and mere allegation is not evidence." With the Apostille Convention, the foreign divorce decree and record of naturalization of Villanueva can be apostillized and presented directly as evidence in Philippines Court without going through the authentication process.

Only the Competent Authority designated by the origin State Party may issue an Apostille. The Competent Authority places the Apostille either on the public document or on an *allonge*.[3] Competent Authorities are considered the "backbone of the sound operation" of the Convention and are tasked with three fundamental functions: verification of the authenticity of the public document, issuance of the Apostille, and recording the apostilles they have issued in the Register.[4] The purpose of the Register is to combat fraud and verify the origin of an Apostille, by making the Register accessible to any interested person. In the Philippines, the designated Competent Authority is the Authentication Division of the Office of Consular Affairs at the Department of Foreign Affairs.

As explained, the Apostille does not certify the quality of the content in the apostillized public document. Instead, it certifies only the "authenticity of the signature, the capacity in which the person signing the document has acted, and where appropriate, the identity of the seal or stamp which the document bears."[5]

Amendments to our Revised Rules on Evidence include provisions implementing the Apostille Convention. Paragraph (c) of Rule 132, Section 19 provides that "documents that are considered public documents under treaties and conventions which are in force between the Philippines and the country of source" are public documents.[6] Under Section 24 of the same rule official records

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[3] A Handbook on the Practical Operation of the Apostille Convention (Apostille Handbook) defines an allonge as "a slip of paper, attached to the underlying public document on which an Apostille is placed. An allonge is used as an alternative to placing the apostille directly on the underlying document."

[4] Apostille Handbook at 13.

[5] Hague Conference on Private International Law, Outline of the Apostille Convention, at 1.

[6] Rule 132, Section 19. Classes of documents. – For the purpose of their presentation in evidence, documents are either public or private.
Public documents are:
a) The written official acts, or records of the sovereign authority, official bodies and tribunals, and public officers, whether of the Philippines, or of a foreign country;

kept in an office in a foreign country, which is a contracting party to a treaty or convention to which the Philippines is also a party, or considered a public document under such treaty or convention pursuant to paragraph (c) of Section 19 hereof, may be proved by the certificate or its equivalent "in the form prescribed by such treaty or convention subject to reciprocity granted to public documents originating from the Philippines."[7] Prior to the Philippines' accession to the Convention, Rule 24 stipulated that the public documents of a sovereign authority may be proved by (1) an official publication thereof, or (2) a copy attested by the officer having legal custody thereof. Further, such must be accompanied with a certificate issued by an official of the Philippine embassy or consular office stationed in the foreign country in which the record is kept and must be authenticated by the seal of that office. With the amendment of this rule on Proof

b) Documents acknowledged before a notary public except last wills and testaments;
c) Documents that are considered public documents under treaties and conventions which are in force between the Philippines and the country of source; and
d) Public records, kept in the Philippines, of private documents required by law to be entered therein.

All other writings are private.

[7] Rule 132, Section 24. Proof of official record. – The record of public documents referred to in paragraph (a) of Section 19, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his or her deputy, and accompanied, if the record is not kept in the Philippines, with a certificate that such officer has the custody.

If the office in which the record is kept is in a foreign country, which is a contracting party to a treaty or convention to which the Philippines is also a party, or considered a public document under such treaty or convention pursuant to paragraph (c) of Section 19 hereof, the certificate or its equivalent shall be in the form prescribed by such treaty or convention subject to reciprocity granted to public documents originating from the Philippines.

For documents originating from a foreign country which is not a contracting party to a treaty or convention referred to in the next preceding sentence, the certificate may be made by a secretary of the embassy or legation, consul general, consul, vice-consul, or consular agent or by any officer in the foreign service of the Philippines stationed in the foreign country in which the record is kept, and authenticated by the seal of his [or her] office.

