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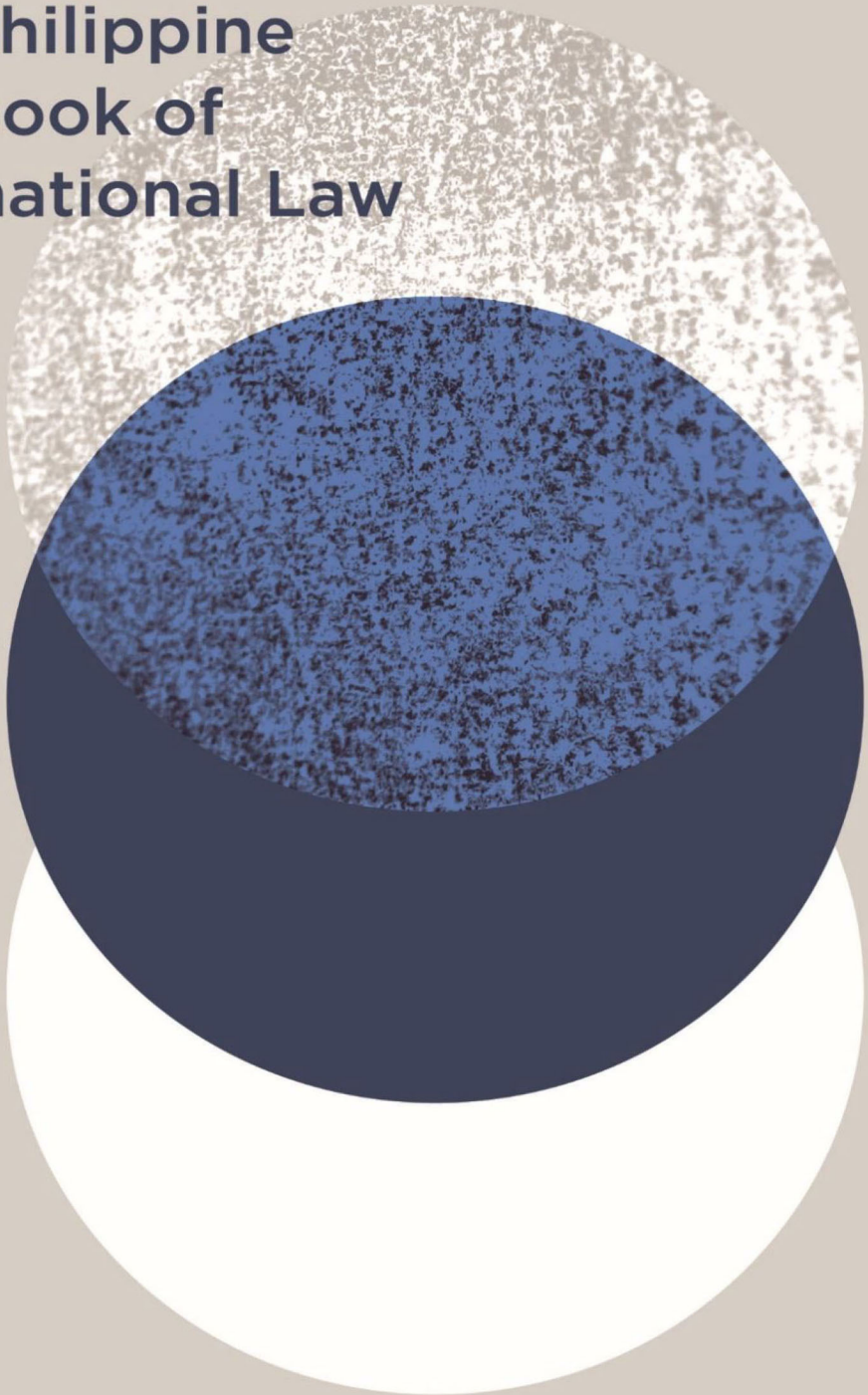

THE PHILIPPINE SOCIETY OF INTERNATIONAL LAW

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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.

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EDITOR'S NOTE

This volume includes four (4) papers. First, the paper of Judge Soliman M. Santos Jr., titled "The Constitutionality Petitions on the Anti-Terrorism Act of 2020: An Unfortunate Lack of International Law Discourse on Both Sides," emphasizes that the crux of the constitutionality issues surrounding the Anti-Terrorism Law. The author points out that not many of the petitions invoke international law against the ATA. In his discussion, Judge Santos Jr. posits that international law can provide insight in arguing the constitutionality of the ATA.

Second, Ambassador J. Eduardo Malaya and Atty. Jillian Joyce De Dumo-Cornista, in their paper, "Implementation of International Agreements and the Self-Executing and Non-Self-Executing Dichotomy: The Case of Three HCCH Conventions," discuss an essential issue in the transformation of international agreements into the domestic legal system. The authors examine the question of self-execution by looking at the Philippines' accession to the Inter-country Adoption, Apostille, and Service Conventions under the Hague Conference of Private International Law. The authors then recommend standards to determine whether an international agreement is self-executing or otherwise.

Third, Atty. Jilliane Joyce R. De Dumo-Cornista, in "The Search for Justice: Reparations in the International Criminal Court," provides a discussion on the theory of reparation in the fields of international law and transitional justice. The paper further examines the ICC and Trust Fund for Victims' practices. In doing so, the author argues that the ICC plays a crucial role in developing a reparations framework. The paper provides recommendations on how the ICC can improve the handling of reparation claims, victim recognition, and engagement, among others.

Fourth, in "Domesticating International Law: Resolving the Uncertainty and Incongruence," Prof. Rommel J. Casis analyzes the issues of the domestication of international law in the Philippine legal system. The paper also looks at how executive agreements are defined and construed vis-à-vis treaties and other international agreements and the absence of rules on the third class of sources of international law – General Principles of Law. Finally, the last part of the paper provides recommendations on resolving the identified

questions through legislative action, judicial construction, and executive correction.

This volume also includes the Report on the Preliminary Examination in the Philippines on Extrajudicial Killings issued by the Office of the Prosecutor of the International Criminal Court (Report). The Report touched upon preliminary jurisdiction issues following the Philippines' withdrawal from the ICC, subject-matter jurisdiction, and the admissibility assessment for the investigations. The Report also announced that the Office of the Prosecutor would decide whether to seek authorization to open an investigation in the Philippines.

This volume also includes a summary of 12 international treaties and agreements that entered into force for the Philippines in 2020. The treaties and agreements span the areas of criminal law, extradition, science and technology, trade, transportation, investments, safety, and health, among others. Among the notable multilateral treaties and agreements included are the ILO Convention 187 on the Promotional Framework for Occupational Safety and Health Convention, the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, and the Minamata Convention on Mercury.

This volume also includes six (6) judicial decisions wherein the Supreme Court had the occasion to address international law issues. These six cases are *Galapon v. Republic, Kondo v. Civil Registrar General, Joint Ship Manning Group Inc. v. SSS, Suzuki v. OSG, Zuneca v. Natrapharm,* and *Alanis v. Court of Appeals*. In addition, the DOJ opinions on the Marawi Compensation Bills and the DOF Loan with Australia are also included.

MERLIN M. MAGALLONA
Editor-in-Chief

FOREWORD

With the current political climate in the Philippines and the COVID-19 pandemic that forced a slowdown in both public and private sector activities, it has been especially difficult to seek justice and the protection of rights. It is notable that when such circumstances led to the emergence of a belief that domestic institutions are unable to uphold the rule of law, a number of sectors of Philippine society would turn to international institutions for legal protection.

This volume of the *Philippine Yearbook of International Law* serves as an outlet of discussions on issues relating to the application of international law to domestic events. Through this approach – the international law perspective – readers are given a different take on the burning domestic issues of the year 2020.

This issue of the Philippine Yearbook of International Law features four articles written by some of the country's distinguished experts in international law. It also includes the Report on the Preliminary Examination in the Philippines on Extrajudicial Killings issued by the Office of the Prosecutor of the International Criminal Court. In addition, this volume contains a summary of twelve treaties and agreements entered into by the Philippines, as well as judicial pronouncements on both public and private international law for the subject year. Finally, the issue also includes two Department of Justice opinions on the Marawi Compensation Bills and a Department of Finance Loan, as well as a listing of books on international law published in 2020.

The efforts of our contributors in continuously studying, debating and sharing their insights on important international law issues and developments amidst these trying times are greatly appreciated. I congratulate the University of the Philippines Law Center - Institute of International Legal Studies and the Philippine Society of International Law for the publication of the 2020 edition of the Philippine Yearbook of International Law despite the challenges of the pandemic.

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

ARTICLES

THE CONSTITUTIONALITY PETITIONS ON THE ANTI-TERRORISM ACT OF 2020: AN UNFORTUNATE LACK OF INTERNATIONAL LAW DISCOURSE ON BOTH SIDES

Soliman M. Santos, Jr.[*]

Abstract

The thirty-seven Petitions questioning the constitutionality of the new Philippine Anti-Terrorism Act (ATA) before the Supreme Court, as well as the Comments thereon by the Office of the Solicitor General to a lesser extent, while understandably abundantly discussing the standard constitutionality issues of vagueness, overbreadth, violations of the Bill of Rights and of the separation of powers, unfortunately largely miss to argue from the perspective of international law as this relates to Philippine constitutional law. This article focuses on the arguments regarding the ATA Section 4 definition of Terrorism in general or as a concept, the ATA's "heart" which inevitably bears on other Sections. The true constitutionality issues and arguments should not be limited to those standard ones, as a fuller constitutionality discussion is best when also enlightened by international law. This article concludes by venturing how international law would bear on the Court's constitutionality discussion and its result.

"The Philippines… adopts the generally accepted principles of international law as part of the law of the land…"
—1987 Philippine Constitution, Art. II, Sec. 2

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[*] He is presently a judge of the Regional Trial Court of Naga City, Camarines Sur, Philippines. He has an A.B. in History *cum laude* from the University of the Philippines, a LL.B. from the University of Nueva Caceres in Naga City, and a LL.M. from the University of Melbourne. He is a long-time human rights and IHL lawyer; legislative consultant and legal scholar; peace advocate, researcher and writer; and author of a number of books. He was the lead individual petitioner in *Southern Hemisphere Engagement Network, Inc. vs. Anti-Terrorism Council* (632 SCRA 146 [2010]), and drew much from his pleadings therein for this article. He was the main drafter of the "IHL Bill" which became R.A. 9851. He is a new member of the Editorial Board of the *International Review of the Red Cross*.

> "It is declared a policy of the State to protect life, liberty, and property from terrorism, to condemn terrorism as inimical and dangerous to the national security of the country and to the welfare of the people, and to make terrorism a crime against the Filipino people, against humanity, and against The Law of Nations."
>
> — The Anti-Terrorism Act of 2020, Sec. 2. *Declaration of Policy*

The thirty-seven petitions questioning the constitutionality of Republic Act No. 11479, the new Anti-Terrorism Act ("ATA") of 2020, before the Supreme Court of the Philippines, make the ATA, in the words of former Chief Justice Artemio V. Panganiban, "the most assailed law in memory under the 1987 Constitution."[1] This constitutionality litigation has understandably generated very much public and media attention, as it should. The said petitions as well as the Comments thereon by the Office of the Solicitor General ("OSG") to a lesser extent, while understandably mainly and even abundantly discussing the standard constitutionality issues of vagueness, overbreadth, violation of the Bill of Rights, and violation of separation of powers, unfortunately miss for the most part to argue from the perspective of international law as this relates to Philippine constitutional law. This article focuses on the said constitutionality litigation's arguments and counter-arguments on the ATA Section 4 definition of Terrorism in general or as a concept, which has been described as the "meat," "heart," or "core" of the ATA, and which thus inevitably bears on other sections as well.

I. Representative Sample of Twenty-Three Petitions

Aside from the said focus on the ATA Section 4 definition of Terrorism, this article is limited to a representative sample of twenty-three of the more prominent among the total thirty-seven petitions and to the OSG comments thereon, all coming in 2020. It does not cover the oral arguments and the memorandums submitted in 2021, much less the ensuing Supreme Court Decision. The said twenty-three petitions are the following in their number sequence of filing (these numbers will be used for reference purposes), with some identification of the lead petitioner/s and counsel/s indicated:

---

[1] Artemio V. Panganiban, *ATA, the most assailed law in memory*, PHILIPPINE DAILY INQUIRER, Nov. 29, 2020, at A7.

1. G.R. No. 252578 (Atty. Howard M. Calleja, et al.)
2. G.R. No. 252579 (Rep. Edcel C. Lagman)
3. G.R. No. 252580 (Dean Melecio S. Sta. Maria, et al.)
   Counsel: Far Eastern University – Institute of Law
4. G.R. No. 252585 (Bayan Muna Party-List, et al.)
   Counsel: Atty. Maneeka Asistol Sarza, et al.
7. G.R. No. 252624 (Atty. Cristian S. Monsod, et al.)
   Counsel: Ateneo Human Rights Center ("AHRC")
8. G.R. No. 252646 (SANLAKAS)
   Counsel: Dean J.V. Bautista
11. G.R. No. 252733 (BAYAN, et al.)
    Counsel: National Union of People's Lawyers ("NUPL")
12. G.R. No. 252736 (Justice Antonio T. Carpio, et al.)
    Counsel: Atty. Luisito V. Liban, et al.
13. G.R. No. 252741 (Ma. Ceres P. Doyo, et al.)
    Counsel: Free Legal Assistance Group ("FLAG")
14. G.R. No. 252747 (National Union of Journalists of the Philippines)
    Counsel: Atty. Evalyn G. Ursua, et al.
16. G.R. No. 252759 (Atty. Algamar A. Latiph, et al.)
    Counsel: Atty. Musa I. Malayang, et al.
17. G.R. 252765 (The Alternate Law Groups, Inc.)
    Counsel: Atty. Marlon J. Manuel, et al.
18. G.R. No. 252767 (Bishop Broderick S. Pabillo, et al.)
    Counsel: Public Interest Law Center ("PILC")
23. G.R. No. 252903 (Concerned Lawyers for Civil Liberties, et al.)
    Counsel: Dean Pacifico A. Agabin, et al.
24. G.R. No. 252904 (Beverly Longid, et al.)
    Counsel: Atty. Antonio G.M. La Viña, et al.
25. G.R. No. 252905 (Center for International Law, Inc.)
    Counsel: Atty. Joel R. Butuyan, et al.
26. G.R. No. 252916 (Main T. Mohammad, et al.)
    Counsel: Ateneo Legal Services Center
30. G.R. No. 253100 (Philippine Bar Association)
    Counsel: Atty. Luis A. Vera Cruz, Jr., et al.
31. G.R. No. 253118 (Balay Rehabilitation Center, Inc., et al.)
    Counsel: Atty. Cristina S. Sevilla, et al.

32. G.R. No. 253124 (Integrated Bar of the Philippines, et al.)
Counsel: Atty. Jose Anselmo I. Cadiz, et al.
35. G.R. No. 253264 (Pagkakaisa ng Kababaihan para sa Kalayaan, et al.)
Counsel: Atty. Virginia Lacsa Suarez, et al.
36. G.R. No. 254191 (Anak Mindanao Party-List, et al.)
Counsel: Atty. Jamar M. Kulayan, et al.
37. G.R. No. 253420 (Haroun Alrashid Alonto Lucman, Jr., et al.)
Counsel: Ateneo [de Davao] Legal Services Office, et al.

This representative sample of twenty-three (out of the total thirty-seven) petitions were chosen for their representativeness in terms of sectors as well as of lawyers' groups represented or acting as counsel, taking into consideration also the stature and track record of individual counsels. It is notable that Bangsamoro and indigenous peoples perspectives are among those represented in certain petitions. There is a good mix of mainstream and activist petitioners and counsels. Some are what may be called the proverbial "usual suspects" in constitutionality litigations against government acts and issuances. Admittedly, in the mix, there can be said to be a significant or multiple representation of open and legal national-democratic organizations and counsels. Some would consider that to be to their credit.

To compare things with the antecedent constitutionality litigation on the Human Security Act ("HSA") of 2007, the case of *Southern Hemisphere Engagement Network, Inc. vs. Anti-Terrorism Council*[2] (an unavoidable and recurrent theme of comparison in the thirty-seven anti-ATA petitions and the OSG comments thereon), there were only six petitions there—four of which had nat-dem lead petitioners (KMU, BAYAN, KARAPATAN and BAYAN-Southern Tagalog), one of which had the IBP as lead petitioner, and one of which had the NGO Southern Hemisphere Engagement Network, Inc. and this author as petitioners, the latter also as lead counsel.[3] At least five other counsels in *Southern Hemisphere*—Attys. Remigdio D. Saladero (KMU), Edre U. Olalia (NUPL), Clara Rita A. Padilla, Pacifico A. Agabin (CLCL), and Neri Javier Colmenares (NUPL)—are also counsels (the latter four are themselves also petitioners) in the current constitutionality

[2] Southern Hemisphere Engagement Network, Inc. vs. Anti-Terrorism Council, 632 SCRA 146 (2010).

[3] With co-counsel Atty. Vicente Dante P. Adan of San Jose, Camarines Sur. He passed away due to COVID-19 last May 1, 2021. This article is in honor of him.

litigation against the ATA. On the other hand, the lone individual public respondent in both *Southern Hemisphere* and the current ATA constitutionality litigation, to be likely referred to as "*Calleja vs. Executive Secretary*," is Gen. Hermogenes C. Esperon, Jr., then as Armed Forces Chief of Staff and now as National Security Adviser.

II. ATA Section 4 Definition of Terrorism

"Section 4 is the core of R.A. 11479.
All the acts penalized in the succeeding sections
depend on the definition of terrorism."
— Bishop Pabillo Petition 18

"Section 4… is the core and anchor of the Anti-Terrorism Act
– this law cannot stand alone without Section 4."
— Philippine Bar Association Petition 27

As earlier indicated as a limitation of this article, we thus focus on the constitutionality litigation regarding Section 4 of the ATA of 2020, where terrorism is defined or conceptualized as follows:

> Section 4. *Terrorism.*––Subject to Section 49 of this Act, terrorism is committed by any person who, within or outside the Philippines, regardless of the stage of execution:
>
> (a) Engages in acts intended to cause death or serious bodily injury to any person, or endangers a person's life;
> (b) Engages in acts intended to cause extensive damage or destruction to a government or public facility, public place or private property;
> (c) Engages in acts intended to cause extensive interference with, damage or destruction to critical infrastructure;
> (d) Develops, manufactures, possesses, acquires, transports, supplies or uses weapons, explosives or of biological, nuclear, radiological or chemical weapons; and

(e) Release of dangerous substances, or causing fire, floods or explosions.

when the purpose of such act, by its nature and context, is to intimidate the general public or a segment thereof, create an atmosphere or spread a message of fear, to provoke or influence by intimidation the government or any international organization, or seriously destabilize or destroy the fundamental political, economic, or social structures of the country, or create a public emergency or seriously undermine public safety, shall be guilty of committing terrorism and shall suffer the penalty of life imprisonment without the benefit of parole and the benefits of Republic Act No. 10592, otherwise known as "An Act Amending Articles 29, 94, 97, 98 and 99 of Act No. 3815, as amended, otherwise known as the Revised Penal Code". *Provided,* That, terrorism as defined in this section shall not include advocacy, protest, dissent, stoppage of work, industrial or mass action, and other similar exercises of civil and political rights, which are not intended to cause death or serious physical harm to a person, to endanger a person's life, or to create a serious risk to public safety.

Section 49 pertains to Extraterritorial Application, while R.A. 10592 is what is commonly known as the "Expanded Good Conduct Time Allowance ["GCTA"] Law." These are not material for purposes of the discussion in this article.

In the 2020 Implementing Rules and Regulations ("IRR") of the ATA, the above definition is broken down by Rule 4.3 into two elements—acts and purposes, as follows:

Rule 4.3. Elements of the crime of terrorism

There is terrorism when the following elements concur:

a. engagement in any of the following *acts*, regardless of the stage of execution:

    i. acts intended to cause death or serious bodily injury to any person, or to endanger a person's life;

ii. acts intended to cause extensive damage or destruction to a government or public facility, public place, or private property;
iii. acts intended to cause extensive interference with, damage, or destruction to critical infrastructure;
iv. developing, manufacturing, possessing, acquiring, transporting, supplying, or using weapons or explosives intended to cause a disproportionate amount of damage, or of biological, nuclear, radiological, or chemical weapons; or
v. releasing of dangerous substances, or causing fire, floods, or explosions; and

b. the *purpose* of engagement in any of the acts under paragraph

(a) of this Rule, by its nature and context, is to:

i. intimidate the general public or a segment thereof;
ii. create an atmosphere or spread a message of fear;
iii. provoke or influence by intimidation the government or any international organization;
iv. seriously destabilize or destroy the fundamental political, economic, or social structures of the country; or
v. create a public emergency or seriously undermine public safety.

x x x

And there is also this IRR breakdown of "acts not considered terrorism," which includes a proviso:

Rule 4.4. Acts not considered terrorism

When not intended to cause death or serious physical harm to a person, to endanger a person's life, or to create a serious risk to

public safety, the following activities shall not be considered acts of terrorism:

a. advocacy;
b. protest;
c. dissent;
d. stoppage of work;
e. industrial or mass action;
f. creative, artistic, and cultural expressions; or
g. other similar exercises of civil and political rights.

If any of the acts enumerated in paragraph (a) to (g) of Rule 4.4, however, are intended to cause death or serious physical harm to a person, to endanger a person's life, or to create a serious risk to public safety, and any of the purposes enumerated in paragraph (b) under Rule 4.3 is proven in the engagement in the said act, the actor/s may be held liable for the crime of terrorism as defined and penalized under Section 4 of the Act. The burden of proving such intent lies with the prosecution arm of the government.