A document that is accompanied by a certificate or its equivalent may be presented in evidence without further proof, the certificate or its equivalent being prima facie evidence of the due execution and genuineness of the document involved. The certificate shall not be required when a treaty or convention between a foreign country and the Philippines has abolished the requirement, or has exempted the document itself from this formality.

of Official Record, authentication is mandatory only if the foreign country from where the document originates is not a State Party to the Convention.[8]

Pursuant to Article 13 of the Apostille Convention, the Philippines made a declaration that the Convention does not apply to Contracting Parties that it does not recognize as States. The Philippines likewise declared that the "[C]ertification by apostille under the Apostille Convention does not satisfy the requirements under the Philippine Extradition Law."[9] Section 4 of the Extradition Law or Presidential Decree 1069 (s. 1977) details who may request for the "extradition of any accused who is or suspected of being in the territorial jurisdiction of the Philippines." It requires that the request be accompanied by the original and authentic copy of the decision issued by the court of the requesting State or the criminal charge and warrant of arrest issued by the authority of the requesting State. Moreover, Section 5 dictates that all related documents be attached to the Petition filed before the proper Court of First Instance that will hear the extradition case.

[8] *Id.*

[9] Declaration found in https://www.hcch.net/de/instruments/conventions/status-table/notifications/? csid=1398&disp=resdn.

SPECIAL COMMISSION ON THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS CONVENED IN THE HAGUE

Elizabeth Aguiling-Pangalangan

The Special Commission on the Recognition and Enforcement of Foreign Judgments was convened in The Hague in June 2016. It was composed of about 400 delegates who developed and finalized the Convention. Ambassador to the Netherlands Jaime Victor B. Ledda headed the Philippine delegation. Prof Elizabeth Aguiling-Pangalangan was elected as Vice Chair of the Special Commission during the 22nd Diplomatic Session held in the Peace Palace from June 18-July 2, 2019. The other members of the Philippine delegation were Consul Zoilo Velasco and Atty. Edgar Guibone.

The Philippine delegates signed the Final Act of the 2019 Judgment Convention during the Closing Ceremony held on July 2, 2019. The Convention set a uniform legal procedure for the recognition and enforcement of judgments issued by the courts of one State and are sought to be recognized and given effect in another State for disputes arising from cross-border civil and commercial transactions.

TREATY SETTING PHILIPPINE AND INDONESIAN EEZ BOUNDARY ENTERS INTO FORCE

An agreement delineating the boundary between the overlapping exclusive economic zones ("EEZs") of the Philippines and Indonesia officially entered into force following the exchange by the two countries' foreign ministers of the instruments of ratification in a special ceremony held on Aug. 1, 2019 in Bangkok.[10]

The "Agreement Concerning the Delimitation of the Exclusive Economic Zone Boundary," which was first discussed in June 1994, was formally signed by the two countries on May 23, 2014 in Manila. President Rodrigo R. Duterte ratified the agreement on Feb. 15, 2017, and by the Indonesian Parliament on Apr. 27, 2017. Subsequently, the Philippine Senate concurred with the President's ratification on June 3, 2019.[11]

The agreement is expected to benefit both countries economically and politically by promoting more bilateral cooperation in the EEZ to advance the common interest of managing and preserving the resources in the EEZ and further strengthening maritime security cooperation between the two countries.[12]

The Philippines and Indonesia, the two largest archipelagic states globally, are parties to the 1982 United Nations Convention on the Law of the Sea and thus are entitled to an EEZ of 200 nautical miles. Under the Convention, States have sovereign rights to explore and exploit, and conserve and manage natural resources, among others, within their EEZ.[13]

Broad overlaps in the EEZ of the Philippines and Indonesia, which run across the Mindanao Sea and the Celebes Sea, and in the southern section of the Philippine Sea in the Pacific Ocean, required the two countries to negotiate and agree on a shared boundary.[14]

On Sept. 27, 2019, the Philippines and Indonesia made an official joint submission to the United Nations of the agreement establishing the boundary between their overlapping EEZs and respective instruments of ratification in New York.[15]

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[10] *Treaty Setting PH, Indonesia EEZ Boundary Enters into Force,* DEPARTMENT OF FOREIGN AFFAIRS, https://dfa.gov.ph/dfa-news/dfa-releasesupdate/23966-treaty-setting-ph-indonesia- eez-boundary-enters-into-force (last visited July 7, 2021).

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *PH, Indonesia Jointly Submit 2014 EEZ Boundary Agreement to UN,* DEPARTMENT OF FOREIGN AFFAIRS, https://dfa.gov.ph/dfa-news/dfa-releasesupdate/24527-ph-indonesia-jointly-submit-2014-eez-boundary-agreement-to-un (last visited July 7, 2021).

PHILIPPINE PARTICIPATION IN VARIOUS MOOT COURT COMPETITIONS

The University of the Philippines team emerged as champions of the 12th Annual Price Media Law Moot Court Competition which took place in Oxford, England on Apr. 8-12, 2019. Mark Xavier Libardo was awarded Best Oralist and Julienne Angela del Rosario was recognized as the Best Oralist in the final. The Lyceum of the Philippines University team reached the quarterfinals of the international rounds. The 2019 international rounds had 36 teams, representing a diverse range of countries, who argued a complex competition case on free speech, privacy, and the regulation of social media and the obligations of States under the International Covenant on Civil and Political Rights before distinguished benches of lawyers, academics, and practitioners from the media industry serving as judges.[16]

Two teams from the Philippines advanced from the Southeast Asian rounds to the international rounds of the 23rd Annual Stetson International Environmental Moot Court Competition: The University of the Philippines and University of St. La Salle. Both teams competed in the international rounds of the competition held in Gulfport, Florida on Apr. 11-13, 2019, with the University of the Philippines team reaching the semifinals. The Stetson International Environmental Moot Court Competition, which focuses on important global environmental challenges, is the most prestigious international environmental law moot court competition in the world.[17]

The University of the Philippines won the 2019 Asia Cup International Law Moot Court Competition. The 2019 edition was held from Aug. 6-7, 2019 in Tokyo, Japan, and had a record high participation of 72 teams from 17 different jurisdictions. Leslie Diane Torres was awarded Best Applicant Oralist. The 2019 Asia Cup was co-organized by the Japanese Society of International Law and

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[16] *International Rounds 2019,* BONAVERO INSTITUTE OF HUMAN RIGHTS, FACULTY OF LAW, OXFORD UNIVERSITY, https://www.law.ox.ac.uk/centres-institutes/bonavero-institute-human-rights/monroe-e-price-media-law-moot-court-competition-3 (last visited June 30, 2021).

[17] *Results of the 23rd Annual Stetson International Environmental Moot Court Competition,* STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT COMPETITION, https://www.stetson.edu/law/international/iemcc/ (last visited June 30, 2021).

Ministry of Foreign Affairs of Japan and aims to contribute to the establishment of "Rule of Law" in Asia.[18]

On Sept. 27, 2019, the 14th National Moot Court Competition on International Humanitarian Law came to a close with the University of the Philippines College of Law emerging victorious. The Philippine Red Cross and the International Committee of the Red Cross co-organized the competition with closing proceedings held at the En Banc Hall of the Supreme Court of the Philippines. Vanayan Odsey was hailed as the Best Mooter of the Final Round. The runner-up of the competition was the University of Batangas. Sixteen schools from all over the country participated in the week-long competition which included submission of memorials, role play challenges, and rounds of oral arguments derived from a formulated compromis dealing with international humanitarian law.[19]