III. The Constitutionality Issues vs. the ATA Definition of Terrorism

The particular constitutionality issues raised against the ATA Section 4 Definition of Terrorism in our representative sample of twenty-three petitions may be tabulated as follows:

CONSTITUTIONALITY ISSUE (1987 Constitution)	PETITIONS RAISING THE ISSUE (By Petition Number earlier abovesaid)
1. Violation of the Due Process Clause (Article III, Section 1)	1, 3, 11, 16, 17, 18, 24, 27, 31, 37 (10 Petitions)
1.1 Void for Vagueness	1, 2, 3, 4, 8, 11, 12, 14, 15, 16, 17, 18, 23, 24, 31, 32, 35, 36, 37 (19 Petitions)
1.2 Void for Overbreadth	1, 2, 3, 4, 7, 11, 12, 15, 17, 23, 24, 25, 27, 31, 32, 35, 37 (17 Petitions)

2. Violation of Fundamental Freedoms or "First Amendment" Rights (Article III, Sections 4, 8 & 12[2])	(total of 11 Petitions, see below from 2.1 to 2.7)
2.1 Freedom of Speech	3, 4, 7, 8, 11, 15, 16, 25, 32, 37
2.2 Freedom of Expression	3, 4, 7, 11, 25, 32
2.3 Freedom of the Press	3, 4
2.4 Freedom of Assembly	3, 4, 7, 11, 25
2.5 Freedom of Petition	3, 4, 11, 25
2.6 Freedom of Association	11
2.7 Freedom from Torture	31
3. Violation of the Equal Protection Clause (Article III, Section 1)	31 (1 Petition)
4. Violation of the State Policy of Protection of the Youth (Article II, Section 13)	31 (1 Petition)
5. Undue Delegation of Legislative Power (Principle of Separation of Powers)	7, 15 (2 Petitions)

The above-tabulated constitutionality issues understandably constitute the bulk of the issues against the ATA Section 4 Definition of Terrorism in our representative sample of twenty-three petitions questioning the constitutionality of the ATA before the Supreme Court. This litigation will naturally either succeed or fail, rise or fall, on these issues, practically the standard constitutionality issues. Actually, one petition in the said sample, the Main Mohammad, et al. Petition 26 by the Ateneo Legal Services Center, did not raise grounds against Section 4, but did so against Sections 25, 29, 36, 34, 12, and 10, in that order of discussion.

At any rate, the Supreme Court Advisory on Nov. 20, 2020 for the oral arguments to be held in Jan. 2021, limited the discussion of the ATA Section 4 definition of terrorism this way:

> Whether Section 4 defining and penalizing the crime of "terrorism" is void for vagueness or overbroad in violation of the constitutional rights to due process, free speech and expression, to be informed of the nature and cause of accusation, and non-detention solely by reason of political beliefs.

The clear main points of contention here are [1] primarily, void for vagueness and overbreadth; and [2] secondarily, violation of the "First Amendment"[4] fundamental freedoms of speech, expression, the press, assembly and petition. The OSG of course traversed these constitutional issues, but we are not covering in this article the abundant arguments and counter-arguments in the pending constitutionality litigation before the Supreme Court. Our stated focus here is on the international law aspect of that litigation, particularly in the pleadings.

There is not much, perhaps understandably, invocation of international law against the ATA Section 4 definition of terrorism among the twenty-three petitions considered here. In fact, some of the international references made are, strictly speaking, not international law *per se* but rather reports, statements, and the like. We tabulate these too as follows:

INTERNATIONAL LAW ISSUE (or International Reference Used)	PETITIONS RAISING THE ISSUE (By Petition Number earlier abovesaid)
1. Principle of Legality	11, 3 (2 Petitions)
2. UN Resolutions, Reports, Statements	(total of 6 Petitions, see below from 2.1 to 2.7)
2.1 UN Security Council Resolutions 1566 & 1373	11
2.2 UN Secretary-General Kofi Anan Statements on August	32, 18, 4

[4] From the U.S. Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." This is equivalent to Sections 5 and 4 of Article III of the 1987 Philippine Constitution.

28, 3008, January 20, 2003 and on another occasion	
2.3 UN Special Rapporteur Fionnuala Ni Aolain statement at a webinar on June 26, 2020	11
2.4 UN Office of the High Commissioner for Human Rights Michelle Bachelet Report on the Human Rights Situation in the Philippines, dated June 4, 2020, and statement on June 30, 2020	11, 4, 24
2.5 UN High Commissioner for Human Rights Sergio Vieira de Mello statement on terrorism	4
2.6 UN Special Rapporteur Philip Alston Report on Extrajudicial Executions in the Philippines, dated April 16, 2008	4
2.7 UN OHCHR Fact Sheet 32	2
3. Inter-American Court of Human Rights ("IACHR") jurisprudence	17 (1 Petition)
	(grand total of 8 Petitions)

There are thus considerably much less, and understandably so, international law issues and the petitions raising them against the ATA Section 4 Definition of Terrorism than the constitutional issues and the petitions raising them. The BAYAN, et al. Petition 11 by the NUPL stands out as the lone petition raising substantial international law issues and references. We however do not include here the ample citations by many petitions of American jurisprudence because these relate more to the aforesaid main constitutional issues. In fact, American constitutional jurisprudence is treated practically as part of Philippine

constitutional jurisprudence, understandably because of the American roots of Philippine constitutional law (but that is another comparative law matter).

One petition, the Beverly Longid, et al. Petition 24 by Atty. Antonio G.M. La Viña, et al. notably invokes the right to self-determination ("RSD") of the indigenous peoples as well as of the Bangsamoro people, albeit against the ATA in general, not specifically against its Section 4 Definition of Terrorism. But with regards to RSD, Petition 24 invokes not international law instruments but rather the 1987 Constitution's Article II, Section 7: "The State shall pursue an independent foreign policy. In its relations with other states the paramount consideration shall be national sovereignty, territorial integrity, national interest, and the right to self-determination." This speaks more to the RSD of the Philippine State in its foreign relations with other states, rather than to "the right of self-determination" of "all peoples" under both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.[5]

IV. The Raised International Law Issues in More Detail

For a better idea of the international law issues and references against the ATA Section 4 Definition of Terrorism in only eight (or about 1/3) out of the twenty-three petitions as tabulated above, we present them now in sufficient detail.

The Dean Sta. Maria, et al. Petition 3 by the FEU-Institute of Law, as part of its void for vagueness and overbreadth argument against Section 4, invokes "the principle of legality of criminal law," not of international law. It quotes Prof. Jerome Hall's 1937 article "*Nulla Poena Sine Lege*" in the *Yale Law Journal*: "… Employed as *nullum crimen sine lege*, the prohibition is that no conduct shall be held criminal unless it is specifically described in the behavior circumstance element of a penal statute."

It is the BAYAN, et al. Petition 11, also as part of its void for vagueness argument against Section 4, that invokes the principle of legality in international law terms. It quotes the UN Office of the High Commissioner for Human Rights ("OHCHR") Michelle Bachelet Report on the Human Rights Situation in the Philippines, dated June 4, 2020, to the effect that "The vague definitions in the Anti-Terrorism Act may violate the principle of legality." The footnote 130 (in p.

[5] In both international covenants, it comes under Part I, Article 1, par. 1.

56) to this states that "The principle of legality is found in paragraph 15 of General Comment No. 35 on Article 9 of the International Covenant on Civil and Political Rights (Liberty and Security of a Person). The said paragraph 15 is also quoted in footnote 120 at the bottom of p. 50 of Petition 11, thus:

> 15. To the extent that States parties impose security detention (sometimes known as administrative detention or internment) not in contemplation of prosecution on a criminal charge, the Committee considers that such detention presents severe risks of arbitrary deprivation of liberty. Such detention would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available. If, under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat, the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that burden increases with the length of the detention. States parties also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by article 9 in all cases. Prompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary is a necessary guarantee for those conditions, as is access to independent legal advice, preferably selected by the detainee, and disclosure to the detainee of, at least, the essence of the evidence on which the decision is taken.

Unfortunately, however, one does not see here any presentation of the principle of legality in international law terms. Aside from this dissonance, it appears that Petition 11 did not really mean to invoke the principle of legality, it just so happened to be mentioned in the quote from UN High Commissioner for Human Rights Bachelet on "the vague definitions in the Anti-Terrorism Act." We shall thus go back to the principle of legality further below.

Aside from the abovesaid Bachelet Report, there are other UN resolutions, reports, and statements invoked or cited among the seven petitions which raise

international law issues and references in the discussion of Section 4. It is again the BAYAN, et al. Petition 11 which makes reference to UN Security Council Resolutions ("UNSCRs") 1566 and 1373. UNSCR 1566 (2004), "while not expressly framed as a definition" of terrorism, is a "resolution generically defining it."[6] UNSCR 1373 (2001) "required States, under Chapter VII" of the UN Charter, "to suppress terrorism," especially terrorist financing, and also required states to "establish such terrorists acts as serious criminal offenses in domestic laws with proportionate penalties."[7]

Petition 11 starts by quoting remarks of Fionnuala Ni Aolain, UN Special Rapporteur on the promotion of and protection of human rights and fundamental freedoms while countering terrorism, during the webinar of Ecumenical Voice for Peace entitled "#NoLockdownonRights, UN Human Rights Report on the Philippines and Trends amid the Pandemic" on June 26, 2020. Aolain cited UNSCR 1566 under which states were reminded to, among others, "ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law." Petition 11 then mentions that UNSCR 1566 affirmed UNSCR 1373, "which Sen. Lacson has been invoking to justify the vague and overbroad provisions of RA 11479." However, the working definition of terrorism in UNSCR 1566 is not quoted or discussed in the said petition. We shall go back to UNSCR 1566 further below.

Petition 11 extensively quoted Aolain's webinar remarks, including this notable passage:

> And as I have said, I think there are grave concerns about the breadth and scope of the terms of terrorism, terrorists, and terrorist activities as used in the legislation. They are certainly broader than the model definition of terrorism that has been advanced by my predecessors Martin Scheinin and Ben Emmerson over almost 20 years. The definitions also seem inconsistent with UN Security Council Resolution 1566 which provides a narrow and agreed

[6] Ben Saul, *Definition of "Terrorism" in the UN Security Council: 1985-2004*, 4(1) CHINESE J. INT'L L. 141, 164(2005).

[7] *Id.* at 156, citations omitted.

> definition of terrorism. And the definition in the Act also appears to go far beyond with what is envisaged by the broadly ratified Terrorism Suppression Convention, So, by all of those measures of international law the definitions of terrorism contained in this legislation seem to go beyond international law's accepted boundaries. (underscoring supplied)

This is of course Aolain's international legal opinion, although webinar remarks can hardly be considered authoritative. But just like with UNSCR 1566, Petition 11 does not quote or discuss the mentioned "model definition of terrorism" and the one in the "Terrorism Suppression Convention."[8]

The official statements of the UN Secretary General ("UNSG") are of course of some international weight. The Bishop Pabello, et al. Petition 18 by the PILC, in its void for vagueness argument against Section 4, cites the UNSG Kofi Anan's Aug. 28, 2008 policy statement on "The Protection of Human Rights and Fundamental Freedoms While Countering Terrorism," as follows: "… the adoption of any overly vague or broad definition of the term terrorism could lead to criminalization of conduct that does not constitute terrorism as such." He further cautioned that there is a danger in definitions that hamper "the legitimate non-violent and peaceful exercise of fundamental rights and freedoms."

As part of its Prefatory, not as part of its discussion of Section 4, the IBP, et al. Petition 32 by Atty. Jose Anselmo I. Cadiz, et al. cites the Statement of UNSG Anan at the UNSC Ministerial Meeting on Terrorism on Jan. 20, 2003 where he cautioned that the war on terrorism also brings with it "collateral damage," specifically, "damage to the presumption of innocence, to precious human rights, to the rule of law, and to the very fabric of democratic governance." Unfortunately, and surprisingly, none of the petitions cite UNSG Anan's paraphrasing of the definition of terrorism in the *Report of the UN High Level Panel on Threats, Challenges and Change* on December 2, 2004 made in his keynote address to the International Summit on Democracy, Terrorism and Security on March 10, 2005 in Madrid. We shall go back to this further below.

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[8] It is not clear which particular "Terrorism Suppression Convention" was referred to by Aolain but the closest appears to be the 1999 International Convention for the Suppression of the Financing of Terrorism.

The Rep. Lagman Petition 2 argues that the vagueness and overbreadth of Section 4 are "compounded by the deletion of the inculpatory element of political motive which is internationally prescribed." For this point, it cites the OHCHR Fact Sheet 32 stating that "Terrorism is commonly understood to refer to acts of violence that target civilians in the pursuit of political or ideological aims." But of course, a fact sheet, even if from the OHCHR, is not usually considered of high authoritative level. Petition 2 contends in its pars. 97-98 (p. 26) that the political or ideological motive indicated by the element "to coerce the government to give in to an unlawful demand" found in the HSA Section 3 Definition of Terrorism has been deleted from the ATA Section 4 Definition of Terrorism. But this is misleading because the ATA Section 4 actually contains the element "to provoke or influence by intimidation the government or any international organization" which arguably amounts to the HSA Section 3 element "to coerce the government to give in to an unlawful demand."

Finally, there is the ALG Petition 17 by Atty. Marlon J. Manuel, et al. which cited, as part of its void for vagueness argument against Section 4, certain jurisprudence from the Inter-American Court of Human Rights ("IACHR"). First cited was *Castillo Petruzzi, et al. vs. Peru* (May 30, 1999), where the IACHR "considers that crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offense, thus giving full meaning to the principle of *nullum crimen nulla poena sine lege praevia* in criminal law. And then next cited was *Cantoral-Benavides vs. Peru* (2000), citing *Petruzzi*, where the IACHR passed upon the legal effect of the similarity of the newly decreed crimes of terrorism and "treason against the fatherland," and held that:

> 157. In defining the crimes, it is necessary to keep the principle of criminal legality in mind; in other words, a clear definition of the illegal conduct, which sets forth its elements and makes it possible to distinguish it from non-punishable behavior or illegal activities punishable with non-criminal measures. Ambiguity in the definition of the crime creates doubt and gives authorities discretion, which is particularly undesirable when establishing the criminal liability of individuals and imposing sentences that have a serious impact on fundamental rights such as life or liberty.

Note that the quoted passage from *Cantoral-Benavides* mentions "the principle of criminal legality," rather than simply the international law principle of legality. Petition 17 then goes on to say that the Philippine Supreme Court "has in the past adopted findings and conclusions of the IACHR and made it part of the law of the land"—but unfortunately without citing the corresponding Philippine jurisprudence referred to.[9]

All told, the international law discourse (including the predominant lack of it) in our representative sample of twenty-three petitions, even if admittedly for a constitutionality litigation, is somewhat disappointing, given the high caliber of the lead counsels for these petitions, not to mention some legal luminary petitioners.

V. International Law Aspects in the OSG Comments

We shall no longer deal here with the OSG counter-arguments on the constitutionality arguments against the ATA Section 4 Definition of Terrorism in the sample of twenty-three petitions—though such constitute the bulk of the argumentation thereon—as this is not the focus of this article, which is on the international law aspects of this constitutionality litigation.

As it is, the OSG comment dated July 17, 2020 (and for that matter its Supplemental comment dated Aug. 24, 2020) does not directly address the international law issues or references raised in the only eight petitions which raised them, as tabulated two sections above, except the argument in Petition 2 against the deletion from Section 4 of the inculpatory element of "political motive" which is internationally prescribed, citing the OHCHR Fact Sheet 32. The OSG counter-argues that "the words in Section 4 were in fact largely patterned from international standards defining terrorism." This then becomes the springboard for the OSG to present five such international standards. In particular, the OSG presents four international definitions of terrorism, highlighting certain elements thereof to argue that "the influence of these definitions on the wording of Section 4 is undeniable… the provision is well-couched in international standards." The five international legal instruments cited in the OSG comment are the following:

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[9] A quick google search resulted in negative findings of Philippine jurisprudence referring to the IACHR.

1. The Appeals Chamber of the (UN-created) Special Tribunal for Lebanon 2011 ruling on the definition of "transnational terrorism" under customary international law;
2. The 1998 Arab Convention for the Suppression of Terrorism definition of terrorism;
3. UNSCR 1566 (2004) definition of terrorism;
4. 2004 UN (High Level Panel on Threats, Challenges and Change) Report definition of terrorism; and
5. European Union (EU) 2002 Framework Decision on Combatting Terrorism definition of terrorism.

We shall try to tabulate this now (not done in the OSG comment) for easier comparison between the ATA Section 4 and the five international legal instruments cited in the OSG comment.

ATA Section 4 Definition of Terrorism: Elements	International Standards per OSG Comment (boldface supplied by this)
A. engagement in any of the following <u>*acts*</u>, regardless of the stage of execution	– "the perpetration of a criminal act… or threatening of such act" (Special Tribunal of Lebanon or STL) – "Any act or threat of violence, whatever its motives or purposes" (Arab Convention for the Suppression of Terrorism or (ACST) – "criminal acts, including against civilians" (UNSCR 1566)

1. acts intended to cause death or serious bodily injury to any person, or to endanger a person's life	– "such as murder, kidnapping, hostage-taking" (STL) – "by harming them, or placing their lives, liberty or security in danger" (ACST) – "committed with intent to cause death or serious bodily injury, or taking of hostages" (UNSCR 1566) – "any act intended to cause death or serious bodily harm to civilians or non-combatants" (UN High-Level Panel Report 2004)
2. acts intended to cause extensive damage or destruction to a government or public facility, public place, or private property	– "such as… arson, and so on" (STL) – "seeking to cause damage to the environment or to public or private installations or property" (ACST)
3. acts intended to cause extensive interference with, damage, or destruction to critical infrastructure	– "such as… arson, and so on" (STL) – "seeking to cause damage to the environment or to public or private installations or property" (ACST)
4. developing, manufacturing, possessing, acquiring, transporting, supplying, or using weapons or explosives intended to cause a disproportionate amount of damage, or of biological, nuclear, radiological, or chemical weapons	
5. releasing of dangerous substances, or causing fire, floods, or explosions	– "such as… arson, and so on" (STL) – "seeking to cause damage to the environment or to public or private installations or property" (ACST)
	– "or to occupying or seizing them (public or private installations or property)" (ACST)

	– "or seeking to jeopardize natural resources" (ACST)
	– "when the act involves a transnational element" (STL)
B. the ***purpose*** of engagement in any of the acts under paragraph (a) of this Rule, by its nature and context, is to:	– "… whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda" (ACST) – "given their nature or context, may seriously damage a country or an international organization where committed with the aim of:" (EU 2002 Framework Decision)
1. intimidate the general public or a segment thereof	– "the intent to spread fear among the population (which would generally entail the creation of public danger)" (STL) – "seeking to sow panic among people, causing fear" (ACST) – "intimidate a population" (UNSCR 1566) – "with the purpose of intimidating a population" (UN High-Level Panel Report 2004) – "seriously intimidating a population" (EU 2002 Framework Decision)
2. create an atmosphere or spread a message of fear	– "the intent to spread fear among the population (which would generally entail the creation of public danger)" (STL) – "seeking to sow panic among people, causing fear" (ACST) – "with the purpose to provoke a state of terror in the general public

	or in a group of persons or particular persons" (UNSCR 1566)
3. provoke or influence by intimidation the government or any international organization	– "or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it" (STL) – "or compel a government or an international organization to do or to abstain from doing any act" (UNSCR 1566) – "or compelling a government or an international organization to do or abstain from doing any act" (UN High-Level Panel Report 2004) – "or unduly compelling a Government or international convention or international organization to perform or abstain from performing any act" (EU 2002 Framework Decision)
4. seriously destabilize or destroy the fundamental political, economic, or social structures of the country	– "or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization" (EU 2002 Framework Decision)
5. create a public emergency or seriously undermine public safety	

It appears from this tabulation that the ATA Section 4 act no. 4 (on use, etc. of disproportionately damaging and certain banned weapons and explosives) and purpose no. 5 (create a public emergency or seriously undermine public safety) have no equivalent in the international standards per the OSG comment.

The famous/infamous "double negative" proviso at the end of the ATA Section 4 Definition of Terrorism ["*Provided,* That, terrorism as defined in this

section shall not include advocacy, protest, dissent, stoppage of work, industrial or mass action, and other similar exercises of civil and political rights, which are not intended to cause death or serious physical harm to a person, to endanger a person's life, or to create a serious risk to public safety."] also does not appear to have an equivalent in the major international law definitions of terrorism. To some, this proviso is progressive for civil liberties and further clarifies what is not terrorism (as in the oft-quoted slogan "activism is not terrorism, terrorism is not activism"), but to most anti-ATA petitions, it is regressive for (potentially in practice) limiting civil liberties and adds to the vagueness and overbreadth of Section 4, with the Rep. Lagman Petition 2 referring to it as "a killer proviso." We shall leave this constitutional issue to the constitutionality litigation.

The five international standards cited by the OSG comment are of course not the only international standards for the definition of terrorism but by quoting them and emphasizing "the (undeniable) influence of these definitions on the wording of Section 4," the heavy volume of fire from the anti-ATA petitions as to its Section 4 Definition of Terrorism being allegedly void for vagueness and overbreadth is somehow parried. Stated otherwise, the OSG is in effect counter-arguing that if this wording is acceptable to the international community, then it should be acceptable to the Philippines.