The 2019 Philippine National Rounds of the Philip C. Jessup International Law Moot Court Competition were organized by Divina Law and were held at the University of Santo Tomas, Manila from Feb. 21-23, 2019. The University of the Philippines emerged as champions with the University of San Carlos as the runner-up. Abelardo Hernandez was awarded Best Oralist. Ateneo de Manila University won the Overall Best Memorial. The international rounds of the Jessup Moot Court Competition were held on Mar. 31-Apr. 6, 2019 at Capitol Hill, Washington D.C. The University of the Philippines reached the quarterfinals of the international rounds. The Jessup Moot Court Competition is the biggest and most prestigious moot court competition in the world.[20]

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[18] *Results of Asia Cup 2019,* ASIA CUP INTERNATIONAL LAW MOOT COURT COMPETITION FOR FUTURE INTERNATIONAL LAWYERS IN ASIA, https://asiacup.sakura.ne.jp/p2019.html (last visited June 30, 2021).

[19] *U.P. National Champion on IHL Moot Court Competition,* RED CROSS PHILIPPINES, https://redcross.org.ph/2019/10/07/u-p-national-champion-on-ihl-moot-court-competition/ (last visited June 30, 2021).

[20] *Jessup 2019,* INTERNATIONAL LAW STUDENTS ASSOCIATION, https://www.ilsa.org/jessup-history/jessup-2019 (last visited June 30, 2021).

SPECIAL FEATURE

7TH BIENNIAL CONFERENCE OF THE ASIAN SOCIETY OF INTERNATIONAL LAW

From Aug. 22-23 2019, the 7th Biennial Conference of the Asian Society of International Law ("AsianSIL") was held in Novotel Manila Araneta Center in Cubao, Quezon City. With the theme "Rethinking International Law: Finding Common Solutions to Contemporary Civilizational Issues from an Asian Perspective," the conference brought together more than 400 delegates from around the world, including foreign ministers, judges, policy-makers, lawyers, researchers, public servants, members of the academe, and students.

AsianSIL is comprised of regional chapters and national societies in Asia which include the Philippine Society of International Law ("PSIL"). In line with its goal of fostering and encouraging Asian perspectives of international law and promoting awareness of and respect for international law in Asia, AsianSIL serves as a forum for scholars and practitioners to promote research, education, and practice of international law. The Biennial Conference is one such way the goal of the institution is achieved. Major conferences are organized every two years, with the 6th Biennial Conference taking place in Seoul, South Korea in 2017.

The main conference was preceded by a Junior Scholars Conference ("JSC") that took place on Aug. 21, 2019, in the University of the Philippines College of Law. The JSC featured over 75 junior academics, academic fellows, post-doctoral fellows, and graduate students, who presented their papers on the same topics included in the parallel sessions of the main conference. The scholars were further guided by the main conference theme, "Rethinking International Law: Finding Common Solutions to Contemporary Civilizational Issues from an Asian Perspective." Notable senior academics and international law practitioners were also in attendance to moderate the sessions, with a keynote speech delivered by Professor Jean Allain, the Associate Dean for Research of the Monash University Faculty of Law.

The two-day global conference included an opening session, over 30 plenary and parallel sessions addressing a wide range of topics in international law, and a closing session.

International Court of Justice ("ICJ") Judge Iwasawa Yuji delivered the keynote address during the opening ceremony. Department of Foreign Affairs Secretary Teodoro Locsin, Jr., Supreme Court Justice Francis Jardeleza, then

AsianSIL President Harry Roque, and PSIL President Prof. Elizabeth Aguiling-Pangalangan also delivered remarks to welcome the delegates.

Various panel sessions were then conducted to discuss the papers of participants on a broad range of topics, including: International Law and Domestic Courts in Asia; International Law Aspects of Recognition and Enforcement of Foreign Judgments in Asia; ASEAN Integration and International Law; Corporations and Human Rights in Asia; Trans-boundary and other Environmental Harms and International Law in Asia; and Challenges to Women and Gender in International Law.

A special panel session was also held in honor of Justice Florentino Feliciano on the spirit of international legal scholarship and judicial theory. Speakers during this panel included retired ICJ Judge Hisashi Owada, Judge Jin-Hyun Paik of the International Tribunal on the Law of the Sea, Judge Raul Pangalangan of the International Criminal Court, and retired Ambassador Lilia Bautista. Moreover, the conference also served as the launch of the UP Law Center Publication "Treaties: Guidance on Practices and Procedures" which was the result of the collaborative efforts of Department of Foreign Affairs Undersecretary J. Eduardo Malaya and UP Institute of International Legal Studies Director Prof. Rommel J. Casis. The conference also served as the venue for the 7th AsianSIL General Meeting and the 21st AsianSIL Executive Council Meeting, which were events exclusive to AsianSIL members.

After the plenary and panel sessions, a closing dinner and fellowship night marked the end of the Biennial Conference. The dinner included performances sponsored by the Tourism Promotions Board of the Philippines as a means of showcasing Philippine culture to the delegates. Members of the Philippine planning committee were also recognized, namely: Dean Merlin Magallona, Prof. Upendra Dev Acharya, Prof. Elizabeth Aguiling-Pangalangan, Undersecretary J. Eduardo Malaya, Prof. Concepcion Jardeleza, Atty. Romel Bagares, Prof. Rommel Casis, Atty. Maricel Seno, Atty. Melissa Anne Telan, and Atty. Modesta Chungalao.

All in all, the conference was a recognition of the invaluable role the Asian region plays in shaping international law. It also presented the opportunity for delegates from diverse backgrounds to come together in pursuit of common solutions to common issues through a deeper understanding and appreciation of international law.

7TH BIENNIAL CONFERENCE OF THE ASIANSIL PHOTOS

Kick-off ceremony of the 7th Biennial Conference of the Asian Society of International Law (AsianSIL) at the Department of Foreign Affairs in Pasay City. In the photo are: (L-R) Foreign Affairs Assistant Secretary for Treaties and Legal Affairs Secretary J. Eduardo Malaya, Philippine Yearbook of International Law Associate Editor Rommel Casis, Supreme Court Associate Justice Mario Victor Leonen, Foreign Affairs Secretary Teodoro L. Locsin Jr., AsianSIL President Harry Roque, Philippine Yearbook of International Law Editor-in-Chief Merlin Magallona, Philippine Society of International Law President Elizabeth Aguiling-Pangalangan, and Papal Nuncio and Dean of the Diplomatic Corps Gabriele Caccia.

International Court of Justice Judge Iwasawa Yuji delivering the Keynote Address at the 7th Biennial Conference of the Asian Society of International Law (AsianSIL).

Opening Ceremony of the 7th Biennial Conference of the Asian Society of International Law (AsianSIL). In the photo are: (L-R): Foreign Affairs Secretary Teodoro L. Locsin Jr., Philippine Society of International Law President Elizabeth Aguiling-Pangalangan, International Court of Justice Judge Iwasawa, Supreme Court Associate Justice Francis Jardeleza, AsianSIL President Harry Roque.

First Plenary Session of the 7th Biennial Conference of the Asian Society of International Law (AsianSIL). In the photo are: (L-R) AsianSIL President Harry Roque, Professor B. S. Chimini, Professor Kawano Mariko, Professor Congyan Cai, Professor Carsten Stahn, Professor Ago Shin-Ichi.

7th Biennial Conference of the Asian Society of International Law (AsianSIL). In the photo are: (L-R) Foreign Affairs Assistant Secretary for Treaties and Legal Affairs Secretary J. Eduardo Malaya, Asian-African Legal Consultative Organization (AALCO) Secretary-General Dr. Kennedy Gastorn, Secretary General of the Hague Conference on Private International Law Christophe Bernasconi, Philippine Society of International Law President Elizabeth Aguiling-Pangalangan, International Criminal Court Judge Raul C. Pangalangan, International Court of Justice Judge Iwasawa, Foreign Affairs Secretary Teodoro L. Locsin Jr, International Court of Justice Judge President Judge (Ret.) Hisashi Owada, AsianSIL President Harry Roque, Supreme Court Associate Justice Francis Jardeleza, International Criminal Court Judge Chang-Ho Chung, Supreme Court Associate Justice Ramon Paul Hernando.