The OSG comment, as we said, paid particular attention to counter-arguing against the Rep. Lagman Petition 2 which argued against the ATA Section 4 Definition of Terrorism because of its alleged "deletion of the inculpatory element of political motive which is internationally prescribed," according to the OHCHR Fact Sheet 32 which states that "Terrorism is commonly understood to refer to acts of violence that target civilians in the pursuit of political or ideological aims." The OSG comment counter-argues by citing the article of H.B. Lazreg on "The debate over what constitutes terrorism" in *The Conversation* to the effect that the Special Tribunal for Lebanon 2011 ruling on the definition of "transnational terrorism" under customary international law "did show a continuing slant *vis-à-vis* the world's understanding of terrorism—from purpose-based to effect-based. Incidents like the October 2017 mass shooting at a music festival in the United States of America, killing at least 59 and injuring as many as 527—an act devoid, from all appearances, of any political motive—trigger constant conversation on the shift in what acts are terroristic."

The Special Tribunal for Lebanon ruling on the definition of "transnational terrorism" under customary international law was however criticized by

international law academic Ben Saul in an international law journal article "Legislating from a radical Hague: The United Nations Special Tribunal for Lebanon invents an international crime of transnational terrorism."[10] This Saul article is cited in Filipino international law consultant Chad Patrick Osorio's lead article in the 2018 Institute of International Legal Studies book *Perspectives on Terrorism in the Philippine Context*[11] to the effect that the said STL ruling is "a premature declaration of an existence of a customary norm, because its [terrorism's] very definition has not yet been pinned down, as seen in the multiple resolutions, instruments, and documents of the UN and its various agencies working on the problem of terrorism."

Incidentally, the above-said Osorio article is cited in par. 72 (pp. 27-28) of the CLCL Petition 23 but on another point, one about the following elements for a definition of "terrorism," thus:

a) the use of violence thru acts
b) the rationale for the violence
c) production of a state of terror, and
d) treat the question of whether or not one cannot be considered a "terrorist" absent one of the elements.

Sadly, however, this enumeration of elements is nowhere found in the Osorio article.

All told, as we indicated early on, the OSG comment, to its fair credit, much more than the anti-ATA Petitions, at least in the Section 4 Definition of Terrorism argumentation, shows more appreciation or availment of international law, in this constitutionality litigation before the Supreme Court. But there is still so much more to be said on the international law aspects of the terrorism definition issue.

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[10] Ben Saul, *Legislating from a radical Hague: The United Nations Special Tribunal for Lebanon invents an international crime of transnational terrorism*, 24 LEIDEN J. INT'L L. 677 (2011).

[11] Chad Patrick Osorio, *Tackling Terrorism in the Philippines: Legal Policies Addressing this Non-Traditional Security Threat*, *in* MARWIL N. LLASOS AND MODESTA APESA H. CHUNGALAO (EDS.), PERSPECTIVES ON TERRORISM IN THE PHILIPPINE CONTEXT 1-30 (Institute of International Legal Studies, University of the Philippines, 2018).

VI. The Most Acceptable International Law Definitions of Terrorism

Aside from the definitions of terrorism in UNSCR 1566 of October 2004 on Threats to international peace and security caused by terrorist acts and in the *UN Secretary-Genera's High-Level Panel Report on Threats, Challenges and Change, A more secure world: our shared responsibility* on Dec. 2, 2004, two of the five international standards for the definition of terrorism cited by the OSG comment, there are at least three other sources of what are considered among the most acceptable international law definitions of terrorism:

1. UN General Assembly ("UNGA") Resolution 49/60 on Measures to eliminate international terrorism, adopted on Dec. 9, 1994, par. 3;
2. International Convention for the Suppression of the Financing of Terrorism ("ICSFT") adopted on Dec. 9, 1999, Article 2, 1(a) & (b); and
3. Draft UN Comprehensive Convention on International Terrorism ("CCIT"), as at June 2018, Article 2, also referred to as "the model definition of terrorism"

Let us proceed now to simply present the core definitions of terrorism in the five international legal instruments mentioned, in chronological order: (boldface and underscoring supplied in the quoted definitions)

[1] **UNGA Resolution 49/60** (1994) —

> 3. **Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes** are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them;

[2] **ICSFT** (1999) —

> Article 2
>
> 1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly,

unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) **An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex**; or
(b) **Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.**

[Note: The annex referred to in (a) lists 9 international conventions and protocols relating to terrorism. There are lately said to be 19 UN counter-terrorism instruments.]

[3] **UNSCR 1566** (1994) —

3. *Recalls* that **criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism**, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature;

[4] ***UN Secretary-General's High-Level Panel Report* on December 2, 2004** —

164. That definition of terrorism should include the following elements:

(a) Recognition, in the preamble, that State use of force against civilians is regulated by the *Geneva Conventions* and other instruments, and, if of sufficient scale, constitutes a war crime by the persons concerned or a crime against humanity;
(b) **Restatement that acts under the 12 preceding anti-terrorism conventions are terrorism**, and a declaration that they are a crime under international law; and restatement that terrorism in time of armed conflict is prohibited by the *Geneva Conventions* and *Protocols*;
(c) **Reference to the definitions contained in the 1999 *International Convention for the Suppression of the Financing of Terrorism* and Security Council resolution 1566 (2004);**
(d) **Description of terrorism as "any action**, in addition to actions already specified by the existing conventions on aspects of terrorism, the *Geneva Conventions* and Security Council resolution 1566 (2004), **that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act."**

[5] **Draft CCIT —**

Article 2.

1. Any person commits an offence within the meaning of the present Convention if that person, **by any means, unlawfully and intentionally, causes:**

(a) **Death or serious bodily injury to any person**; or
(b) **Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment**; or

> (c) **Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss;**
>
> **when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.**

We need not tabulate again the above five most acceptable international law definitions vis-à-vis the ATA Section 4 Definition of Terrorism to see from a quick perusal and comparison that the latter hews well enough to the former. And if this is indeed so, it effectively takes the wind out of the sails of the void from vagueness and overbreadth constitutionality argument against Section 4, including its adoption of the international law instrument phrase "by its nature or context" (mentioned in three of the five most acceptable international law definitions)—even this phrase did not escape the "void from vagueness and overbreadth" (over-?) scrutiny of the anti-ATA petitions.

Of the above-quoted five international legal instruments, the ICSFT (1999), being an international convention or treaty, thus a direct source of public international law,[12] and ratified by the Philippines,[13] is most binding on the Philippines. Besides, it has been already transformed into domestic legislation as R.A. No. 10168, the Terrorism Financing Prevention and Suppression Act of 2012 ("TFPSA")—which strangely or ironically has not been subjected to constitutionality litigation. It adopts in its Section 3(j)(2) definition of terrorist acts the exact same wording as the above quoted Article 2, par. 1(b) of the ICSFT:

> Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to

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[12] Statute of the International Court of Justice, Article 38(a), Apr. 18, 1946, 993 T.S. 25; *see also* JOVITO R. SALONGA AND PEDRO L. YAP, PUBLIC INTERNATIONAL LAW (Regina Publishing Company, 4th Ed., 1974), p. 63; EDGARDO L. PARAS, INTERNATIONAL LAW AND WORLD ORGANIZATIONS 35 (Rex Book Store, 1980).

[13] *See* J. EDUARDO MALAYA, ET AL., PHILIPPINE TREATIES INDEX 1946-2010 183 (Foreign Service Institute, 2010).

> compel a government or an international organization to do or to abstain from doing any act.

Ben Saul's previously cited international law journal article on the "Definition of 'Terrorism' in the UN Security Council: 1985-2004" provides an excellent UN system context for the five international legal instruments we cited and quoted for the most acceptable international law definitions of terrorism, and we now quote extensively the relevant passages from this article: (citations omitted)

> Within the UN system, the question of terrorism was largely consigned to the General Assembly prior to 2001, reflecting the structural dichotomy between the Assembly as "the soft UN" and the [Security] Council as the "hard UN."[14]....
>
> xxx
>
> ... Since then [11 September 2001], the Council has imposed binding, quasi-legislative measures against terrorism in general, unconnected to specific incidents, and unlimited in time. The Council has also regarded "any" act of terrorism as a threat to peace and security, regardless of its severity, or international effects. Yet the Council failed to define terrorism until late 2004, despite using it as an operative legal concept with serious consequences for individuals and entities. For three years, States could unilaterally define terrorism and assert universal jurisdiction over it (encouraged by the Counter-Terrorism Committee), despite wide divergences in national definitions. The Council's 2004 definition raises other problems, since it is non-binding (allowing States to preserve unilateral definitions) and potentially conflicts with multilateral treaty negotiations on defining terrorism.[15]
>
> xxx

[14] Saul, *supra* note 6, at 141.

[15] *Id*. at 142.

> The [UNSCR 1566] definition of "terrorism" provides explicit guidance to States (and the working group and CTC) on the meaning of terrorism, and may also exert pressure on the General Assembly to break the impasse on the Draft Comprehensive Convention. It presents a relatively narrow definition, limited to ats constituting sectoral offences (typically serious violence endangering life or property, and requiring an international element), which are *also* intended to create terror, intimidate a population, or coerce a government or organization. It thus combines elements of the definitions in the General Assembly's 1994 Declaration on Measures to Eliminate International Terrorism, and the 1999 Terrorist Financing Convention. It is, however, at variance with the definitions proposed in art. 2(1) of the current Draft Comprehensive Convention and by the UN High-Level Panel in late 2004. While both of those proposals refer to intimidation and coercion (as in SC Res 1566), neither of the proposed definitions cover acts aimed solely to provoke terror.[16]
>
> The definition in Res 1566 does not require a political or other motive, thus encompassing private acts which terrorize, intimidate or coerce. Consequently, some of the distinctiveness of terrorism, as *political* violence, is lost.[17] ....

It is clear from this that there is presently no universally agreed definition of terrorism yet within the UN system. At the same time, despite that, and following the 9/11 terrorist attacks in the U.S., UNSCR 1373 (2011) required states, under Chapter VII of the UN Charter,[18] to among others "establish such terrorist acts as serious criminal offenses in domestic laws with proportionate penalties."

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[16] *Id.* at 165.

[17] *Id.*

[18] The UN Charter's Chapter VII is on "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression." Under Article 39 thereof, "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." Article 25 of Chapter V on "The Security Council" provides that "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

In the absence of a universally agreed definition of terrorism, recourse to guidance for national legislation is available from the most acceptable international law definitions of terrorism, despite some differences or specific nuances among them. The definition of terrorism in UNSCR 1566 was specifically meant to, among others, assist states with their domestic legislation obligation under UNSCR 1373. Stated otherwise, if we might add, the absence of a universally agreed definition of terrorism does not automatically support the void for vagueness and overbreadth argument against the ATA Section 4 Definition of Terrorism.

It is instructive to understand the absence so far of a universally agreed definition of terrorism. One particularly excellent resource, the United Nations Office of Drugs and Crime ("UNODC") "Defining Terrorism Module" (July 2018),[19] indicates "most of the Draft Convention [CCIT] text now having been agreed. What remains elusive, however, is reaching final agreement on a definition of terrorism due to disagreement regarding exceptions to prosecution, such as acts perpetrated during liberations wars…" The said UNODC Module elaborates further on the remaining primary obstacles which relate to permissible exceptions to the CCIT's scope:

> … One remaining hurdle is how to define terrorism and terrorist offences, particularly with respect to self-determination as well as those of struggles and groups. A primary tension here has been between those States and other actors, which wish for the Draft Convention to be made comprehensive in reach with no exceptions, even for those who engaged in armed self-determination struggles; and those States and entities which do not regard such persons and groups, when engaged in what those States consider to be legitimate self-determination struggles, to be terrorists.
>
> Another sticking point has been trying to reach agreement regarding the scope of the Convention, with respect to the activities of State armed forces when engaged in fighting non-State actors engaged in armed self-determination struggles as well as those of State armed forces. A particular concern here has been to ensure that

[19] United Nations Office on Drugs and Crime, *Defining terrorism* (n.d.), https://www.unodc.org/e4j/en/terrorism/module-4/key-issues/defining-terrorism.html.

> any definition of terrorism developed for criminal justice purposes does not confuse the existing regime applicable to situations of armed conflict or other situations when international humanitarian law applies, especially since this regime has clear provisions dealing with terrorist means and methods of warfare. Issues regarding so called State sponsorship of terrorism are an unspoken, but lingering, source of contention….

There are several interesting international law angles here to tease out, especially those involving international humanitarian law, which we shall do so further below, but we go back first to one principle of international law invoked notably in the BAYAN, et al. Petition 11 in its void from vagueness and overbreadth argument against the ATA Section 4 Definition of Terrorism—the principle of legality—which the abovesaid UNODC Module also highlights in endorsing the Draft CCIT.

VII. On the Principle of Legality and "Part of the Law of the Land"

The UNODC "Defining Terrorism Module" endorses the Draft CCIT as a guide for national legislation on and definition of terrorism in this way:

> This in turn has the potential to bring further clarity to national definitions of terrorism and therefore increased rule of law certainty in domestic criminal justice systems, consistent with **the principle of legality as provided for in article 15 of the International Covenant on Civil and Political Rights** (ICCPR), which requires that any criminal offence and its related punishment is predictable and accessible. Ambiguously worded national counter-terrorism legislation has been, and continues to be, a cause of significant concern to many, including the United Nations Human Rights Committee (CCPR/C/RUS/CO/6, para. 7 and para. 26), as well as the Special Rapporteur on promoting and protecting human rights and fundamental freedoms while countering terrorism. Some of the primary concerns are captured in the following observations which, whilst made in relation to one State, are of broader significance:

> The vaguely defined crime of collaboration [with terrorist organizations] runs the risk of being extended to include behaviour that does not relate to any kind of violent activity and the vagueness of certain provisions on terrorist crimes in the … Penal Code carries with it the risk of a 'slippery slope,' i.e., the gradual broadening of the notion of terrorism to acts that do not amount to, and do not have sufficient connection to, acts of serious violence against members of the general population. (General Assembly, Human Rights Council report A/HRC/10/3/Add.2, paras. 9 and 52). (boldface supplied, underscoring in the original)

Indeed, the BAYAN, et al. Petition 11 cites Special Rapporteur Fionnuala Ni Aolain and High Commissioner for Human Rights Michelle Bachelet on their critical preliminary assessments, among others, of the definition of terrorism and other terrorist acts in the Anti-Terrorism Bill before it became the ATA of 2020. But beyond such statements, we must go to the international law sources or references themselves. Mention was already made of the ICCPR as a source or reference for the principle of legality. While Petition 11 erroneously cited "paragraph 15 of General Comment No. 35 on Article 9" of the ICCPR, the correct citation indicated by the UNODC Module is Article 15 of the ICCPR:

> 1. **No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.** If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
>
> 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations. (boldface supplied)

The boldface passage in the above-quoted par. 1 is rendered with the following slightly different wording as Rule 101 of customary international humanitarian law (IHL):

> No one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed; nor may a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed.

The 2005 customary IHL rules study of the International Committee of the Red Cross ("ICRC"),[20] which listed 161 rules in six areas of concern, indicate the above-quoted Rule 101 or the principle of legality to be derived or reflected in the following provisions of the main IHL treaties, the 1949 Geneva Conventions and their 1977 Additional Protocols:

1. Third Geneva Convention, Article 99, first paragraph;
2. Fourth Geneva Convention, Article 67;
3. Additional Protocol I, Article 75(4)(c); and
4. Additional Protocol II, Article 6(2)(c).

The said ICRC customary IHL study further comments:

> The principle of legality, including the prohibition on imposing a heavier penalty than that applicable at the time of the commission of the offence, is set forth in the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the regional human rights conventions.[21] **It is specifically listed as non-**

[20] JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME I RULES 371-372 (Cambridge University Press, 2005).

[21] International Covenant on Civil and Political Rights, art. 15(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention on the Rights of the Child, art. 40(2)(a), Nov. 20, 1989, 1577 U.N.T.S. 3; European Convention on Human Rights, art. 7(1), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; American Convention on Human Rights, art. 9, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR]; African Charter on Human and Peoples' Rights, art. 7(2), June 27, 1981, 1520 U.N.T.S. 217.

derogable in the International Covenant on Civil and Political Rights and the European and American Conventions on Human Rights,[22] **while the Convention on the Rights of the Child and the African Charter on Human and Peoples' Rights do not allow for the possibility of derogation.** In addition, the International Covenant on Civil and Political Rights and the American Convention on Human Rights specify that if, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit from this.[23] **The principle of legality is also contained in other international instruments.**[24]

The principle of legality has been interpreted by the European Court of Human Rights as embodying the principle that only the law can define a crime and prescribe a penalty and the principle that criminal law must not be extensively construed to an accused's detriment, for instance by analogy. This requires that the offence be clearly defined in law, so that "the individual can know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it, what acts and omissions will make him liable."[25] The European Court of Human Rights has stated that the principle of legality allows courts to gradually clarify the rules of criminal liability through judicial interpretation from case to case, "provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen."[26] **The Inter-American Court of Human Rights has also stressed that the principle of legality requires that crimes be classified and described in "precise and unambiguous language that narrowly defines the punishable offence."**[27] (boldface supplied, footnotes included)

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[22] ICCPR, *supra* note 21, art. 4; ECHR, *supra* note 21, art. 15(2); ACHR, *supra* note 21, art. 27.

[23] ICCPR, *supra* note 21, art. 15(1); ACHR, *supra* note 21, art. 9.

[24] *See e.g.*, G.A. Res. 217 A (III) (Universal Declaration on Human Rights), art. 11 (Dec. 10, 1948); EU Charter of Fundamental Rights, art. 49.

[25] European Court of Human Rights, *Kokkinakis v. Greece*.

[26] European Court of Human Rights, *S. W. v. UK*.

[27] Inter-American Court of Human Rights, *Castillo Petruzzi and Others case*.

Note that the above last footnote citation of the Inter-American Court of Human Rights, *Castillo Petruzzi and Others case* had been also cited in the ALG Petition 17. Given this abundant international law affirmation and elaboration of the principle of legality, it is safe to say that this is a generally accepted principle of international law. As such, it is "adopted… as part of the law of the land" under the incorporation clause in Article II, Section 2 of the Philippine Constitution. For some reason, the ICCPR Article 15(1) was not reflected in the Philippine Constitution's Article III Bill of Rights—unlike a number of ICCPR Articles like Article 14 on the (civil/human) rights of the accused.

But is the international law principle of legality more than just "part of the law of the land"? Might it not also be part of the Constitution which is part of the law of the land, or stated otherwise, part of the fundamental law of the land?

Note the ICRC customary IHL study commentary on the ICCPR and other major international treaties' treatment of the principle of legality as "non-derogable." As such, it may even be considered a *jus cogens* norm of international law. *Jus cogens* or peremptory norms of international law are defined in Article 53 of the 1969 Vienna Convention on the Law of Treaties as: "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Among the peremptory norms in present-day international law are: prohibition of the use or threat of aggressive armed force; the right of dependent peoples to self-determination; and the prohibition under all circumstances, including war and national emergency, of slavery, genocide, severe discrimination, taking of hostages, collective punishment, torture, mass extermination, arbitrary killings and summary executions.[28] "The basic rules of international humanitarian law" are included in a non-exhaustive list of peremptory norms of general international law (*jus cogens*) that the International Law Commission has referred to as having that status.[29] The principle of legality, as embodied in Article 15 of the ICCPR, is not included in that list.

The point we are getting at is this: if the generally accepted principles of international law are adopted as part of the law of the land, then the *jus cogens*

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[28] LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS 717-718 (Finnish Lawyers' Publishing Company, 1988).

[29] International Law Commission, *Peremptory norms of general international law*, UNITED NATIONS, 146-47 (n.d.), https://legal.un.org/ilc/reports/2019/english/chp5.pdf.

and other high norms of international law may be deemed adopted as part of the fundamental law of the land, of the Constitution. In fact, it has already been pointed out by a Philippine expert in international law, Prof. Merlin M. Magallona, that certain generally accepted principles of international law are already part of the Constitution. The fundamental principle of the Pact of Paris (or the Kellog-Briand Pact) of 1928 on renouncing war as an instrument of national policy is also in our Constitution, Art. II, Sec. 2, in fact together there with the incorporation clause. Another is the principle of sovereign immunity which is embodied in our Constitution, Art. XVI, Sec. 3 ("The state may not be sued without its consent."), as affirmed in *U.S.A. vs. Guinto* (182 SCRA 645) and *Holy See vs. Rosario* (238 SCRA 524).[30]

Surely, there have to be generally accepted principles of international law, even if not *jus cogens* norms, that are so fundamental that their incorporation into Philippine law should accord them not just ordinary legal but constitutional status. The first thing that comes to mind in this regard are human rights as defined in the International Bill of Rights (i.e., the Universal Declaration and the two International Covenants). Are these not of the same level as the Philippine constitutional Bill of Rights (Art. III) and Art. XIII on Social Justice and Human Rights? If so, then the principle of legality, as embodied in Article 15 of the ICCPR, can be accorded constitutional status. In this regard, this principle of legality is not only an international law argument as invoked in only two (in our sample of twenty-three) anti-ATA petitions; it is also a constitutional law argument—but which neither of those two petitions framed it to be in arguing against the ATA Section 4 Definition of Terrorism. This could have reinforced the predominantly void for vagueness and overbreadth arguments of the anti-ATA petitions against Section 4.

VIII. Revisiting *Kuroda vs. Jalandoni* and the Geneva Conventions of 1949

At this point in our discussion, it is instructive to revisit the 1949 case of *Kuroda vs. Jalandoni*[31] involving Executive Order No. 68 establishing military commissions to try Japanese war criminals. We shall, however, focus here only on

[30] MERLIN M. MAGALLONA, AN INTRODUCTION TO INTERNATIONAL LAW IN RELATION TO PHILIPPINE LAW 43 (Merlin M. Magallona, 2nd ed., 1999).