Junior Scholars Conference ("Rethinking International Law: Finding Common Solutions to Contemporary Civilizational Issues from an Asian Perspective") that preceded the 7th Biennial Conference of the Asian Society of International Law.

WELCOME REMARKS[*]

Hon. Teodoro L. Locsin, Jr.[**]

His Excellency Judge Yuji Iwasawa of the International Court of Justice,

Supreme Court Justice Francis Jardeleza,

Their Excellencies Judges Chang-ho Chung and Raul Pangalangan of the International Criminal Court,

His Excellency retired Judge Hisashi Owada, former President of the International Court of Justice and the first President of AsianSIL,

Professor Elizabeth Pangalangan, Professor Harry Roque, Ambassadors and members of the diplomatic corps, Colleagues in government,

Distinguished delegates, ladies and gentlemen, good morning.

It is a distinct honor to welcome you all to Manila for the 7th Biennial Conference of the Asian Society of International Law. The Department of Foreign Affairs is pleased to sponsor this event with the University of the Philippines Law Center and the Philippine Society of International Law.

Our theme – "*Finding Common Solutions to Contemporary Civilizational Issues from an Asian Perspective*" — acknowledges the challenges our vast region must tackle collectively; collectively because no one pays attention let alone respect to singular and idiosyncratic opinions on such a matter. Either the solution is rooted in universal principles or it is mumbo-jumbo. It is sad but true: the best thinking in the West is the best thoughts on the subject of all mankind — be they in the East or West, North or South. Modernity is Western; so is efficiency in all pursuits good and ill. And universality in moral thinking is Immanuel Kant. There's been no improvement on his categorical imperative; just refinements like Rawls'.

[*] 7th Biennial Conference of the Asian Society of International Law (AsianSIL), Aug. 22, 2019, Novotel Manila Conference Center, Quezon City.

[**] Secretary, Department of Foreign Affairs, Republic of the Philippines.

This is why Asian values never took off. To start with, Asian values boil down to the millennial curse of Oriental despotism marked chiefly by nepotism and abject submission to authority. Such values serve only as foundations of fear and despair; never of community and hope.

Asian values are invoked by those who abuse others — hopefully with impunity as a mode of unique cultural expression to be spared condemnation. They are the grand-sounding cultural excuse for abuse — from female circumcision to honor killing and binding feet.

Real solutions in our time, and for all time hereafter we hope, must be common ones and by common consent — better yet by consensus. At least that's Asian or ASEAN. Solutions that are worth the time discussing them must be seen to benefit everyone at first glance: like leaving no one behind—the motto of the US Marine Corps.

For the next two days, officials and academics will propose and debate legal solutions concerning counterterrorism, human rights, the rule of law, dispute settlement, and maritime issues; all these in ways addressing each notion's varied and conflicting aspects. These are but a few of the current challenges affecting the ordinary lives of ordinary people; and therefore of the President I serve.

Showed an extravagant way to make his duties lighter to bear, he said: "No. This is too much; it's too expensive. I am but an ordinary man, accustomed to ordinary things." These are the things that matter to the ordinary people we are sworn to serve.

We are very interested in the discussion; we will listen very closely; and we will participate very actively.

On fighting terrorism, we must understand the combustion that drug money laundering ignites in a mixture of murder, mayhem and religious madness; for example, in the taking of Marawi. The cleanness and celerity of its recapture by our Army was described in my presence at the Security Council as "a near textbook perfect victory" — dismissing outright allegations of human rights violations from the usual suspects. The fight was savage, sweeping, and swift. We took back in six months when took the West six years to recapture Raqqa. There just wasn't time to attach electrodes to anyone's privates.

On human rights, we must confront the duplicity in the application of undoubtedly universal Western standards of decency in the treatment of fellow human beings. More famously honored in the breach than the observance. On the one hand there is the wilfully ignorant — and for that reason all the more

sweeping — condemnation of jungle folk like us when we address threats to public order and safety with the necessary severity. On the other hand, there is the silent acceptance of its gross failures and misdeeds which the West much prefers in having its own record judged.

The Philippine record comes closer to the Western ideal. It dates from the 1948 Universal Declaration, the 1951 Convention on the Status of Refugees, to the 1979 Convention on the Elimination of All Forms of Discrimination against Women, to name but a few. But well before these codes of decent conduct were written, there was a country still a colony for all practical purposes that defied its anti-Semitic colonial master to take in the wretched of the earth fleeing one holocaust after another in the West. Before subscribing to any written code of decent conduct, Filipinos practiced it first. Two Philippine administration have offered Rohingya unconditional asylum — to the embarrassment of non-Christian neighbors who shut the door on their co-religionists' faces.

On dispute settlement, let us discuss if *pacta sunt servanda* is still relevant when more states refuse to recognize let alone carry out judicial or arbitral awards they lost fairly and legally. Let us remind the world of the 1982 Manila Declaration on the Peaceful Settlement of International Disputes — to date the most important achievement of the Special Committee on the Charter of the United Nations.

Ladies and gentlemen, we may agree, we may disagree. But let us listen, let us learn from one another as scholars, as governments, as human beings, — and Asians. Let's do and be a little better than non-Asians even if we didn't come up with the Western notions that hold true for all time and everywhere, finally achieving in their place of origin a verbal allegiance.

We have half of the world's human resources to address these challenges. Surely there can be more creative and viable legal and political solutions drawn from the Asian experience of Western democracy. Looking at the record, we have done Western civilization rather better.

Long before the present millennium, the Asian Century was our creed. Twenty years on, the growth of our region in great part shapes that of the rest of the world. With emerging economic might comes a leading role and a major responsibility to do right. Let me cite two examples.

The Association of Southeast Asian Nations paved the way toward social and political stability in a region wracked by the most savage war of peace since the end of World War 2. It replaced the moribund US-led South-East Asian Treaty

Organization. In that turbulent period, five Southeast Asian countries — at odds with each other — came together to hold on to whatever they still had to build a safer, more progressive future from there. They quarreled every step of the way — like a family. None left the fold lest they miss out on the only viable prospect of peace, freedom and progress — by hanging together so as not to hang separately.

It has since affiliated with major neighbors such as Japan, South Korea and China — in the so-called ASEAN +3. And promoted dialogue with partner states like the US in ASEAN Regional Forums. It's framed the agenda for meetings with Australia, India, New Zealand, Russia and others. But it has never adopted any of them as one of its own. That's like letting the fox in the henhouse. At their farewell lunch for me, I told my ASEAN colleagues at the UN: "Whatever you do, don't do a G-77 plus China. Never add a superpower. You'll end up the dog being wagged by its tail. Keep it simple: Southeast Asian and no one else.

Second, we have produced legal experts that continue to illuminate international law; from the International Law Commission to various international courts and tribunals – and many are in our midst today, our keynote speaker among them. International law has benefitted from legal thinking rooted in the Asian experience, reflecting our pacific ways of accommodating each other where possible, and leaving each other alone when unable to. This year is a milestone for international law. I mentioned the principle of *pacta sunt servanda* enshrined in the treaty on treaties – the Vienna Convention.

Adopted 50 years ago, it codified bedrocks of acceptable international conduct we hold sacred today. If only we all followed our treaty obligations in good faith, there **would** have been — there **could** have been — less war and suffering; less deceit and consequent cynicism about the possibility of right in international relations.