[31] Kuroda v. Jalandoni, 83 Phil. 171 (1949).

two key passages from the Decision penned by the venerable Chief Justice Manuel V. Moran, interpreting and applying the incorporation clause of the then 1935 Philippine Constitution:

> Article 2 of our Constitution provides in its section 3, that –
>
> "The Philippines renounces war as an instrument of national policy, and adopts the generally accepted principles of international law as part of the law of the nation."
>
> In accordance with the generally accepted principles of international law of the present day, **including the Hague Convention, the Geneva Convention and significant precedents of international jurisprudence established by the United Nations**, all those persons, military or civilian, who have been guilty of planning, preparing or waging a war of aggression and of the commission of crimes and offenses consequential and incidental thereto, in violation of the laws and customs of war, of humanity and civilization, are held accountable therefor. Consequently, in the promulgation and enforcement of Executive Order No. 68, the President of the Philippines has acted in conformity with **the generally accepted principles and policies of international law which are part of our Constitution.**
>
> xxx
>
> Petitioner argues that respondent Military Commission has no justification to try petitioner for acts committed in violation of the Hague Convention and the Geneva Convention because the Philippines is not a signatory to the first and signed the second only in 1947. It cannot be denied that **the rules and regulations of the Hague and Geneva Conventions form part of and are wholly based on the generally accepted principles of international law**. In fact, these rules and principles were accepted by the two belligerent nations, the United States and Japan, who were signatories to the two Conventions. **Such rules and principles, therefore, form part of the law of our nation even if the Philippines was not a signatory to the**

> **conventions embodying them, for our Constitution has been deliberately general and extensive in its scope and is not confined to the recognition of rules and principles of international law as contained in treaties to which our government may have been or shall be a signatory.** (boldface supplied)

Certain points in these passages merit deeper examination. The most significant or far-reaching point for possible supplemental interpretation or clarification by the present Supreme Court: the *Kuroda* pronouncement on "the generally accepted principles and policies of international law **which are part of our Constitution.**" (boldface supplied) At first glance, this seems a slip of the pen of the ponente. But on deeper examination, the ponente, a venerable Chief Justice no less, must have been careful and deliberate in his choice of words.

The above-quoted *Kuroda* pronouncement does not mean that all "the generally accepted principles and policies [note: policies, not just principles] of international law" are "part of our Constitution." But we submit that some generally accepted principles of international law—such as the basic rules of IHL—are part of our Constitution, or may be deemed or ruled part of it, or given constitutional status. To repeat, the phrase "part of the law of the land" in the incorporation clause includes the Constitution because it is in fact part of the law of the land as the highest or fundamental law of the land.

Now, among the basic rules of IHL, in fact considered customary IHL Rule 2 is that "Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."[32] This is the essence of terrorism and of any acceptable definition of it. Recall also that in the fourth of the five most acceptable international law definitions of terrorism—the UN Secretary-General's High-Level Panel Report on December 2, 2004—the first listed element thereunder is:

> (e) Recognition, in the preamble, that State use of force against civilians is regulated by the *Geneva Conventions* and other instruments, and, if of sufficient scale, constitutes a war crime by the persons concerned or a crime against humanity.

[32] Henckaerts and Doswald-Beck, *supra* note 20, 8-11.

Without prejudice to later teasing this out further below, we present here the specific provisions in the 1949 Geneva Conventions and their 1977 Additional Protocol, all ratified by the Philippines (and also deemed incorporated in Philippine law by the above-quoted *Kuroda* ruling) which deal with terrorism:

> [1] [**Fourth**] ***Geneva Convention*** *Relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, **Article 33, first paragraph** – "… Collective penalties and likewise **all measures of intimidation or of terrorism are prohibited.**" (boldface supplied)
>
> [2] 1977 ***Additional Protocol II*** *Relating to the Protection of Victims of Non-International Armed Conflicts*, **Article 4, paragraph 2(d)** – prohibits **"acts of terrorism."** (boldface supplied)
>
> [3] 1977 ***Additional Protocol I*** *Relating to the Protection of Victims of International Armed Conflicts*, **Article 51, paragraph 2**, and ***Protocol II***, **Article 13, paragraph 2** (both of identical text) – "The civilian population as such, as well as individual **civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population** are prohibited." (boldface supplied)

On the above-quoted last sentence ("Acts or threats of violence…"), this is the instructive authoritative international legal commentary thereon:

> … the Conference wished to indicate that **the prohibition covers acts intended to spread terror**; there is no doubt that acts of violence related to a state of war almost always give rise to some degree of terror among the population and sometimes also among the armed forces. It also happens that attacks on armed forces are purposely conducted brutally in order to intimidate the enemy soldiers and persuade them to surrender. This is not the sort of terror envisaged here. **This provision is intended to prohibit acts of violence the primary purpose of which is to spread terror among the civilian population without offering substantial military advantage.** It is interesting to note that threats of such acts are also prohibited. This calls to mind some of the proclamations made in the

> past threatening the annihilation of civilian populations.[33] (boldface supplied)

Now, the above-quoted Philippine-ratified treaty provisions are binding on the Philippines, even more than customary international law, because of the fundamental international law principle of *pacta sunt servanda* (treaties must be observed in good faith)[34]—itself ruled by the Supreme Court to be a generally accepted principle of international law adopted as part of the law of the land.[35] It is also among the general principles of law as applied by international courts and tribunals.[36] "(T)he general principles of law recognized by civilized nations" are in fact among the sources of international law under Article 38(1)(c) of the ICJ Statute. All told, *pacta sunt servanda* may be argued to even partake of a constitutional status—akin to the Philippine Constitution Bill of Rights Article III, Section 10: "No law impairing the obligation of contracts shall be passed."

In addition, international treaty observance is an integral part of the Philippine state policy of international cooperation pursuance to its Constitution Article II, Section 2: "The Philippines… adheres to the policy of peace, equality, justice, freedom, cooperation and amity with all nations." It is notable—in a more negative sense—that the OSG did not invoke this and *pacta sunt servanda* in its comment when counter-posing the terrorism definitions in five international legal instruments against the void for vagueness and overbreadth arguments of the anti-ATA petitions.

The Philippines is bound to perform or observe in good faith the international treaties on terrorism which it has ratified, including the definitions therein, especially for the purpose of criminalizing (i.e., defining and penalizing) terrorism in our domestic implementing legislation against this which is among

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[33] YVES SANDOZ, CHRISTOPHE SWINARSKI, AND BRUNO ZIMMERMAN (EDS.), COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 618 (Martinus Nijhoff Publishers, 1987).

[34] Also embodied in the 1969 Vienna Convention on the Law of Treaties, art. 26 on *Pacta sunt servanda*: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

[35] See La Chemise Lacoste vs. Fernandez (129 SCRA 373), Agustin vs. Edu (88 SCRA 195), Tañada vs. Angara (272 SCRA 18), and Bayan vs. Zamora (342 SCRA 449 [2000]) with the same lead petitioner as that in the herein subject Petition 11.

[36] BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 112-114 (Cambridge University Press, 2006).

the most serious crimes of concern to the international community. In criminalization, definition, aside from penalization, is basic. No definition, no crime. Wrong definition, wrong crime.

As far as the general definition or concept of terrorism is found in the Geneva Conventions and in customary IHL rules, the Philippines is bound as a matter of the incorporation clause, under the Constitution's Article II, Section 2 and the *Kuroda* ruling. Apart from this national jurisprudence, there is much international jurisprudence affirming the customary international law status of the whole Geneva Conventions because of their overwhelming international acceptance.[37] Verily, *Kuroda* was well ahead of its time, a real credit to Philippine jurisprudence and in its appreciation of international law.

The current ATA constitutionality litigation before the Supreme Court could, if not ought to, be the occasion for a new *Kuroda*. The subject ATA in its Section 2 Declaration of Policy itself states:

> It is declared a policy of the State to protect life, liberty, and property from terrorism, to condemn terrorism as inimical and dangerous to the national security of the country and to the welfare of the people, and to make terrorism a crime against the Filipino people, against humanity, and against the law of nations. (underscorings supplied)

So, it must be asked: How come then that the current ATA constitutional litigation lacks attention to international law aspects on both sides of the litigation? In fact, there is also lack of attention by them not only to *Kuroda* but to other, more recent, Philippine jurisprudence bearing on the definition of terrorism and bearing a more international law perspective. And this does not include *Southern Hemisphere* which did not permit itself even "a limited vagueness analysis of the definition of terrorism in RA 9372."

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[37] *See e.g.,* the UN Secretary-General's Report to the Security Council preparatory to the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), New York, 3 May 1993, particularly paragraphs 37-44, pursuant to paragraph 2 of Security Council resolution 808 (1993).

IX. More Recent Philippine Jurisprudence Bearing on the Definition of Terrorism

At this point, we see fit to also revisit the "much maligned" Dissenting Opinion of Associate Justice Dante O. Tinga in the "much applauded" case of *Prof. Randolf S. David vs. Pres. Gloria Macapagal-Arroyo*,[38] one of a trilogy "In Defense of Liberty."[39] Given the foregoing discussion, it was Mr. Justice Tinga in that landmark case who showed the best appreciation of the general sense of international law as to what constitutes terrorism, contrary to notions that it is "still an amorphous and vague concept" and "at best fraught with ambiguity." Quoting Tinga:

> … Terrorism has a widely accepted meaning that encompasses many acts already punishable by our general penal laws. There are several United Nations and multilateral conventions on terrorism,[40] as well as declarations made by the United Nations General Assembly denouncing and seeking to combat terrorism.[41] There is a general sense in international law as to what constitutes terrorism, even if no precise definition has been adopted as binding on all nations.[42]

In this quote's first footnote (actually footnote 53 in the Dissenting Opinion), Mr. Justice Tinga mentions a new anti-terrorism convention—the

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[38] Prof. Randolf S. David vs. Pres. Gloria Macapagal-Arroyo, G.R. No. 171409, May 3, 2006 concerning Presidential Proclamation No. 1017 (PP 1017) declaring a state of national emergency on Feb. 24, 2006.

[39] From the title of the Supreme Court Public Information Office publication *The Supreme Court Speaks: In Defense of Liberty*, featuring three "Landmark Decisions on the Constitutionally Enshrined Liberty of the Filipino People" on the issues of EO 464, CPR and BP 880, and PP 1017.

[40] Originally, Tinga footnote 53: "To name a few, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973); International Convention for the Suppression of Terrorist Bombings (1997); International Convention for the Suppression of the Financing of Terrorism (1999); the International Convention for the Suppression of Acts of Nuclear Terrorism (2005). See 'United Nations Treaty Collection – Conventions on Terrorism,' http://untreaty.un.org/ English/Terrorism.asp (visited, 30 April 2006)."

[41] Originally, Tinga footnote 54: "See e.g., Resolution No. 49/60, Adopted by the United Nations General Assembly on 17 February 1995."

[42] At page 33 of the original loose-leaf Dissenting Opinion of Tinga, J., also at pp. 209-10 of the afore-cited publication *The Supreme Court Speaks: In Defense of Liberty*.

International Convention for the Suppression of Acts of Nuclear Terrorism (2005)—which is naturally not among "the preceding 12 anti-terrorism conventions" referred to by the UN High Level Panel in its above-quoted Report of Dec. 2004.

The majority opinion/decision in *David vs. Macapagal-Arroyo* makes reference to the "definitional predicament" regarding terrorism,[43] quoting extensively from the Mar. 12, 2002 Supreme Court Centenary Lecture of Austrian Professor Hans Koechler on "The United Nations, the International Rule of Law, and Terrorism,"[44] as cited in the Dissenting Opinion of Justice Kapunan in *Lim vs. Executive Secretary*.[45] But the *David vs. Macapagal-Arroyo* Decision/majority opinion does not quote Justice Kapunan's own paragraph after quoting Koechler, and so we quote now Justice Kapunan's said paragraph in *Lim vs. Executive Secretary*:

> **Koechler adds, however, that this failure to distinguish between terrorist acts and acts of national liberation did not prevent the international community from arriving at an implicit or "operative" definition.** For example, in Article [5] of the International Convention for Suppression of Terrorist Bombings, terrorist acts are referred to as "criminal acts…, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons" that are under no circumstances justifiable [by] considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature." (boldface and bracketed portions supplied)

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[43] At pp. 61-63 (loose-leaf version); also at pp. 154-56 of the afore-cited publication *The Supreme Court Speaks: In Defense of Liberty*. The Decision's crucial observation made in 2006 that "no law has been enacted" yet to define and penalize terrorism is what actually gave impetus to the enactment of the first Philippine anti-terrorism law, Republic Act No. 9372, the Human Security Act of 2007.

[44] Published among others in HANS KOECHLER MANILA LECTURES 2002: TERRORISM AND THE QUEST FOR A JUST WORLD ORDER 1-28 (Foundation for Social Justice, 2002).

[45] Lim vs. Executive Secretary, G.R. No. 151445, Apr. 11, 2002, 380 SCRA 739, Dissenting Opinion, 7 (loose-leaf version).

In fact, Koechler, in that same 2002 Supreme Court Centenary Lecture, proposed what he called a comprehensive or unified approach, which is not far from the terrorism definitional elements recommended by the UN High Level Panel two years later. According to Koechler, in a universal and at the same time unified system of norms, ideally to be created as an extension of existing legal instruments, there should be corresponding sets of rules (a) penalizing deliberate attacks on civilians or civilian infrastructure in wartime (as covered by the Geneva Conventions), and (b) penalizing deliberate attacks on civilians in peacetime (covered by the twelve or now more anti-terrorist conventions). He says, "Such a harmonization of the basic legal rules related to politically motivated violent acts against civilians would make it legally consistent also to include the term 'state terrorism' in the general definition of terrorism."

This actually touches on such questions, including definitional ones, of the relationship between terrorism, on one hand, and war crimes, crimes against humanity, genocide, rebellion, and even common crimes like murder, arson and kidnapping, on the other hand. Some discussion of this may seem like a digression but it is quite instructive precisely because it bears on definitions and the related matter of distinctions, and as may also have bearing on vagueness or clarity.

X. Terrorism vis-à-vis War Crimes, Crimes Against Humanity, Genocide, Rebellion, and Common Crimes

We had already quoted above this passage on the definition of terrorism from the Report of the UN High Level Panel on Threats, Challenges and Change on Dec. 2, 2004: "164. That definition of terrorism should include the following elements: (a) Recognition, in the preamble, that State use of force against civilians is regulated by the *Geneva Conventions* and other instruments, and, if of sufficient scale, constitutes a war crime by the persons concerned or a crime against humanity;…" (underscorings supplied)

UNSG Kofi Anan, in endorsing the said UN High Level Panel Report and its indicative definition of terrorism, made the following remarks in his keynote address to the International Summit on Democracy, Terrorism and Security on Mar. 10, 2005 in Madrid:

> For too long the moral authority of the UN in confronting terrorism has been weakened by the spectacle of protracted

> negotiations. But the report of the High-Level Panel offers us a way to end these arguments. We do not need to argue whether States can be guilty of terrorism, because deliberate use of force by States against civilians is already clearly prohibited under international law. As for the right to resist occupation, it must be understood in its true meaning. It cannot include the right to deliberately kill or maim civilians. (underscorings supplied)

Then, we have the afore-cited Judgement of the Special Tribunal for Lebanon in 2011, which had controversially found that since at least 2005, a definition of "transnational terrorism" has existed within customary international law. But the Tribunal had also stated, among others, that the necessary substantive (objective and subjective) elements for two other classes of terrorist criminal conduct also existed within international law: war crimes committed in the course of international or non-international armed conflict; and those acts crossing the threshold to constitute crimes against humanity, whether perpetrated during peace time or armed conflict.[46]

In international practice, in addition to terrorism crimes established by the universal instruments against terrorism, which must be incorporated by states parties to them into domestic criminal legislation, it may be possible to prosecute some terrorist offences as core international crimes whether sourced in customary international law or codified within treaty texts such as the 1998 Rome Statute of the International Criminal Court. The core international crimes of particular relevance here are crimes against humanity, war crimes, and genocide.[47]

And so, both conceptually and more likely in legal practice, there is bound to be some confusion between terrorism, on one hand, and crimes against humanity, war crimes and genocide, on the other hand. To start with, the subject ATA in its Section 2 Declaration of Policy itself speaks of "… and to make terrorism a crime against the Filipino people, against humanity, and against the law of nations." (underscorings supplied) This places on the level of state policy a confusion between terrorism and crimes against humanity. This might then

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[46] UNODC, *Defining Terrorism Module* (July 2018), https://www.unodc.org/e4j/en/terrorism/module-4/key-issues/defining-terrorism.html.

[47] UNODC, *Core International Crimes Module* (July 2018), https://www.unodc.org/e4j/en/terrorism/module-4/key-issues/core-international-crimes.html.

support the void for vagueness and overbreadth argument of the anti-ATA petitions.

But let us try to sort out this confusion. Terrorism and crimes against humanity have each their distinct international legal frameworks. That for terrorism was much discussed above. Unlike terrorism and for that matter war crimes and genocide which have long-time multilateral treaty-based definitions,[48] crimes against humanity developed largely as a matter of customary international law until its multilateral treaty definition in the Rome Statute, which also has the latest international criminal law definitions of war crimes and genocide.[49] These all represent different legal frameworks dealing with different criminal phenomena which have come to the fore of global attention at different eras and contexts. We are now still in the post-9/11 era of international terrorism and counter-terrorism (and the newer era of climate change and global pandemics).

Terrorism must be given its just due in terms of a specific legal framework to address it, in the same way that common crimes like murder, political offenses like rebellion, war crimes, crimes against humanity, and genocide have their respective specific legal frameworks. Murder committed in furtherance of rebellion is absorbed by the latter.[50] But rebellion does not absorb war crimes, crimes against humanity, genocide and terrorism even if committed in furtherance of rebellion.[51]

That the emerging international law on terrorism makes use of the international law on war crimes, particularly for terrorism during armed conflict, does not change those differences in legal frameworks. We might say by analogy in these pandemic times that each disease or diagnosis has its corresponding treatment or medicine. That is why we should not confuse different classes of crimes—lest we take the wrong legal action, like when common crimes are charged for what are really political offenses.

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[48] War crimes defined in the 1947 *Geneva Conventions* and 1977 *Additional Protocols*, and genocide defined in the 1948 Genocide Convention.

[49] *See* Timothy L.H. McCormack and Sue Robertson, *Jurisdictional Aspects of the Rome Statute for the New International Criminal Court*, 23(3) MELBOURNE U. L. REV. 635, 651 (1999).

[50] In Philippine jurisprudence, this is known as the political offense doctrine, as articulated in the landmark case of People vs. Hernandez, 99 Phil. 515 (1956).

[51] Per Concurring Opinion of Justice Marvic Mario Victor F. Leonen in Ocampo vs. Abando, G.R. No. 176830, Feb. 11, 2014, as to the R.A. 9851 crimes of war crimes, genocide, and other crimes against humanity as exceptions to the political offense doctrine.

During the 112th Assembly of the Inter-Parliamentary Union ("IPU") held in Manila on Mar. 31 to Apr. 8, 2005, it passed a Resolution on "The Role of Parliaments in the Establishment and Functioning of Mechanisms to Provide for the Judgment and Sentencing of War Crimes, Crimes Against Humanity, Genocide and Terrorism, with a View to Avoiding Impunity." Note how terrorism is distinct from and not subsumed under or absorbed by war crimes, crimes against humanity and genocide. In the Philippines, the latter three international crimes are already the subject of Republic Act No. 9851, the Philippine Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity,[52] while terrorism is now covered by the questioned ATA (previously, the now repealed Human Security Act of 2007).

Crimes against humanity ("CAH"), as defined in the Rome Statute's Article 7, deals with about 11 kinds of acts, including murder, rape, torture, enforced disappearance, and forcible displacement, (and this is the key chapeau or qualification:) "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." It sounds similar to the emerging international legal definition of terrorism but there are some different elements. CAH does not include such definitional elements of terrorism as the "purpose… to intimidate a population [or "to spread terror among the civilian population"], or to compel a government or an international organization to do or abstain from doing any act." As far as attacks directed against any civilian population, CAH involves a high threshold that these attacks are "widespread and systematic," a qualification not necessarily obtaining in terrorism.

Terrorism, CAH, genocide, and common crimes can be committed both in peace time and in war time. But war crimes and rebellion are, by their nature, committed only in the context of an armed conflict, mainly non-international (or internal) armed conflict in the case of rebellion. All these crimes are separate and distinct from each other, with different elements, including intent and purpose, and are not mutually exclusive (except when rebellion absorbs certain common crimes like murder in its furtherance). In other words, a given incident of armed violence may, repeat may, partake of more than one kind of crime, depending on the circumstances where the elements of the crime obtain in the incident. And

[52] The author happened to be the main drafter of the then-called "IHL Bill" before it was passed into this law. R.A. 9851 was enacted even before the Philippines ratified the Rome Statute and then eventually withdrew from it.

thus, more than one kind of crime may be charged based on that one incident, even on just one incident.

The question of the particular relationship between terrorism and rebellion has come up in the course of the public (not necessarily pleading) discourse around the ATA and its constitutionality litigation in the Supreme Court.

XI. Terrorism and Rebellion: "Are CPP-NPA rebels terrorists?"

In the BAYAN, et al. Petition 11 against the ATA for unconstitutionality, there is a footnote 117 in p. 47 relating to par. 115 that reads: "Section 4 of the assailed law does away with the concept of 'predicate crimes,' which had been used—at least in part—to define terrorism under Section 3 of the HSA." We shall to the repealed Human Security Act Section 3 Definition of Terrorism shortly below. But for now, we deal with the reference made in the said footnote 117: "*See* Antonio T. Carpio, 'Are CPP-NPA rebels terrorists?,' *Philippine Daily Inquirer*, July 16, 2020…" Ironically, no reference to this is made in the Justice Carpio, et al., Petition 12 itself! It is of course no secret that the Communist Party of the Philippines-New People's Army ("CPP-NPA") is among the main, if not the main, target of the ATA. Justice Carpio in his said *Inquirer* column piece (not in his petition) makes this argument:

> … under the ATA rebels are not terrorists and cannot be declared as terrorists. First, in defining terrorism the ATA deleted all the predicate crimes, like rebellion and coup d'etat, listed in the definition of terrorism in the Human Security Act of 2007 (HSA). The crime of terrorism in the ATA is now a separate and distinct stand-alone crime, unlike in the HSA where the predicate crimes, like rebellion and coup d'etat, were the means of committing the crime of terrorism. In *Lagman v. Medialdea*, the Supreme Court ruled that under the HSA rebellion is absorbed in terrorism because rebellion is one of the predicate crimes of terrorism. This is no longer the case since the ATA has repealed and replaced the HSA.
>
> x x x
>
> There can be no dispute that the ATA does not criminalize as terrorism acts that constitute rebellion. If the acts constitute rebellion, then the crime committed will be rebellion and not

> terrorism. The intent of rebels is to remove any territory or military force of the Philippines from allegiance to the Government or its laws, or to deprive the President or Congress of any of their powers. The intent of terrorists is to intimidate the public and the Government, create fear, or destabilize the political, economic, and social structure of the country.
>
> CPP-NPA rebels, whose intent is clearly rebellion, are not terrorists under the ATA, and consequently they, individually or as a group, cannot be proscribed as terrorists under the ATA.

It is interesting to note that the CPP found that "Justice Carpio's article is a sharp legal instrument that exposes a gaping hole in the Duterte regime's plan of using the ATA against the CPP and the revolutionary cause."[53] We hope that Justice Carpio has not thereby been "red-tagged."

But actually, contrary to Justice Carpio's interpretation of *Lagman vs. Medialdia*,[54] is its ruling to the effect that "Terrorism neither negates nor absorbs rebellion:"

> Besides, there is nothing in Art. 134 of the RPC [for rebellion] and RA 9372 [for terrorism] which states that rebellion and terrorism are mutually exclusive of each other or that they cannot co-exist together. RA 9372 does not expressly or impliedly repeal Art. 134 of the RPC. **And while rebellion is one of the predicate crimes of terrorism, one cannot absorb the other as they have different elements.** (boldface supplied, footnote omitted)

While rebellion was one of the predicate crimes of terrorism under the RA 9372 or HSA Section 3 Definition of Terrorism, it is not so under the ATA Section 4 Definition of Terrorism which does away with the concept of "predicate crimes." That rebellion is no longer a predicate crime of terrorism under the ATA, it simply does not follow that the CPP-NPA as undoubtedly rebels can no longer be considered terrorists under the ATA nor be proscribed as terrorists thereunder,

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[53] Marco Valbuena, *On Justice Carpio's opinion asserting that CPP/NPA are not terrorists under ATA*, PHILIPPINE REVOLUTION WEB CENTRAL (July 20, 2020), https://cpp.ph/ statements/on-justice-carpios-opinion-asserting-that-cpp-npa-are-not-terrorists-under-ata/.

[54] Lagman vs. Medialdia, G.R. No. 231658, July 4, 2017,

contrary to Justice Carpio's opinion. It depends on whether the elements of terrorism or the requirements for proscription as terrorists under the ATA would obtain in the case of the CPP-NPA in a proper case for that purpose. That result cannot be ruled out simply because the ATA did away with rebellion as a predicate crime of terrorism. As two distinct crimes, with more reason that a ruling that CPP-NPA rebels are also terrorists or that the CPP-NPA as a rebel group is terrorist cannot be ruled out. It would and should depend on the evidence and of course on a fair application of the law, not on its brute weaponization. And if rebellion does not absorb war crimes, crimes against humanity and genocide committed purportedly in furtherance thereof, then similarly rebellion does not absorb terrorism or terrorist acts committed purportedly in furtherance thereof.

Incidentally, the lead petitioner in *Lagman vs. Medialdia* is the same lone petitioner in the Rep. Lagman Petition 2 in our subject anti-ATA constitutionality litigation—among the "usual suspects," as they say, for such litigation.

XII. On the HSA Model of "Predicate Crimes"

Many of the anti-ATA petitions, in assailing its Section 4 Definition of Terrorism as "void for vagueness," invariably contrasted it unfavorably with the HSA Section 3 Definition of Terrorism which enumerated 12 predicate crimes (six felonies and six special offenses) to more clearly or precisely define the conduct or acts part (the other part being the intent or purpose part) of the crime of terrorism. To recall, the HSA Section 3 Definition of Terrorism:

> SEC. 3. *Terrorism.*—Any person who commits an act punishable under any of the following provisions of the Revised Penal Code:
>
> a. Article 122 (Piracy in General and Mutiny in the High Seas or in the Philippine Waters);
> b. Article 134 (Rebellion or Insurrection);
> c. Article 134-a (Coup d' Etat), including acts committed by private persons;
> d. Article 248 (Murder);
> e. Article 267 (Kidnapping and Serious Illegal Detention);
> f. Article 324 (Crimes Involving Destruction), or under

1. Presidential Decree No. 1613 (The Law on Arson);
2. Republic Act No. 6969 (Toxic Substances and Hazardous and Nuclear Waste Control Act of 1990);
3. Republic Act No. 5207, (Atomic Energy Regulatory and Liability Act of 1968);
4. Republic Act No. 6235 (Anti-Hijacking Law);
5. Presidential Decree No. 532 (Anti-Piracy and Anti-Highway Robbery Law of 1974); and,
6. Presidential Decree No. 1866, as amended (Decree Codifying the Laws on Illegal and Unlawful Possession, Manufacture, Dealing in, Acquisition or Disposition of Firearms, Ammunitions or Explosives)

thereby sowing and creating a condition of widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand shall be guilty of the crime of terrorism and shall suffer the penalty of forty (40) years of imprisonment, without the benefit of parole as provided for under Act No. 4103, otherwise known as the Indeterminate Sentence Law, as amended.

It was the above-quoted phrase "thereby sowing and creating a condition of widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand" in this definition of terrorism that was assailed as void for vagueness and overbreadth in *Southern Hemisphere* but which the Decision therein purposedly made no substantive ruling thereon.

As for the HSA model of predicate crimes, this is not the only way to go in the definition of the most serious crimes of concern to the international community. The non-enumeration of predicate crimes does not necessarily render a definition of such crimes as void for vagueness. We need look only at certain key examples from R.A. 9851 (which was admittedly patterned after the Rome Statute though it was not yet ratified by the Philippines at the time R.A. 9851 was enacted, nothing wrong with that):

Section 4. *War Crimes.*—For the purpose of this Act, "war crimes" or "crimes against International Human Humanitarian Law" means:

(a) In case of an international armed conflict, grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under provisions of the relevant Geneva Convention:

(1) Willful killing;
(2) Torture or inhuman treatment, including biological experiments;
(3) Willfully causing great suffering, or serious injury to body or health;
(4) Extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly;
(5) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
(6) Arbitrary deportation or forcible transfer of population or unlawful confinement;
(7) Taking of hostages;
(8) Compelling a prisoner a prisoner of war or other protected person to serve in the forces of a hostile power; and
(9) Unjustifiable delay in the repatriation of prisoners of war or other protected persons.

x x x

Section 5. *Genocide.*—(a) For the purpose of this Act, "genocide" means any of the following acts with intent to destroy, in whole or in part, a national, ethnic, racial, religious, social or any other similar stable and permanent group as such:

(1) Killing members of the group;

(2) Causing serious bodily or mental harm to members of the group;
(3) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(4) Imposing measures intended to prevent births within the group; and
(5) Forcibly transferring children of the group to another group.

(b) It shall be unlawful for any person to directly and publicly incite others to commit genocide.

x x x

Section 6. *Other Crimes Against Humanity*.—For the purpose of this act, "other crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Willful killing;
(b) Extermination;
(c) Enslavement;
(d) Arbitrary deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, sexual orientation or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime defined in this Act;

(i) Enforced or involuntary disappearance of persons;
(j) Apartheid; and
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

x x x

To be sure, many of the terms used in the above-quoted provisions of R.A. 9851 are defined in its Section 3, but the point of this example is that the conduct or acts part of a definition of a crime of international concern like war crimes, genocide and crimes against humanity need not be by way of enumerating specific domestic criminal statutes or provisions like the HSA did. But the OSG has overlooked this counter-argument that has international law references.

XIII. Conclusion

Based on the foregoing discussion of the ATA's constitutionality litigation arguments and counter-arguments on the ATA Section 4 definition of Terrorism in general or as a concept, it is likely that Supreme Court will not significantly deal with international law as it bears on the constitutionality discussion or result, one way or the other. And this would be largely because the case counsels themselves unfortunately miss for the most part to argue from the perspective of international law as this relates to Philippine constitutional law, preferring the trodden-path of the usual constitutionality arguments like void for vagueness and overbreadth. Whatever the result, may there be some lessons learned of more and better international law consciousness.[55]

Our fearless forecast is that the constitutionality ATA Section 4 definition of Terrorism will be upheld as a general concept that is in accord with the most accepted international law definitions of terrorism. But although Section 4 is the "meat," "heart," or "core" of the ATA, and thus inevitably bears on other Sections as well, these other sections which operationalize the general concept will likely

[55] Perhaps the kind exemplified in the essays in MERLIN M. MAGALLONA, THE PHILIPPINE CONSTITUTION AND INTERNATIONAL LAW (U.P. Law Complex, 2013).

encounter rougher sailing through the Supreme Court gauntlet where the devil is in the details. There are Sections 5 to 12 concerning other specific offenses of terrorism, including Section 10 membership in a terrorist organization which include those designated as such by the UNSC. For these sections, the Section 4 definition of terrorism is not the only parameter.

There are also Sections 25 to 28 on designation and proscription of terrorist organizations. Designation involves automatically adopting the UNSC Consolidated List of designated terrorist individuals and organizations. That designation already being given, there is no more application or interpretation of the Section 4 definition of Terrorism to be done. In the current ATA constitutionality litigation, this is likely to involve tension between the "paramount consideration" of "national sovereignty" in foreign relations under the Constitution's Article II, Section 7, on one hand, and the state policy of "cooperation… with all nations" under the Constitution's Article II, Section 2, especially with the United Nations and its Security Council with its binding Resolutions like UNSCR 1373, on the other hand. This actually came out, for one, in the Justice Carpio, et al. Petition 12's discussion of Section 25 at p. 68 where it described the UNSC as "not a judicial body, whether in Philippine or international law." But we are no longer discussing this as being outside our self-limited scope of Section 4. The point is that there is more to the *operational* definition of terrorism than that found in Section 4.

Our educated guess is that the Supreme Court will uphold the constitutionality of the ATA and Section 4 as a whole but will strike down some other sections or parts of sections as unconstitutional using mainly the standard parameters for this like vagueness, overbreadth, violation of the Bill of Rights and violation of separation of powers, with minimal reference to international law. The latter lack unfortunately misses out on a fuller constitutionality discussion that is informed, enriched and enlightened by international law.

IMPLEMENTATION OF INTERNATIONAL AGREEMENTS AND THE SELF-EXECUTING AND NON-SELF-EXECUTING DICHOTOMY: THE CASE OF THREE HCCH CONVENTIONS

J. Eduardo Malaya[*] and Jilliane Joyce R. De Dumo-Cornista[**]

Abstract

While the negotiation of and entry into international agreement are vital in treaty-making, equally important is the transformation of such agreement into the domestic legal system and the implementation of its provisions. A central issue in this phase is whether or not a particular agreement is "self-executing," i.e., if it can be carried out or enforced using existing legal authorities and without the need for further action by the legislature or the courts. This article examines this issue by analyzing the Philippines' accession to, and implementation of, three conventions (Inter-country Adoption, Apostille, and Service Conventions) under the Hague Conference of Private International Law, all intended to facilitate cross-border transactions. It then recommends certain standards — namely the States Parties' intent, specificity, non-prohibition, existence of legal right, and practicability —

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in making a determination whether an international agreement is self-executing or otherwise.

Introduction

Since the Philippines' accession to the Statute of the Hague Conference on Private International Law ("HCCH") in 2010, the robust portfolio of private international law conventions under the Conference's auspices have come to light. This is no less driven by a convergence of state policies and private sector representations to facilitate cross-country transactions and hasten the disposition of civil and commercial cases through various means, including multilateral international agreements. For its part, the Department of Foreign Affairs ("DFA") had wanted to streamline certain consular processes, and so took the lead in the country's accessions in 2018 to the Apostille Convention, and in 2020, to the Service Convention, in coordination with the Supreme Court of the Philippines.

Indeed, "cross-country" and "facilitation" are in the heart of private international law. Touted as one of the most "dynamic and rapidly evolving field of direct relevance to sophisticated lawyers [and the present co-authors would add, 'and other stakeholders'] working in a broad spectrum of international and transactional contexts,"[1] private international law has seen a surge of importance in the twenty-first century and even during the COVID-19 pandemic when globalization is largely driven by private activity.[2]

Ratification of international agreements—particularly multilateral ones, whether in the public or private international law spheres—requires an assessment of their potential benefits and costs, the so-called National Interest Analysis,[3] with the obligations arising therefrom requiring good faith state implementation. In certain instances, the country's legal and operational frameworks may need to be amended and harmonized (through the passage of implementing legislation or administrative regulation) to conform with the obligations. The oft-repeated debate on how international agreements are

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[1] David P. Stewart, *Private International Law: A Dynamic and Developing Field Anniversary Contributions - Private International Law*, 30 U. PA. J. INT'L L. 1121 (2009).

[2] *Id.*

[3] J. EDUARDO MALAYA AND ROMMEL J. CASIS, TREATIES: GUIDANCE TO PRACTICES AND PROCEDURES 28 (University of the Philippines Law Center, 2018) (citing Department of Foreign Affairs O. No. 21-99).

transformed into a domestic legal system, and whether particular agreements are self-executing or not, are determinative of a state's success in operationalizing these provisions.

In the context of the Apostille and Service Conventions, the central issues that the diplomat-lawyers at the DFA Office of Treaties and Legal Affairs ("OTLA") had to address were the nature of these Conventions and the mode of implementation. Specifically, this refers to whether the obligations required legislations for their implementation (i.e., the agreements are deemed "non-self-executing") or may already be carried out using existing legal authorities (i.e., the agreements are "self-executing").

This article thus seeks to examine the nature of agreements and their implementation, as well as the factors which may be considered in determining whether particular agreements are self-executing or otherwise.[4] It is divided into four parts: the first part shall review the concept of treaties and executive agreements, and the jurisprudence on self-executing and non-self-executing agreements. The second part will provide an overview of private international law in the Philippines and the HCCH, the foremost intergovernmental organization in private international law, to which the Philippines is a state party. It will also examine three HCCH Conventions (Intercountry Adoption, Apostille and Service) acceded to by the country. In the third part, the implementation of these Conventions will be analyzed in light of the factors used in making the self-executing/non-self-executing dichotomy, including the framework for making such classification. Finally, the article will conclude with a restatement of the key principles discussed, and lay the importance of prompt and good-faith implementation of agreements.

I. Implementation of Agreements: Classification Between Self-Executing and Non-Self-Executing

Section 21, Article VII of the 1987 Philippine Constitution states that "[n]o treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate." A treaty or an international agreement would therefore need the ratification by the President and the

[4] For this paper, the term "agreement" may be used interchangeably with international agreement or treaties. However, executive agreements shall be referred to specifically as such.

concurrence to the said ratification by the Senate before it becomes valid and effective.

The term "treaty" is used in this article in its domestic law sense—an international agreement that underwent Senate concurrence, as required under the Philippine Constitution—and not as understood in international law. The distinction between treaties and executive agreements has no bearing in the international law sphere because a treaty under the Vienna Convention on the Law of Treaties generally means "an international agreement concluded between States in written form and governed by international law whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[5]

Consequently, an executive agreement is also a "treaty" under international law since there is no distinction as to the manner by which an agreement may have been approved or confirmed domestically. While domestic law may call an instrument an executive agreement, it is still a treaty under the Vienna Convention on the Law of Treaties if it complies with the elements provided under Art. 2(1)(a) thereof, notably that it is legally binding under international law and not a non-legally binding memorandum of understanding.

Under domestic laws, however, the phrase "treaty or international agreement" in Section 21, Article VII of the Constitution must be examined in light of a series of Supreme Court decisions clarifying its coverage.

A. Treaties and Executive Agreements

In the seminal case *USAFFE v. Treasurer of the Philippines*,[6] the Supreme Court stated that:

> [A] treaty is not the only form that an international agreement may assume. For the grant of the treaty-making power to the Executive and the Senate does not exhaust the power of the government over international relations. Consequently, executive

[5] Vienna Convention on the Law of Treaties, art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331.

[6] USAFFE v. Treasurer of the Philippines, G.R. No. L-10500, June 30, 1959.

> agreements may be entered with other states and are effective even without the concurrence of the Senate...[7]

In addition to a treaty, which is defined as an international agreement entered into by the Philippines requiring legislative concurrence after executive ratification,[8] the government can enter into an executive agreement, an instrument that is similar to a treaty, but does not require legislative concurrence to enter into force.[9]

The Supreme Court, in *Commissioner of Customs v. Eastern Sea Trading*,[10] elaborated on the distinction between the two instruments in this manner:

> International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. But international agreements embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements.[11]

An international agreement which would conflict with existing laws and thus require amendment of said laws should take the form of a treaty (and therefore also require Senate concurrence). Thus, those that may be at variance with or entail departure from established national policies (e.g., archipelagic doctrine),[12] need the enactment of legislation for its implementation, or with provisions that criminalizes certain conduct will all require Senate concurrence.[13]

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[7] *Id.*

[8] EXEC. ORDER NO. 459, s. 1997 ("Providing For The Guidelines In The Negotiation Of International Agreements And Its Ratification"). This term may include compacts, conventions, covenants, and acts.

[9] Exec. Order No. 459 (1997), §2(c).

[10] Commissioner of Customs v. Eastern Sea Trading, G.R. No. L-14279, Oct. 31, 1961.

[11] *Id.*

[12] J. EDUARDO MALAYA AND MARIA ANTONINA-OBLENA, PHILIPPINE TREATIES INDEX 1946-2010 7 (2010); *see also* MALAYA & CASIS, *supra* note 3, at 11.

[13] MALAYA & CASIS, *supra* note 3, at 11-13. The following categories of agreements, among others, have been classified as treaties: status of forces agreement/visiting forces agreement; comprehensive free trade agreement and economic partnership agreement whose provisions go

On the other hand, executive agreements are those considered to embody the "*adjustments of detail* carrying out well-established national policies" and involve arrangements of temporary nature, such as cultural, scientific and technological cooperation, economic cooperation, and labor promotion and protection agreements.[14]

As to executive agreements, *USAFFE Veterans Association*[15] is also instructive in categorizing it into two classes: "(a) agreements made purely as executive acts affecting external relations and independent of or without legislative authorization, which may be termed Presidential Agreements, and (b) agreements entered into in pursuance of acts of Congress, which may be designated as Congressional-Executive Agreements." To the latter can be added, in the present co-authors' view, international agreements entered into pursuant to a treaty concurred in by the Senate, the congressional body entrusted under the Constitution with matters pertaining to foreign policy.

At the heart of these pronouncements is the primacy of the executive in matters relating to foreign relations. As observed by eminent constitutionalist Dean Joaquin G. Bernas, S.J.:

> If one must look for a specific constitutional justification for such practice… it is submitted that through such executive agreements the President merely carries out his duty to 'ensure that the laws will be faithfully executed.' What the President does in such situations would be unlike the formulation of administrative regulations by administrative agencies pursuant to a delegating law.

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beyond the President's tariff-setting powers under Section 28(2), Article VI of the Constitution; agreement on the avoidance of double taxation; headquarters/host country agreement which grants immunities upon the headquarters of an international organization; and agreement on the transfer of sentenced persons (since the exercise of criminal jurisdiction is based on the territoriality principle).

[14] *Id.* The other agreements classified as executive agreements include air services agreement; defense cooperation agreement; mutual logistics support agreement; agreement on gainful employment of spouses of members of diplomatic and consular missions; investment promotion and protection agreement; maritime agreement; waiver of visa requirement agreement; and trade cooperation/facilitation agreements, such as those among ASEAN countries.

[15] USAFFE v. Treasurer of the Philippines, *supra* note 6.

> Administrative regulations do not need confirmation by Congress but draw their strength from the delegating law.[16]

The 1987 Constitution also carries this understanding. The debate among the members of the Constitutional Commission ("CONCOM") on the concept of executive agreement is a result of the proposed resolution of Commissioner Hilario Davide, Jr. entitled "Resolution To Incorporate In The New Constitution A Provision Requiring The Approval Or Consent Of The Legislature For The Effectivity And Validity Of Treaties, Executive Agreements And Recognition Of States Or Governments," which would eventually become Section 21, Article VII of our present Constitution.[17]

The debate was on whether or not executive agreements should be reviewed by the legislature.[18] There were earlier confusions on the definition of an executive agreement, with Commissioner Roberto Concepcion arguing that "[e]xecutive agreements are generally made to implement a treaty already enforced or to determine the details for the implementation of the treaty"—"details of which do not affect the sovereignty of the State."[19] To complement this, Commissioner Felicitas Aquino agreed with the latter definition, adding that "except that it does not cover the first kind of executive agreement which is just protocol or an exchange of notes and this would be in the nature of reinforcement of claims of a citizen against a country, for example."[20] Commissioner Aquino then proposed an amendment, which read: "No treaty or international agreement EXCEPT EXECUTIVE AGREEMENTS shall be valid and effective," in the belief that executive agreements should be excepted from the requirement of concurrence of two-thirds of the Members of the Senate.[21]

Nonetheless, for then Commissioner Fr. Bernas, this amendment is unnecessary.[22] He pointed out the Supreme Court decision in *Commissioner of*

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[16] JOAQUIN BERNAS, S.J., THE 1987 CONSTITUTION OF THE PHILIPPINES: A COMMENTARY 906 (2003).