There **would** have been — there **should** have been — more progress and better living standards within a larger self-enriching freedom. But to paraphrase Dag Hammarskjöld, perhaps international law, like the United Nations, is negotiated not to take us to heaven but to save us from hell. After Hammarskjöld, the United Nations led the way to hell on a pavement of good intentions in Rwanda.

This year marks the 25th anniversary of the coming into force of our constitution for the oceans: the UN Convention on the Law of the Sea. Despite near universal acceptance by 168 states parties, the most imminent and potentially

the most disastrous dangers in our world today pertain to marine and maritime affairs — the Persian Gulf and the South China Sea.

If only we respected *pacta sunt servanda* in our obligations under UNCLOS, there would be less animosity with its greater likelihood of conflict. If only the greatest power on earth led by the example of subscribing to UNCLOS, it would be a safer world. The only cure for the uncertainty that gnaws at our sense of security — and invites us to prepare for war to find its opposite in peace — is the universal acceptance of international law. Not in place of the national self-interest but to serve it better.

Before I conclude, I wish to take this opportunity to once again welcome our Keynote Speaker Judge Yuji Iwasawa and to announce that the Philippines is fully and unconditionally supporting his re-election to the International Court of Justice in the elections to be held next year. We do not seek any quid pro quo for our vote; because we are casting it for the best of the interest of the world — and therefore of our country. Thank you!

LIST OF PLENARY SESSIONS

FIRST PLENARY SESSION

Finding Common Solutions to Civilizational Problems: International Law's Promise?

HON. H. HARRY L. ROQUE, JR.
President
Asian Society of International Law

PROFESSOR B. S. CHIMNI
Former Chairperson
Centre for International Legal Studies Jawaharlal Nehru University

PROFESSOR KAWANO MARIKO
Professor of International Law
Waseda University Faculty of Law

PROFESSOR CARSTEN STAHN
Professor of International Criminal Law and Global Justice
Laiden Law School

PROFESSOR CONGYAN CAI
Professor of International Law
Xiamen University School of Law

PROFESSOR AGO SHIN-ICHI (Chair)
Professor of Law
Ritsumeikan University

SECOND PLENARY SESSION

Special Plenary Panel in Honor of the late Justice Florentino Feliciano: International Legal Scholarship and Judicial Theory International Law as Shaped by Asian Judges and Lawyers – What Do We Bring to the Table?

H.E. JUDGE (RET.) HISASHI OWADA
Former Judge and President
International Court of Justice

H.E. JUDGE JIN-HYUN PAIK
President
International Tribunal on the Law of the Sea

H.E. JUDGE RAUL C. PANGALANGAN
President
Trial Division, International Criminal Court

AMBASSADOR LILIA BAUTISTA (RET.)
Dean and Professor of Law
Jose Rizal University School of Law

PROFESSOR VED NANDA
Professor of Law
Strum College of Law, University of Denver

PROFESSOR NATALIE KLEIN
Faculty of Law
University of New South Wales

RESPONSES
HON. FRANCIS H. JARDELEZA (Chair)
Associate Justice
Supreme Court of the Philippines

CONCLUDING PLENARY SESSION

From Commonalities and Divergences – International Law in Asia and its Contestable Future/s?

DEAN MERLIN M. MAGALLONA
Professorial Lecturer in International Law and Former Dean
University of the Philippines College of Law

DR. ANIRUDDHA RAJPUT
Member and Chair
Drafting Committee, 69th Session
International Law Commission

PROFESSOR LILIANA OBREGÓN TARAZONA
Professor of International Law
Facultad de Derecho, Universidad de los Andes, Colombia

PROFESSOR N.M. (NIKOLAS) RAJKOVIC
Professor and Chair of International Law
Tilburg University, Netherlands

PROFESSOR VERA RUSINOVA
Professor of International Law, Faculty of Law
National Research University Higher School of Economics Moscow, Russia

PROFESSOR UPENDRA DEV ACHARYA (Chair)
Professor of International Law
Gonzaga University School of Law