[17] Alain B. Baguisi and Jilliane Joyce R. De Dumo, *Executive Agreements: The Ties That Don't Quite Bind* (2012), U.P. College of Law (unpublished).

[18] *Id.*

[19] *See* Record of the 1986 Constitutional Commission, Volume II.

[20] *Id.*

[21] *Id.*

[22] Baguisi & De Dumo, *supra* note 17.

Customs v. Eastern Sea Trading[23] where the "right of the executive to enter into binding agreements without the necessity of subsequent Congressional approval has been confirmed by long usage... [t]he validity of this has never been seriously questioned by our Courts." He also cited the case of *Gonzales v. Hechanova*[24] as instructive as to the nature of executive agreements.[25] Furthermore, Fr. Bernas added that what are referred to as international agreements which need the concurrence of at least two-thirds of the members of the Senate are those permanent in nature, as opposed to executive agreements which are temporary.[26]

It is for this reason that Commissioner Aquino decided to withdraw her proposed amendment.[27] The deliberations eventually adopted the principle that international agreements do not include the term executive agreements. Thus, the concurrence of at least two-thirds of all the members of the Senate is not needed for an executive agreement to be valid and effective.

These policies and practices would later be codified in Executive Order No. 459, series of 1997, issued by the Office of the President,[28] which requires that authorization from the President be secured prior to negotiating agreements. This authorization may be in the form of a Full Powers and instructions, in cases of changes in national policy or those involving international arrangements of a permanent character entered into in the name of the Government of the Republic of the Philippines; and written authorization or Special Authority in cases of other agreements, such as those classified as executive agreements.[29]

Discussed thus far are the negotiation of an international agreement and its transformation into the domestic legal order—through presidential ratification and Senate concurrence in the case of a treaty, and solely through presidential ratification in the case of an executive agreement. This, however, pertains to the entry phase, and not yet the implementation of the agreement, although the two phases are closely linked. As earlier opined, the consideration of how the agreement will be approved domestically considers its impact on existing law or

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[23] Commissioner of Customs v. Eastern Sea Trading, *supra* note 10.

[24] Gonzales v. Hechanova, G.R. No. 21897, Oct. 22, 1963.

[25] *Id.*

[26] *Id.*

[27] Baguisi & De Dumo, *supra* note 17.

[28] *See* MALAYA & MENDOZA-OBLENA, *supra* note 12, at 512.

[29] *Id.* at 26.

national policy and the manner of its implementation. The discussion now proceeds to the implementation phase.

B. Treaty as Law of the Land[30]

The Constitution states that an international agreement once concurred in by the Senate becomes "valid and effective."[31] This means that it becomes domestic law.[32] The Senate's concurrence makes the treaty "legal[ly] effective and binding by transformation… [and] has the force and effect of a statute enacted by Congress."[33] It would then be "in the same class" as a law.[34]

A treaty, therefore, assumes a double character: one, a source of international obligation on the part of the Philippines under international law, and second, as domestic law, where it is also a source of rights and duties for individuals, whether natural or juridical persons.[35]

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[30] U.S. CONSTITUTION, art. VI states that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (underscoring supplied)

[31] There are two methods on how international law can find itself in the Philippine legal framework: the doctrines of incorporation and transformation. In *PIHAP vs. Duque* (G.R. No. 173034, Oct. 9, 2007), the distinction between the two doctrines were explained: "[u]nder the 1987 Constitution, international law can become part of the sphere of domestic law either by transformation or incorporation. The transformation method requires that an international law be transformed into a domestic law through a constitutional mechanism such as local legislation. The incorporation method applies when, by mere constitutional declaration, international law is deemed to have the force of domestic law."

[32] MERLIN MAGALLONA, FUNDAMENTALS OF PUBLIC INTERNATIONAL LAW 543 (2005) (citing Guerrero's Transportation Services v. Blayblock Transportation Services Employees Association-Kilusan, G.R. No. L–41518, June 30, 1976). (According to the Supreme Court, "[a] treaty has two (2) aspects — as an international agreement between states, and as municipal law for the people of each state to observe.")

[33] David v. Senate Electoral Tribunal, G.R. No. 221538, Sept. 20, 2016.

[34] MAGALLONA, *supra* note 32, at 552 (citing Abbas v. Commission on Elections, 179 SCRA 287 (1978)).

[35] *Id.,* at 544. It was noted that the treaty becomes valid and effective upon Senate concurrence provided it has also entered into force by its own provisions.

Having the impact of statutory law, a treaty can amend or prevail over prior statutory enactment.[36] It takes precedence over any prior statutory enactment,[37] and following the principle *lex posterior derogat priori*, it can repeal or amend a statute, in the same manner that a statute may repeal an earlier treaty."[38] While a treaty has the force and effect of law and can amend or prevail over prior statutory enactments, an executive agreement has no such effect.[39]

For instance, in *Marubeni v. Commissioner of Internal Revenue*,[40] the Supreme Court applied the special rate of corporate income tax for non-resident corporation as fixed by the PH-Japan Tax Convention. It gave effect to the Convention which amended the Internal Revenue Code by reducing the tax rate from 35% (under the Code) to not exceeding 25% of the gross income (under the Tax Convention),[41] at least with respect to Japanese corporations. This is an example of a treaty taking precedence over a statutory enactment.

C. Treaty and its Self-Executing Nature Generally

In his book *Fundamentals of Public International Law*,[42] Dean Merlin Magallona summarized the state of jurisprudence on the matter in the following manner:

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[36] *See* Intellectual Property Association of the Philippines v. Ochoa, G.R. No. 204605, July 19, 2016.

[37] Bayan Muna v. Romulo, G.R. No. 159618, February 1, 2011.

[38] Secretary of Justice v. Hon. Ralph Lantion and Mark Jimenez, G.R. No. 139465, Oct. 17, 2000.

[39] Intellectual Property Association of the Philippines v. Ochoa, G.R. No. 204605, July 19, 2016.

[40] Marubeni v. Commissioner of Internal Revenue, G.R. No. 76573, September 14, 1989.

[41] *Id.*

[42] MAGALLONA, *supra* note 32. In U.S. jurisprudence, there is an expectation that treaties would be self-executing, or at least that the courts would apply treaties to the fullest extent possible, in light of Article VI of the U.S. Constitution which states that a treaty is "the supreme Law of the Land." (Philip Trimble, UNITED STATES FOREIGN RELATIONS LAW, 2002, 152-154). As stated in the Reporter's Notes to the Restatement (Third) of Foreign Relations Law, "agreements that can be readily given effect by executive or judicial bodies … without further legislation, are deemed self-executing, unless a contrary intention is manifest. Obligations not to act, or to act only subject to limitations, are generally self-executing" (RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, Sec. 111, Reporter's Note 5, 1987). In the 1950s, then U.S. Senator John Bricker of Ohio proposed a constitutional amendment "stipulating that treaties would not go into force, unless approved by both houses of Congress and all forty-eight states, and requiring congressional action before executive agreements went into effect" (Duane A. Tananbaum, *The Bricker Amendment Controversy: Its Origins and Eisenhower's Role*, Diplomatic History, Volume 9, Issue 1, January

Q. Is a treaty self-executing, or does it require a further legislative or executive act to be a source of legal rights and obligations?

A. Generally, for a treaty to "be valid and effective," the Constitution requires only the concurrence of the Senate and no more.

Accordingly, the Supreme Court has applied treaties to which the Philippines is a part, as self-executing instruments, requiring no further prerequisite to their effectivity within Philippine jurisdiction. This is illustrated in Marubeni v. Commissioner of Internal Revenue (118 SCRA 500) as to the Tax Convention with Japan; in La Chemiste Lacoste v. Fernandez (129 SCRA 373) with respect to the Paris Convention for the Protection of Industrial Property; and in KLM Royal Dutch Airline v Court of Appeals (65 Phil. 237) as to the Convention for the Unification of Certain Rules Relating to International Air Travel (Warsaw Convention).

Based on Philippine ratification, the Supreme Court in WHO v. Aquino (48 SCRA 422) considers the Philippines bound by the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations (1 Phil. T.S 621). The Court then states: "This is a treaty commitment voluntarily assumed by the Philippines and as such as the force and effect of law."

1985, Pages 73–93, https://doi.org/10.1111/j.1467-7709.1985.tb00523.x) This clause would have meant that all treaties and international agreements in the U.S. would be non-self-executing, and prevented congressional implementation of a treaty by legislation that is outside constitutionally-granted legislative powers, thus overruling the U.S. Supreme Court's holding in *Missouri v. Holland.* (Curtis Bradley and Jack Goldsmith, FOREIGN RELATIONS LAW 6TH EDITION (2017), 336. *See also Missouri v. Holland,* 252 U.S. 416, 40 S. Ct. 382, 1920; *Case Brief,* at https://www.lexisnexis.com/community/casebrief/p/casebrief-missouri-v-holland. ["By U.S. Const. art. II, § 2, the power to make treaties is delegated expressly, and by U.S. Const. art. VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute implementing the treaty under U.S. Const. art. I, § 8, as a necessary and proper means to execute the powers of the government"]). The proposed amendment was defeated, thus "sav[ing] [the U.S. Constitution] from the most radical overhauling in its history" (*Tananbaum, supra*).

> It is possible, however, that a treaty itself may provide for its application or enforcement through the enactment of a legislative act, or executive or administrative measures. (underscoring supplied)

Dean Bernas likewise stated that:

> Once Senate concurrence is given, the President may make the treaty … If he does … it is then that it binds as both international law and, where it touches domestic relations, also domestic law … There may be instances when the language of the treaty need[s] further action by Congress before it can be fully implemented. For instance, the treaty itself might require the parties to enact implementing legislation as a pre-condition for its effectivity… Certainly, for instance, if the implementation of the treaty requires expenditure of public funds, congressional action would be needed.[43] (underscoring supplied)

An example of a treaty which requires legislation is the International Convention on the Elimination of All Forms of Discrimination, which obligates states parties "to declare an offense punishable by law all discrimination of ideas based on racial superiority or hatred" among other acts. For this purpose, Presidential Decrees Nos. 966 (July 20, 1976) and 1350-A (Apr. 17, 1978) were issued to implement it.[44] Similarly, treaties that raise taxes, require appropriation of funds, create criminal responsibility,[45] or are intended by the parties not to be so, are not self-executing. Relatedly, as civil and political rights enshrined in the Constitution have been deemed generally justiciable, and therefore self-executory, provisions pertaining to economic, social, and cultural rights are generally not self-executing.[46]

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[43] JOAQUIN G. BERNAS, S.J., FOREIGN RELATIONS IN CONSTITUTIONAL LAW 111-112 (1995).

[44] *Magallona*, *supra* note 32, at 548-549.

[45] PHILIP TRIMBLE, UNITED STATES FOREIGN RELATIONS LAW 160 (2002).

[46] The Supreme Court had in various cases consistently ruled that provisions dealing with civil and political rights can be taken cognizance by the Court even in the absence of implementing law from Congress. This is so since a reading of the Bill of Rights provisions yields a conclusion that these are all self-executing provisions, meaning, they are "complete in itself and become operative without the aid of supplemental or enabling legislation, or they supply a sufficient rule

From the above discussions, certain principles emerge: a treaty may be said to be "self-executing" if it can be implemented—or enforced through the courts at the behest of a litigant—without the need for any independent action by a legislative or executive official;[47] otherwise, it is non-self-executing. In contrast, an executive agreement need not necessarily be non-self-executing, or require legislative enactment for its implementation, particularly if it was entered into in pursuance of acts of Congress (or of the Senate in the case of a prior treaty), or if it "embod[ies] *adjustments of detail* carrying out well-established national policies and traditions" which can be implemented on the basis of existing law or presidential authorities.[48]

II. Private International Law in Philippine Practice

A. Private International Law as a Field of Practice in the Philippines

Though not as celebrated as public international law, private international law has a long history in the Philippine legal system. Defined as the "body of conventions, model laws, national laws, legal guides, and other documents and instruments that regulate private relationships across national borders,"[49] it is the dualistic character of private international law (i.e., balancing "international consensus with domestic recognition and implementation"[50]) that gives it a continuing relevance in light of globalization and the increased mobility of people and transactions.

Specifically, rapid globalization necessitates a stable set of laws that are both recognized and enforced by different states to which the transacting parties (or the transaction itself) have a close connection to. This is because "[t]he nexus between private international law and globalization is about responsiveness to a

by means of which the right it grants may be enjoyed or protected" (*see Manila Prince Hotel v. GSIS*. G.R. No. 122156, February 3, 19970). On the other hand, the economic, social, and cultural guarantees under the Constitution are generally non-self-executing; hence, violation of these may not be acted by the Court in the absence of a legislation from the Congress (*see* Tondo Medical Center Employees Association v. Court of Appeals, G.R. No. 167324, July 17, 2007).

[47] TRIMBLE, *supra* note 45, at 152.

[48] *See* USAFFE Veterans Association v. Treasurer of the Philippines*, supra* note 6.

[49] Don Ford, *Private International Law,* AMERICAN SOCIETY OF INTERNATIONAL LAW, 3 (Aug. 2, 2013), https://www.asil.org/sites/default/files/ERG_PRIVATE_INT.pdf.

[50] *Id.*

relative interdependence of legal systems,"[51] as "the conflict rules of a given legal system reflect the degree to which that system accommodates situations arising from elsewhere."[52] In this sense, should a dispute arise from an international commercial contract, there would be an endless course of suits filed in different states (which can afford a certain level of advantage to one of the transacting parties), if there is no controlling legal principle recognized by all parties involved. With the rising number of cross-border transactions concluded periodically, globalization cannot afford unstable legal systems, as "international commercial contract[s]… in its wider sense, is the motor of economic globalization."[53]

The Philippines is no less familiar to the situation. With the significant Filipino diaspora and increasing forays of Philippine companies in foreign markets, such as the Bench and Jollibee brands, the country has been faced with complex conflicts of law concerns, particularly in the field of family law and corporate disputes. From recognition and enforcement of divorce to issues on surrogacy and child support, it is clear that it is to the best interest of the Philippines to take an active participation in the development of conventions in this field and ensure that the rights and welfare of the Filipino community and corporate entities overseas are promoted and protected.

Thus comes the important role of international law experts and diplomats who have been in recent years looking into a body of work of international agreements,[54] municipal laws, and rules of procedures,[55] in an attempt to

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[51] Olusoji Elias, *Globalisation and private international law: reviewing contemporary local law,* 36 AMICUS CURIAE 5 (2001), https://sas-space.sas.ac.uk/3746/1/1319-1424-1-SM.pdf.

[52] *Id.*

[53] *Id.*

[54] *See* Elliot Cheatham, *Sources of Rules for Conflict of Laws*, 89 U. PA. L. REV. 430, 442 (1941), https://scholarship.law.upenn.edu/penn_law_review/vol89/iss4/2. The article stated that "[t]here was for long a doubt whether the treaty power extended over the whole field of Conflict of Laws. x x x These doubts have been completely dispelled, it is believed, by a series of recent cases. x x x Chief Justice Hughes stated the broad control of treaty-making power over Conflict of Laws: 'The treaty-making power is broad enough to cover all subjects that properly pertain to our foreign relations, and agreement with respect to the rights and privileges of citizens of the United States in foreign countries, and of the nationals of such countries within the United States, and the disposition of property of aliens dying within the territory of the respective parties, is within the scope of that power, and any conflicting law of the State must yield.'"

[55] *See* D. Josephus Jitta, *The Development of Private International Law Through Conventions*, 29 YALE L.J. 497, 499 (1920), https://digitalcommons.law.yale.edu/ylj/vol29/iss5/2. The article stated that "[t]he conception that private international law should exclusively be part of the law of a country

streamline issues on jurisdiction, choice of law, and recognition and enforcement of foreign judgments, among others.[56]

As an advocate of private international law and with a mandate to negotiate international agreements,[57] the DFA led the push for the Philippines' membership in the HCCH in 2010, in order to adopt "best practices" (i.e., model standards) from other contracting states and contribute to the discussions on inter-state legal cooperation. As the designated national organ to the HCCH, the DFA facilitates regular inter-agency discussions to ensure that the Hague Conventions to which the Philippines is a Contracting Party are properly implemented, update the competent authorities in the Philippines on significant movements in the HCCH, and develop a Philippine position and strategy framework on other Hague Conventions which the country may accede to in the future. The co-authors of this paper proposed such a strategy framework or roadmap which also appeared in the 2020 article *The HCCH Conventions and their Practical Effects to Private International Law in the Philippines.*[58]

B. The Hague Conference on Private International Law (HCCH) and the Philippines

The leading international organization in the field of private international law is the Hague Conference on Private International Law or HCCH. The acronym HCCH stands for Hague Conference on Private International Law - Conférence de La Haye de droit international privé, its name in the English and French languages.

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is a too narrow conception. Private international law is certainly a matter of national regulation, it includes directions, given by the lawgiver of a country to the courts of the same country, for their guidance in matters connected with aliens, foreign laws and foreign judgments. But private international law may be considered from a higher point of view, that of a union of nations, or States… and even from the point of view of the collectivity of nations, acting as the public power of mankind and able to give to mankind universally working regulations. We have to discriminate, therefore, a national branch of private international law, and an international or universal branch. x x x"

[56] *See* Elizabeth Aguiling-Pangalangan, *International Judicial Cooperation through The Hague Conference of Private International Law*, 2017 PHIL. Y.B. INT'L L. 31, 46-48.

[57] Exec. Order No. 459 (1997).

[58] J. Eduardo Malaya and Jilliane Joyce De Dumo-Cornista, *The HCCH Conventions and their Practical Effects to Private International Law in the Philippines*, 45(2) J. INTEGRATED BAR PHIL., 41-84 (September 2020).

Described by Jovito Salonga as "the most remarkable international organization dealing with the unification of conflict rules,"[59] the HCCH was first convened on Sept. 12, 1893 by Tobias Asser, a Dutch jurist, scholar, and statesman. The HCCH was convened as a multilateral platform for dialogue, discussion, negotiation and collaboration to create strong legal frameworks governing private cross-border interactions among people and businesses.[60] During this period, the HCCH produced various documents, in the areas of succession, family law, and civil procedure, including the Hague Convention on Civil Procedure.[61]

Over the years, the HCCH formally evolved as an inter-governmental organization under the "Statute of the Hague Conference on Private International Law" (hereinafter "HCCH" Statute"). The Statute was adopted during the Seventh Session of the Hague Conference on Private International Law on Oct. 31, 1951 and entered into force on July 15, 1955, initially with sixteen contracting states.[62] Though still referred to as a Conference, the HCCH is an international organization with distinct legal personality, has a permanent headquarters, and maintains a secretariat headed by a Secretary General. To date, the HCCH is a robust inter-governmental organization with eighty-five Members (eighty-four states and the European Union), building bridges between legal systems and reinforcing legal certainty and security through its various Conventions.[63]

There are currently forty-one Conventions (including the HCCH Statute) under the helm of the HCCH, covering cross-cutting issues in family law, commercial law, and civil procedure. A list of the forty-one HCCH Conventions is found in the Annex to this article.

In the late 2000s, the DFA OTLA,[64] then headed by the first co-author as Assistant Secretary, advocated for the country's membership in the HCCH. The decision to join came rather late for the country, given the long history and existence of the HCCH.

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[59] JOVITO SALONGA, PRIVATE INTERNATIONAL LAW 36 (1995).

[60] HCCH, *125 Years HCCH*, (Sept. 12, 2018), https://www.hcch.net/en/news-archive/details/?varevent=636.

[61] *Id.*

[62] Statute of the Hague Conference on Private International Law, ¶2, July 15, 1955, 220 U.N.T.S. 121 [hereinafter HCCH Statute].

[63] HCCH, *About HCCH*, (n.d.), https://www.hcch.net/en/about.

[64] The office was titled simply as the Office of Legal Affairs. The change in office name was made in 2018.

After consultations with the Department of Justice ("DOJ") and other relevant agencies, the DFA sought, and received approval, from the Office of the President to join the HCCH, and later deposited the instrument of accession signed by President Gloria Macapagal Arroyo with the Government of The Netherlands, which acts as the depositary for HCCH instruments.

The Philippines became a Contracting Party to the HCCH Statute on July 14, 2010, with the DFA as its national organ to the HCCH under Article 7(1) of the Statute.[65] As the national organ, the DFA is tasked as the communications liaison between the Philippines and the HCCH.

Even before it became a member, the Philippines had acceded to the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption ("Intercountry Adoption Convention"). Accession to specific conventions by a non-member country is allowed under the HCCH rules. After joining the HCCH in July 2010, the Philippines completed accessions to three more conventions, namely (a) Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("Child Abduction Convention"); (b) Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents ("Apostille Convention"); and (c) Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Service Convention").

This paper will examine three of the four Conventions acceded to, namely the Intercountry Adoption, Apostille and Service Conventions, including the manner by which their provisions were implemented domestically. The fourth one, the Child Abduction Convention, will not be taken up as the implementing regulations have yet to be issued by the concerned agency.

C. Intercountry Adoption Convention

As a context, the Special Commission of the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption ("Intercountry Adoption Convention") noted that the number of intercountry adoptions increased considerably after the World War II.[66] Because it was creating

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[65] HCCH Statute, *supra* note 62, art. 7(1).

[66] HCCH, *Information Brochure*, 5 (2017), https://assets.hcch.net/docs/994654cc-a296-4299-bd3c-f70d63a5862a.pdf, *citing* G. Parra-Aranguren, *Explanatory Report on the 1993 Hague Intercountry*

"serious and complex humanitarian and legal problems [in the] absence of existing domestic and international legal instruments" that were targeted towards a multilateral approach,[67] the HCCH Contracting states decided to adopt the Intercountry Adoption Convention.

The Convention is intended to establish "safeguards which ensure that intercountry adoptions take place in the best interest of the child and with respect for the child's fundamental rights;" and prevent the abduction, the sale of, or traffic in children. It is also meant to complement Article 21 of the UN Convention on the Rights of the Child (UNCRC), "by adding substantive safeguards and procedures to the broad principles and norms laid down in the Convention on the Rights of the Child."

Particularly, the Convention emphasizes certain principles and minimum standards which contracting states should apply when considering intercountry adoption. These principles include the following:

1. Principle of best interests of the child – contracting states must "ensure the child is adoptable; preserve information about the child and his/her parents; evaluate thoroughly the prospective adoptive parents; match the child with a suitable family; [and] impose additional safeguards where needed." In addition, the Convention mandates that "States should establish safeguards to prevent abduction, sale and trafficking in children for adoption by protecting birth families from exploitation and undue pressure; ensuring only children in need of a family are adoptable and adopted; preventing improper financial gain and corruption; and regulating agencies and individuals involved in adoptions by accrediting them in accordance with Convention standards."
2. Principle of subsidiarity – contracting states recognize that national solutions must first be considered before intercountry adoption may be resorted to, including the option that the child may be raised by his or her birth family or extended

Adoption Convention, in Proceedings of the Seventeenth Session (1993), https://assets.hcch.net/docs/78e18c87-fdc7-4d86-b58c-c8fdd5795c1a.pdf.

[67] *Id.*

family, whenever possible, or other forms of permanent care in the country of origin.

3. Cooperation through Central Authorities – The Convention provides for a system of Central Authorities which must supervise the implementation of intercountry adoption within their given jurisdictions.

There are currently 102 contracting states to the Convention.

The Philippines signed the Convention on July 17, 1995, and after its ratification by the President on Jan. 8, 1996, it was submitted to and concurred in by the Senate on June 4, 1996.[68] The Philippines' Instrument of Ratification was deposited on July 2, 1996, and the Convention entered into force for the Philippines on Nov. 1, 1996.

While steps were being undertaken for the accession to the Convention, the proposed "Act Establishing the Rules to Govern Inter-Country Adoption of Filipino Children, and for Other Purposes" was filed in Congress, and eventually enacted into law as Republic Act (R.A.) No. 8043 on June 7, 1995.

R.A. No. 8043 created the Intercountry Adoption Board ("ICAB") [69] and empowered it "to prepare, review or modify, and thereafter, recommend to the DFA, Memoranda of Agreement respecting inter-country adoption consistent with the implementation of this Act and its stated goals, entered into, between and among foreign governments, international organizations and recognized international non-governmental organizations."[70] Furthermore, Section 15 of said law provided the following:

> Sec. 15. *Executive Agreements.*—The Department of Foreign Affairs, upon representation of the Board, shall cause the preparation

[68] J. EDUARDO MALAYA AND CRYSTAL GALE DAMPIL-MANDIGMA, PHILIPPINE TREATIES IN FORCE 2020 230 (2021).

[69] Rep. Act No. 8043 (1995), art. II, §4, "The Inter-Country Adoption Board. – There is hereby created the Inter-Country Adoption Board to act as the central authority in matters relating to inter-country adoption. It shall act as the policy-making body for purposes of carrying out the provisions of this Act, in consultations and coordination with the Department, the child-care and placement agencies, adoptive agencies, as well as non-government organizations engaged in child-care and placement activities. xxx".

[70] Rep. Act No. 8043 (1995), art. II, §6(k).

> of Executive Agreements with countries of the foreign adoption agencies to ensure the legitimate concurrence of said countries in upholding the safeguards provided by this Act.

It may be recalled that the first step in the process of accession to the Intercountry Adoption Convention—that of signing—took place a month after the enactment of R.A. No. 8043.

For the implementation of the Intercountry Convention, the ICAB was designated as Central Authority, the term used in HCCH Conventions to refer to implementing agencies. Through the pro-active programs of the ICAB, the Philippines is considered to have one of the "best practices" in the implementation of the Intercountry Adoption Convention.[71]

D. Apostille Convention

The Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, more commonly known as the "Apostille Convention", simplifies the authentication process of public documents whenever they are used abroad or in foreign jurisdictions.

The DFA OTLA and Office of Consular Affairs had identified accession to the Convention as a priority starting in the late 2000s in order to lessen the administrative burdens on the business community and the overseas Filipino workers, among other sectors, who needed to present documents in other countries. The Philippine Chamber of Commerce and Industry also recommended accession. The earlier challenges were the need to upgrade the authentication database and ensure recognition by the Judiciary of the new authentication format as a valid piece of evidence.

The HCCH explained the Convention's importance in the following wise:

> Public documents, such as birth certificates, judgments, patents or notarial attestations (acknowledgments) of signatures, frequently need to be used abroad. However, before a public

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[71] *See* HCCH, *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice* (2008), https://assets.hcch.net/docs/bb168262-1696-4e7f-acf3-fbbd85504af6.pdf.

> document can be used in a country other than the one that issued it, its origin must often be authenticated. The traditional method for authenticating public documents to be used abroad is called legalization and consists of a chain of individual authentications of the document. This process involves officials of the country where the document was issued as well as the foreign Embassy or Consulate of the country where the document is to be used. Because of the number of authorities involved, the legalisation process is frequently slow, cumbersome and costly… Where it applies, the treaty reduces the authentication process to a single formality: the issuance of an authentication certificate by an authority designated by the country where the public document was issued. This certificate is called an *Apostille*.[72]

In essence, the apostille replaces the authentication certificate (colloquially known as certificates with "red ribbon") by certifying the origin of the public document to which it relates.[73]

The usual authentication process is comprised of the following steps: (1) a document is first certified by the issuing government agency such as the Philippine Statistics Authority for birth certificates; (2) the certified document is then submitted to the DFA for authentication; and (3) the authenticated document will be submitted to the relevant foreign Embassy or Consulate for legalization. In contrast, the Apostille Convention trims down the process down to two steps: (1) a document is first certified by the issuing government agency; and (2) the certified document is apostillized by the DFA.[74] The apostillized document is automatically recognized by all 117 contracting states (except at this time of writing, Austria, Finland, Germany and Greece),[75] to the Apostille

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[72] HCCH, *The ABCs of Apostilles: How to ensure that your public documents will be recognized abroad*, 2 (n.d.), https://assets.hcch.net/docs/6dd54368-bebd-4b10-a078-0a92e5bca40a.pdf [hereinafter *The ABCs of Apostilles*].

[73] *See* Department of Foreign Affairs, *Question-And-Answer and Infographics on Authentication Through Apostille* (n.d.), https://dfa.gov.ph/dfa-news/dfa-releasesupdate/ 22280-question-and-answer-and-infographics-on-authentication-through-apostille [hereinafter *Question-And-Answer and Infographics*].

[74] *Id.*

[75] The Federal Republic of Germany, Finland, Republic of Austria, and the Hellenic Republic have objected to the Philippines' accession to the *Apostille* Convention, and thus as of this writing do

Convention; hence, the document no longer needs to pass through another authentication or legalization by the foreign embassies in the Philippines.

The Apostille however only applies if both the country where the public document was issued and the country where the public document is to be used are Parties to the Convention.[76] If the document originated from or to be used in a country which is not a party to the Convention, such as some ASEAN member states, or if it originates from or to be used in Austria, Finland, Germany and Greece,[77] the traditional authentication ("red ribbon") process will apply.

Because of its practical effects, the Apostille Convention has attracted the highest number of ratifications and accessions.[78] The Convention entered into force for the Philippines on May 14, 2019,[79] with the DFA Office of the Consular Affairs as the Competent Authority.

As of Jan. 2020, or after nine months of the Convention's implementation, the DFA Office of Consular Affairs had issued over 520,000 apostilles. These apostilles may be verified online by inputting the appropriate number or code written in the issued apostille.[80]

The Philippines' accession was welcomed by several groups, including legal professionals, the business sector, overseas Filipino workers, and the overburdened Philippine embassies and consulates worldwide. The Convention enabled them to legalize public documents for foreign use with less rigidity and cost, while taking advantage of present technology.[81]

On the part of the DFA and its foreign service posts, the use of apostilles significantly eased their workload and gave them added safety nets that ensured that the signature in the document they are presented with is indeed authentic.

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not recognize the *apostilles* issued by the country. *See* HCCH, *Declarations/Reservations/ Notifications to the Philippines' Accession* (n.d.), https://www.hcch.net/en/instruments/ conventions/ status-table/notifications/?csid=1398&disp=type.

[76] *The ABCs of Apostilles*, *supra* note 72, at 7.

[77] *See Question-And-Answer and Infographics*, *supra* note 73.

[78] HCCH, *Apostille Handbook on the Practical Operation of the Apostille Convention*, 1 (2013), https://assets.hcch.net/docs/ff5ad106-3573-495b-be94-7d66b7da7721.pdf.

[79] MALAYA & DAMPIL-MANDIGMA, *supra* note 68, at 230.

[80] Department of Foreign Affairs, *Apostille Verification* (n.d.), https://www.dfa.gov.ph/verify-apostille.

[81] Jomel Manaig, *Goodbye ribbons! Hello apostilles!*, BUSINESS MIRROR (May 28, 2019), https://business mirror.com.ph/2019/05/28/goodbye-ribbons-hello-apostilles/.

Immediately after the Philippines' accession and upon representations by the DFA OTLA, the Supreme Court of the Philippines complemented the action and moved to recognize the apostille as a valid piece of evidence in domestic courts. Such reference may be found in Section 3(e) of A.M. No. 19-08-14-SC or the Rules of Procedure for Admiralty Cases,[82] and Section 24, Rule 132 of A.M. No. 19-08-15-SC or the 2019 Amendments to the Revised Rules on Evidence.[83] Section 24 of Rule 132 on Proof of Official Record states, in part, as follows:

> If the office in which the [official] 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

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[82] RULES OF PROCEDURE FOR ADMIRALTY CASES, Rule 2, § 3(e). Verified Complaint. – The verified complaint shall state or contain: x x x (e) Specification of all evidence supporting the cause of action, such as affidavits of witnesses… **Official documents from a foreign jurisdiction shall be considered as admissible when duly authenticated in accordance with The Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, otherwise known as the Apostille Convention**. x x x.

[83] REV. RULES ON EVID., Rule 132, § 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 which the record is kept, and authenticated by the seal of his or her office.

A document that is accompanied by the 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.

> prescribed by such treaty or convention subject to reciprocity granted to public documents originating from the Philippines. xxx
>
> A document that is accompanied by the 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.

Moving forward, the DFA Office of Consular Affairs is taking steps towards implementation of the successor e-Apostille program, which "promotes the use of technology to further enhance the secure and effective operation"[84] of the Apostille Convention.

E. Service Convention

The Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Service Convention") is a classic example of private international law's tangible contribution in fostering inter-state legal and judicial cooperation, and more importantly, in addressing delays in court proceedings and enhancing the administration of justice.

With at least seventy-three contracting states, the Service Convention is an effective tool to facilitate the "transmission of documents (whether judicial or extrajudicial document) from one State to another State."[85] For the Convention to apply, the following requirements must be met:

> 1) A document is to be transmitted from one state party to the Convention to another state party for service in the latter (i.e., the law of the state of origin determines whether or not a document has to be transmitted abroad for service in the other state);

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[84] Christopher Bernasconi, *The electronic Apostille Program* (*e-APP*) (2013), http://mddb.apec.org/Documents/2013/EC/WKSP3/13_ec_wksp3_008.pdf (citing the 2012 Special Commission on e-APP).

[85] HCCH, *Frequently Asked Questions on the Service Convention*, XLV ¶ I.1 (n.d.), https://assets.hcch.net/docs/aed182a1-de95-4eaf-a1ae-25ade7cd09de.pdf.

2) An address for the person to be served is known;
3) The document to be served is a judicial or extrajudicial document; and
4) The document to be served relates to a civil and/or commercial matter.[86]

Under the Convention, the authority or judicial officer competent under the law of the requesting state shall transmit the document to be served to a Central Authority of the requested state (i.e., the state where the service is to occur).[87] The request for service transmitted to the Central Authority must comply with the Model Form annexed to the Convention, and be accompanied by the documents to be served (the list of documents to be served is to be determined according to the law of the requesting state).[88]

The Central Authority however may refuse execution of the request if the Central Authority considers that the request does not meet the formal and substantive requirements of the Convention,[89] or if it considers that execution of the service would infringe the sovereignty or security of the requested state.[90] As stated in the Convention's title, it is applicable to documents in civil and commercial cases and not to criminal cases.

The Service Convention is meant to address efficiency issues in the justice system, as it allows for the direct transmission of documents to a competent judicial authority who may execute the service.

Prior to the Convention, outbound documents from domestic courts are first transmitted to the DFA main office in Manila, which then forwards them to the relevant Philippine Embassy or Consulate General abroad. The Embassy or Consulate General then requests the host Ministry of Foreign Affairs to have the service done by local authorities. The Embassy or Consulate General at times send the documents directly via registered mail. The turnaround time for the service often take four to six months. On some occasions, there is no return (result) of service.

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[86] *Id.* at XLV-XLVI, ¶ 3.
[87] *Id.* at XLVI, ¶ 7.
[88] *Id.* at XLVII, ¶¶ 10-11.
[89] *Id.* at XLIX, ¶ 19.
[90] *Id.*

On the other hand, prior also to the Convention, inbound documents from foreign jurisdictions are first transmitted to the Ministry of Foreign Affairs, which then transmits them to their Embassy in Manila. The latter in turn transmits the documents to the DFA main office. The DFA OTLA then sends the documents to the Executive Judge of the area where the service is expected to be made, with a request to serve the same. The turnaround time for the service is the same as for outbound documents, and within that period, cases are on a standstill while awaiting the return (result) of service.

Under the Service Convention, this roundabout way of serving will no longer apply, as documents will henceforth be directly transmitted from one Central Authority to another. The experience under the Convention is that documents are served within one and a half months.[91]

After securing the concurrence of the Supreme Court to the accession to the Convention and approval for such accession from the Office of the President, the DFA deposited the instrument of accession on Mar. 4, 2020 in The Hague. For the Philippines, the Convention entered into force on Oct. 1, 2020.[92]

For the implementation of the Convention, the Supreme Court designated the Office of the Court Administrator ("OCA") as Central Authority for the Philippines, and the latter office issued Administrative Order No. 251-2020 dated Sept. 11, 2020[93] to operationalize the Convention.

This OCA guideline finds basis in A.M. No. 19-10-20-SC or the 2019 Amendments to the 1997 Rules of Civil Procedure, specifically Rule 14, Section 17 thereof,[94] where the Service Convention is referred to. Specifically, Section 17

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[91] HCCH, *Authorities and Practical Information on the Service Convention* (n.d.), https://www.hcch.net/en/instruments/conventions/authorities1/?cid=17.

[92] MALAYA & DAMPIL-MANDIGMA, *supra* note 68, at 230-231.

[93] *Guidelines on the Implementation in the Philippines of the Hague Service Convention on the Service Abroad of Judicial Documents in Civil and Commercial Matters,* https://sc.judiciary.gov.ph/13918/.

[94] REV. RULES ON CIV. PROC., Rule 14, § 17. Extraterritorial service. — When the defendant does not reside and is not found in the Philippines, and the action affects the personal status of the plaintiff or relates to, or the subject of which is, property within the Philippines, in which the defendant has or claims a lien or interest, actual or contingent, or in which the relief demanded consists, wholly or in part, in excluding the defendant from any interest therein, or the property of the defendant has been attached within the Philippines, service may, by leave of court, be effected out of the Philippines by personal service as under Section 6; **or as provided for in international conventions to which the Philippines is a party**; or by publication in a newspaper of general circulation in such places and for such time as the court may order, in which case a

provides that extraterritorial service "may, by leave of court, be effected out of the Philippines by personal service as under Section 6; or as provided for in international conventions to which the Philippines is a party or by publication in a newspaper of general circulation x x x."

III. A Framework for Classifying Agreements as Self-Executing and Non-Self-Executing and the HCCH Conventions

A. The Four-Doctrine Approach

To recall the earlier discussions on the implementation of international agreements, the Executive makes an initial evaluation on the domestic approval requirements for a proposed agreement, including the legal basis by which its provisions will be implemented. To this end, principles such as a treaty having the force and effect of law, and generally considered as self-executing, are applied. An executive agreement may also be self-executing if entered into pursuant to acts of Congress (or of the Senate with respect to a prior treaty), or if merely "embodying *adjustments of detail* carrying out well-established national policies and traditions." In the case of the latter, the same may be implemented based on existing laws or presidential authorities; otherwise, it may not be implemented without congressional enactment.

How to make the distinction between self-executing and non-self-executing agreements has been the subject of many scholarship, where the bifurcated definitions of the two, albeit simplified by negating each other's meaning, underscores the need for standards in order to "legitimately … conclude that particular treaties are or are not judicially enforceable without additional legislation."[95] One of these is the four-doctrine approach propounded by Prof. Carlos Manuel Vasquez.[96]

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copy of the summons and order of the court shall be sent by registered mail to the last known address of the defendant, or in any other manner the court may deem sufficient. Any order granting such leave shall specify a reasonable time, which shall not be less than sixty (60) calendar days after notice, within which the defendant must answer. (15a).

[95] Carlos Manuel Vasquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 696 (1995), https://scholarship.law.georgetown.edu/facpub/1016.

[96] *Id.*

The first principle that should be considered in determining whether an agreement is self-executing or not is the intention of the parties.[97] Intent is a matter of proof and may be determined through various pieces of evidence, such as the records of an agreement and testimonies of the individuals who facilitated the accession.[98]

In *Nicolas v. Romulo,*[99] the PH-US Visiting Forces Agreement ("VFA") was deemed to be self-executing "because the parties intend its provisions to be enforceable."[100] This "intent" was considered in light of how the VFA was meant to carry out state obligations and undertakings under the PH-US Mutual Defense Treaty, and the subsequent actions of the state parties to comply with the same (i.e., "[a]s a matter of fact, the VFA has been implemented and executed, with the U.S. faithfully complying with its obligation to produce L/CPL Smith before the court during the trial.").[101]

Second, an implementing legislation is necessary "if the norm the treaty establishes is 'addressed' as a constitutional matter to the legislature."[102] This standard requires an examination of the treaty's text, so that the provisions thereof must have some form of specificity to guide the parties in its implementation. For instance, "precatory" treaties or those that "do not impose obligations but, instead, set forth aspirations,"[103] have been classified as non-self-executing. The underlying premise is that precatory provisions are not judicially enforceable not because of the absence of intent to make it so, but because under the separation of powers principle, lack of a judicially enforced standard makes it political question which the courts cannot entertain.[104]

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[97] *Id.* at 700.

[98] *Id.* at 711. "[i]n Frolova v. USSR, the court enumerated the following factors as relevant to whether the treaty was 'intended to be self- executing': (1) the language and purposes of the agreement as a whole; (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the availability and feasibility of alternative enforcement mechanisms; (5) the implications of permitting a private right of action; and (6) the capability of the judiciary to resolve the dispute."

[99] Nicolas v. Romulo, G.R. No. 175888, Feb. 11, 2009.

[100] *Id.*

[101] *Id.*

[102] Vasquez, *supra* note 95, at 697.

[103] *Id.* at 712.

[104] *Id.*

A similar approach was made in Philippine jurisprudence, in *Tanada v. Angara*,[105] where the Supreme Court held that broad declaration of principles and state policies are not "intended to be self-executing principles ready for enforcement through the courts."[106] Hence, when an international agreement outlines procedural matters which may be easily adopted by domestic implementing authorities, the same may be considered as self-executing.

Third, legislation is necessary "if the treaty purports to accomplish what under [the] **Constitution** may be accomplished only by statute."[107] To this extent, provisions in the Constitution such as those referring to foreign ownership limitations or the Bill of Rights,[108] may be construed as absolute prohibitions, so that international agreements that have been acceded to cannot be implemented without consideration to these constitutional requirements.

Finally, legislation is needed "if no law confers a right of action on a plaintiff seeking to enforce the treaty."[109] An examination of existing domestic legal framework in a given subject matter is therefore necessary before an agreement may be classified as self-executing or not. If there are existing laws or administrative regulations already present for which interested parties may seek recourse from, then the same can be considered as self-executing.

B. Applying the Four-Doctrine Approach to the HCCH Conventions

1. Apostille Convention

In the case of the Apostille Convention, the instrument of accession was deposited in Sept. 2018 with the HCCH depositary, the Government of the Netherlands, after the President had ratified the Convention. After its entry into

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[105] Tanada v. Angara, G.R. No. 118295, May 2, 1997.

[106] *Id.*

[107] Vasquez, *supra* note 95, at 697.

[108] *Id.* at 718. ("The dearth of case law on the "constitutionality" version of the doctrine indicates that this category is of limited practical significance. The types of treaties that have been considered non-self-executing for constitutional reasons include treaties that purport to raise revenue, treaties that purport to make conduct criminal, and treaties that purport to appropriate money. Whether these conclusions are sound, and whether there are other powers that the lawmakers possess but the treaty makers lack, are beyond the scope of this article.")

[109] *Id.* at 697.

force for the Philippines in May 2019,[110] the DFA implemented the shift to the apostille format of authentication through the issuance of administrative regulations. This was followed by the issuances by the Supreme Court of circulars which recognized the apostille as a valid piece of evidence before domestic courts. In short, the Apostille Convention was treated as a self-executing agreement.

Prior to the Apostille system, there was an existing legal basis and bureaucratic procedure for public documents to be used overseas. It is a customary consular service undertaken by foreign ministries, consulates general and consular sections of embassies on the basis of the 1963 Vienna Convention on Consular Relations, which was concurred in by the Senate in May 1965,[111] to wit:

> Art. 5. Consular functions shall consist in … (f) acting as notary and civil registrar and in capacities of a similar kind, and performing certain administrative nature … (underscoring supplied)

The Administrative Code of 1987, in Section 21(4), Title 1, Book IV, also enumerates as among the functions of Philippine consular establishments the performance of "notarial functions allowed by regulations." The apostille merely simplified this process.

Because the apostille, as a replacement for the usual authentication certificate recognized by domestic courts, is also a source of right among litigants, it needed to be similarly recognized as an acceptable piece of evidence in court. This is where the rule-making power of the Judiciary came in. Section 5(5), Article VIII of the Constitution gives the Supreme Court the power to "[p]romulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases." This wide latitude given to the Judiciary is an important element in the practice of international law in the Philippines, considering that the courts, as the ultimate arbiters of litigant rights, have the ability to craft rules that can facilitate judicially enforceable rights.

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[110] MALAYA & DAMPIL-MANDIGMA, *supra* note 68, at 230.

[111] *Id.* at 262.

The Supreme Court's inclusion of Section 24, Rule 132 in the 2019 Amendments to the Revised Rules on Evidence, as well as Section 3(e) in the Rules of Procedure for Admiralty Cases, highlights the complementary role of the courts in implementing international agreements.

Here, an implementing legislation was no longer necessary because the legal bases for the authentication of public documents, whether through the red ribbon method or the apostille, was in place. Instead, what was needed were complementary guidelines, which were within the powers of the implementing agencies—the DFA and the Supreme Court—to issue.

Thus, within the framework of the four-doctrine approach, the Apostille Convention is considered self-executing because the Philippines, and in particular, the DFA as the Competent Authority under the Convention, intended it to be enforceable. Steps were in fact undertaken (e.g., systems upgrade) during the preparatory stages to ensure that the Convention is operationally feasible in the country. The Convention itself is also littered with procedural matters[112] that leaves no room for doubt on how an implementing authority should enforce it, and there is no known constitutional provision which prohibits its implementation. Because the apostille, as a replacement for the traditional authentication certificate recognized by domestic courts, is also a source of right among litigants, it needed to be similarly recognized as an acceptable piece of evidence in court, which the Supreme Court did through its rule-making power. Underlying all these is the presence of firm legal bases and bureaucratic procedure in dealing with public documents to be used abroad, with the apostille simplifying this process.

2. Service Convention

The extraterritorial service of documents in civil or commercial matters via the diplomatic channel is of a well-established consular function. In fact, the courts have long assisted the DFA in the service of foreign judicial orders through its network of sheriffs across the country. This consular service is based on the Vienna Convention on Consular Relations, which states that "Art. 5. Consular

[112] Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, arts. 4-8, Oct. 5, 1961, 1562 U.N.T.S. 331.

functions shall consist in … (j) transmitting judicial and extrajudicial documents …"

The Administrative Code, in Section 21(5), Title 1, Book IV, also cites as a function of consular establishments the "transmit(tal) (of) judicial and extrajudicial documents." Extraterritorial service had been also recognized in Section 15, Rule 14 of the (old) Rules on Civil Procedure.[113] That provision highlighted the need for a judicially approved method to conduct extraterritorial service.

After its effectivity for the Philippines in Oct. 2020, the Service Convention was implemented by the adoption of a streamlined process in lieu of the service via diplomatic channels. The Supreme Court's Office of the Court Administrator issued Administrative Order No. 251-2020 dated Sept. 11, 2020[114] to operationalize the Convention, as authorized by the Court's A.M. No. 19-10-20-SC or the 2019 Amendments to the 1997 Rules of Civil Procedure, under Rule 14, Section 17 thereof,[115] where the Service Convention is legally recognized.

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[113] RULES ON CIV. PROC., Rule 14, §15. Extraterritorial service. — When the defendant does not reside and is not found in the Philippines, and the action affects the personal status of the plaintiff or relates to, or the subject of which is, property within the Philippines, in which the defendant has or claims a lien or interest, actual or contingent, or in which the relief demanded consists, wholly or in part, in excluding the defendant from any interest therein, or the property of the defendant has been attached within the Philippines, service may, by leave of court, be effected out of the Philippines by personal service as under section 6; or by publication in a newspaper of general circulation in such places and for such time as the court may order, in which case a copy of the summons and order of the court shall be sent by registered mail to the last known address of the defendant, or in any other manner the court may deem sufficient. Any order granting such leave shall specify a reasonable time, which shall not be less than sixty (60) days after notice, within which the defendant must answer.

[114] *Guidelines on the Implementation in the Philippines of the Hague Service Convention on the Service, supra* note 93.

[115] REV. RULES ON CIV. PROC., Rule 14, §17. Extraterritorial service. — When the defendant does not reside and is not found in the Philippines, and the action affects the personal status of the plaintiff or relates to, or the subject of which is, property within the Philippines, in which the defendant has or claims a lien or interest, actual or contingent, or in which the relief demanded consists, wholly or in part, in excluding the defendant from any interest therein, or the property of the defendant has been attached within the Philippines, service may, by leave of court, be effected out of the Philippines by personal service as under Section 6; **or as provided for in international conventions to which the Philippines is a party**; or by publication in a newspaper of general circulation in such places and for such time as the court may order, in which case a copy of the summons and order of the court shall be sent by registered mail to the last known

What the (present) Revised Rules on Civil Procedure did was to recognize an alternative process (as outlined in the Service Convention) that is also utilized by other contracting states, but still requiring judicial approval, thus working within the limits imposed by the remedial law. Corollary, the subsequent issuance of Administrative Order No. 251-2020 was an implementing guideline within the Court's rule-making power.

Thus, the Service Convention is a self-executing agreement using the same standards. Apart from the intent (which is borne out by the official records of the instrument), the text of the Service Convention is also filled with procedural guideposts,[116] with the option to oppose certain provisions which a contracting state may find difficult to implement.[117]

3. Intercountry Adoption Convention

The proponents of the accession to the Intercountry Adoption Convention awaited the enactment in June 1995 of R.A. No. 8043, which established the Rules governing Inter-Country Adoption of Filipino Children, before having the Convention signed. As earlier mentioned, R.A. No. 8043 mandated and authorized the ICAB[118] to prepare and recommend Agreement respecting inter-country adoption between and among foreign governments and international organizations,[119] and the DFA, upon representation of the Board, shall cause the preparation of Executive Agreements with other countries on inter-country adoption.[120]

Following this mandate, the DFA considered the HCCH Intercountry Adoption Convention,[121] the primary and authoritative international instrument

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address of the defendant, or in any other manner the court may deem sufficient. Any order granting such leave shall specify a reasonable time, which shall not be less than sixty (60) calendar days after notice, within which the defendant must answer. (15a).

[116] Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, arts. 2-17, Nov. 15, 1965, 1703 U.N.T.S. 424.

[117] *Id.,* art. 21.

[118] Rep. Act No. 8043, art. II, §4.

[119] Rep. Act No. 8043, art. II, §6(k).

[120] Rep. Act No. 8043, art. III, §15.

[121] Under art. 44(a) of the HCCH Intercountry Adoption Convention, non-HCCH Member States are allowed to accede to it.

on intercountry adoption with 102 states parties.[122] Accession to this Convention means establishing a network with competent authorities on intercountry adoptions, as well as harmonizing policies and practices on the matter.[123] It also meant safeguarding the rights of Filipino children who are qualified for adoption. So, in Jan. 1996, the Convention was ratified by the President and concurred in by the Senate in July 1996.

It is noted that even though R.A. No. 8043 had authorized the entry into "agreement respecting inter-country adoption,"[124] and specified "executive agreement" for it, the Convention was still submitted to the Senate for concurrence, which the latter granted.

It is the view of the co-authors of this paper that considering the authority under Sections 6(k) and 15 of R.A. No. 8043, the entry to the Intercountry Adoption Convention and its domestic approval process were intended by Congress to be as an executive agreement, so that its submission for Senate concurrence was no longer necessary. Inasmuch as the subject was a novel one for the country at that time, the cautious approach to the matter is understandable.

Nonetheless, the Intercountry Adoption Convention also fulfils the standards as self-executing, notably the clear intent of the Convention to be self-executing and presence of numerous procedural safeguards to ensure the rights of adopted children. There is in fact a clear congressional mandate to the executive branch to enter into international agreements on the subject matter. The submission of the Convention to the Senate for concurrence, however, was a matter of choice and not legal necessity.

C. The Fifth Element of "Practicability"

All things considered, all three Conventions fall squarely within the requirements of self-executing agreements: intent, specificity, non-prohibition, and existence of a legal right. At the same time, what this paper may contribute to scholarship is the addition of another element within the Philippine context and at least in the area of private international law: the matter of practicability.

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[122] HCCH, 1993 HAGUE CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION, 25 YEARS OF PROTECTING CHILDREN IN INTERCOUNTRY ADOPTION 8 (2018), https://assets.hcch.net/docs/ccbf557d-d5d2-436d-88d6-90cddbe78262.pdf.

[123] *Id.*

[124] Rep. Act No. 8043, art. II, §15.

Practicability here refers to the ability of operationalizing an international agreement by working on the existing legal frameworks, whether fragmented or otherwise. At the core of this element is a balancing of interests that must be carefully done by the government and its stakeholders: on one hand, there is a need to give immediate effect to an international agreement and ease the burden of the private sector and ensure the rights of children; and on the other hand, a need to ensure compliance with existing domestic legal frameworks. However, the co-authors of this paper wish to emphasize that the ratification or accession should not be used as a ground to organize, fix, or rearrange fragmented domestic legal frameworks. That is not the function of international agreements altogether. Instead, it is meant to give the most practical benefit to the public, that is, in the context of the three HCCH Conventions, an efficient means of facilitating private cross-border transactions and litigations and ensuring the best interest of children who are up for foreign adoption. When the relevant domestic legal frameworks or bases exist, though seemingly varied and dissipate these may be, consideration of a subject international agreement as self-executing can be explored.

The element of practicality can be seen as having been considered in the treatment of the Apostille and Service Conventions as self-executing, given their obvious benefits to the public, after all the legal frameworks for their implementations are present.

Professor Rommel Casis made similar observations in his study of the Philippines' implementation of multilateral environment agreements ("MEAs"), such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora and the Convention on Biological Diversity, where there is a dearth of treaty-specific implementing statutes. To comply with the obligations under the MEAs, the relevant government agencies like the Department of Environment and Natural Resources, have to rely on legislations on related subject matters and resort to "action plans" and administrative issuances, some of whose enforcement provisions may not have clear statutory basis. There are advantages to the approach of relying on administrative issuances for MEA enforcement, to wit:

> ... First, administrative issuances do not undergo the same political obstacles as statutes and therefore may take less time and effort to complete. This consideration is important when the environmental problem sought to be remedied requires urgent

> attention. Second, the rules required to enforce MEAs may require technical knowledge more accessible to experts in the executive branch than to politicians in Congress… Third, the issuance of these regulations may not require the political horse trading that may be necessary for the passage of legislation. When political considerations are suppressed, the benefit is that the provisions are not "watered down" …[125]

IV. Towards Good-Faith Performance of Agreements

A cardinal principle in international law is that agreements "must be performed by (the parties) in good faith"[126] and with a view to the full observance and smooth implementation of its provisions. This ensures the stability of agreements, which are the building blocks of peace, cooperation, and security among states.[127] The issue as to whether an agreement is self-executing or not has relevance to the pace at which it can be implemented.

A determination that an agreement is non-self-executing will most likely mean a delay in having to wait for Congress to pass implementing legislation. Delay not only defers domestic implementation of a desirable norm (if the norm was not desirable in the first place, presumably the executive branch would not have concluded the agreement), but also defers the changes in a foreign government behavior sought through the treaty negotiation and may risk backsliding from the commitments undertaken.[128] The issue is thus not only a legal or constitutional one; it may have policy implications.

As perhaps now clear at this point, there are policy justifications for having agreements as self-executing, particularly treaties concurred in by the Senate. The examination of the Apostille and Service Conventions, which find basis in the 1963 Vienna Convention on Consular Relations and the Administrative Code of 1987, bore this out. The same observation can be said of the Intercountry Adoption Convention, which is anchored on R.A. No. 8034.

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[125] Rommel J. Casis, *Developing Country Implementation of Multilateral Environmental Agreements: The Philippine Experience*, 2017 PHIL. Y.B. INT'L L 57 (2017).

[126] Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331.

[127] MALAYA & DAMPIL-MANDIGMA, *supra* note 68, at 380.

[128] Trimble, *supra* note 45, at 165.

The examination of the three HCCH Conventions and the observations on the implementation of MEAs highlight the challenges faced by government agencies, concerned civil society organizations, and other sector stakeholders who are interested in seeing the good-faith implementation of agreements, and the fulfillment of committed policy objectives.

In a previous article written by the co-authors of this paper,[129] they advocated for the Philippines' accession to other HCCH conventions[130] in view of their direct relevance and benefits to the overseas Filipinos, the business community, and the society in general. A call was also made to the legal profession, the law academe, the business community, and the rest of society to remain engaged with each other and the relevant national government agencies in order to ensure that the dialogues and discussions in this and other fields of international law thrive and continue.

Thus, in the process of acceding to these Conventions, a clearer understanding of the distinction between self-executing and non-self-executing agreements and the standards that would apply in making the distinction is helpful. As a contribution to the scholarship, this paper posited a practicability analysis as a policy consideration to ensure that the interests of various stakeholders are taken into account.

In the end, agreements are not simply the embodiment of the commitments of states between and among themselves, and with respect to private international law ones, their efforts at harmonizing conflicts-of-law principles; these are meant to provide tangible benefits to states and peoples in terms of convenience, cooperation, security, and peace. International agreements are indeed intended to respond to global needs, while respecting unique domestic legal requirements and traditions.

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[129] *See* Malaya & De Dumo-Cornista, *supra* note 58.

[130] *Id.* Four priority conventions were stated, namely the Evidence, Child Support, Choice of Court, and the Recognition and Enforcement of Foreign Judgments Conventions.

THE SEARCH FOR JUSTICE: REPARATIONS IN THE INTERNATIONAL CRIMINAL COURT

Jilliane Joyce R. De Dumo-Cornista[*]

Abstract

Reparations in the International Criminal Court (ICC) are both a tool and a process – a tool to usher transitional justice, but also a technical process that guides the ICC in deciding when to award them. This paper argues that the ICC, although a criminal judicial tribunal, plays a crucial in developing a reparations framework within the context of transitional justice. It discusses the theory of reparation in the fields of international law and transitional justice; and examines the ICC and Trust Fund for Victims' ("TFV") practices in awarding reparations, particularly in the Lubanga case. The paper concludes with proposals on how the ICC and the TFV may improve its handling of reparation claims, such as the retention of the TFV's dual mandates; improving victim recognition and engagements; utilizing presumptions and other standards of proof; and addressing the resource gaps of the TFV.

I. Introduction

The word "justice" always connotes some level of consequence both for the aggrieved and aggressor. Whether this sense of justice comes in the form of retributive, restorative, and sometimes, economic and social transformation,[1] it

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[1] Alexander L. Boraine, *Transitional Justice: A Holistic Interpretation*, 60 J. INT'L AFF. 1, 18 (2006), https://www.jstor.org/stable/24358011.

must always respond to the victims' rights and needs resulting from the violation committed.[2]

Any judicial tribunal, whether domestic or international in nature, must use a variety of tools to "serve the ends of justice," such as accountability measures through a guilty verdict, imprisonment, fines, and reparation.[3] The mandate of the International Criminal Court ("ICC"), as a criminal court, is no different. While the ICC does deliver imprisonment verdicts, its recent foray in the area of reparation through the *Lubanga*[4] case has put into focus the ICC's role in advancing transitional justice.

Reparations in the ICC are aimed at "relieving the suffering and affording justice to victims not only through the conviction of the perpetrator by this Court, but also by attempting to redress the consequences of genocide, crimes against humanity and war crimes…"[5] Here, reparations are both a tool and a process – a tool to usher transitional justice, but also a technical process that guides the ICC in deciding when to award them. This dynamism is precisely what makes reparations such a powerful tool for empowerment, healing, and change for the survivors and victims' families.

This paper argues that the ICC, although it functions as a criminal judicial tribunal, is also crucial institution in developing a reparations framework within the context of transitional justice. It is divided into four parts. The first part focuses on the general theory of reparation and will contextualize it as a tool in international law and transitional justice. The second and third parts will examine the ICC and Trust Fund for Victims' ("TFV") principles and practices in awarding reparations, and as specifically applied in the *Lubanga* case. The paper will

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[2] International Center for Transitional Justice, *Reparation* (n.d.), https://www.ictj.org/our-work/transitional-justice-issues/reparations.

[3] *See* Drazan Dukic, *Transitional justice and the International Criminal Court – in "the interests of justice"?,* 89(867) INT'L REV. RED CROSS (Sept. 2007), https://international-review.icrc.org/sites/default/files/irrc-867-9.pdf.

[4] Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-3129-AnxA, Order for Reparations, amended (Mar. 3, 2015), https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-01/06-3129-AnxA.

[5] ICC, THE ROLE OF THE TFV AND ITS RELATIONS WITH THE REGISTRY OF THE ICC, ICC Press Kit (2004); *see also* Linda M. Keller, *Seeking Justice at the International Criminal Court: Victims' Reparations*, 29 T. JEFFERSON L. REV. 189 (2006-2007), https://www.tjsl.edu/sites/default/files/files/Keller_reparations_ICC_final.pdf.

conclude with proposals on how the ICC and the TFV may further improve its handling of claims relating to victims' reparations.

II. Reparation as a Concept in Law and Transitional Justice

It has been said that the "concept of reparations, the making amends for wrongs, is an ancient, universal and basic institution of justice."[6] In legal terms, reparation is often expressed as a right to restitution, compensation, or damage for loss or injury.[7] It is also sometimes confused with retributive justice, a focal point in modern forms of criminal justice which emphasizes the need to punish individuals who have committed a wrong,[8] and restorative justice, which promotes victim-offender mediation, with the offender taking the necessary steps to repair the harm they have caused.[9]

But reparation or reparative justice differs because it is anchored on key principles that determine "how victims experience the justice process in terms of how far the specific harm they have suffered is repaired."[10] These principles include the substantive outcome of an award aimed at repairing harm suffered by victims, the victims' procedural rights such as rights to access proceedings and rights to protection and support in the judicial process, and the victims' perceptions of the overall justice mechanism such as fairness and the restoration of dignity.[11]

In international law, these principles are often co-mingled, but with a focus on state responsibility,[12] and not just on the victims' sense of justice vis-à-vis individual liability. The history of reparation began as an inter-state affair, with

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[6] Malin Åberg, *The Reparation Regime of the International Criminal Court*, DIGITALA VETENSKAPLIGA ARKIVET, 10 (2015), http://www.diva-portal.org/smash/get/diva2:801293/ FULLTEXT01.pdf.

[7] *Id.* at 11.

[8] *Id.* at 10-11.

[9] *Id.*

[10] *Id.* at 11.

[11] *Id.*

[12] *Id.* at 14 ("Accepted forms of reparation to be made between states include restitution, compensation and satisfaction, either singly or in combination, with cessation and guarantees of non-repetition as appropriate, constituting separate consequences of a breach of an international obligation"); *see also* ILC Articles on Responsibility of States, art. 31. ("The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act").

payments being made by the losing state to another, such as in the Versailles Treaty. The Holocaust experience slightly veered from this mechanism, with a nationally (state) sponsored reparations program made in favor of individuals.[13] Other instances of reparation in the global stage are those paid by Japan to Korean comfort women, by South Africa to victims of apartheid in its own country, and by the United States to Japanese Americans and others confined in internment camps in the United States during World War II.[14]

This trend went on and is embodied in the 2005 United Nations General Assembly Resolution on *the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (*"Basic Principles"*).[15] Largely applied to international human rights law and international humanitarian law, the *Basic Principles* require states to comply with their obligation under international and domestic law to make available adequate, effective, prompt, and appropriate remedies, including reparation, to the victims.[16] States must then provide access to information and develop procedures that allow groups of victims to present claims for and receive reparation.[17] Under the *Basic*

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[13] *Boraine, supra* note 1, at 24; *see also* Annabelle Timsit, *The blueprint the US can follow to finally pay reparations*, QUARTZ (2020), https://qz.com/1915185/how-germany-paid-reparations-for-the-holocaust/. ("In 1951, West German chancellor Konrad Adenauer committed to paying "moral and material indemnity" for the "unspeakable crimes…committed in the name of the German people" during World War II. The following year the government signed a set of reparations agreements with Israel (pdf) and an umbrella group of advocates known as the Conference on Jewish Material Claims Against Germany, or Claims Conference. Over the next 20 years Germany committed to compensating other countries, Jewish and non-Jewish victims of the Holocaust, and former forced laborers. While it's difficult to estimate the exact amount of money, in today's dollars, that was paid in deutsche mark over all this time, Germany says it has distributed over €77.8 billion [$91.9 billion].").

[14] David C. Gray, *A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice*, 87 WASH. U. L. REV. 1053 (2010), https://openscholarship.wustl.edu/law_lawreview/ vol87/iss5/3/.

[15] G.A. Res. 60/147 (Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 16, 2005), https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx.

[16] *Id.* at I(c); *see also* IX.15 ("In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim").

[17] *Id.* at VIII13.

Principles, these reparations may take the form of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[18]

In transitional justice, the theory of reparative justice finds a perfect fit, regardless of state or individual responsibility. Indeed, the focus is not on the offender, but on the victim, as the rise of transitional justice amid a community's search for true justice in the wake of "undemocratic, often oppressive and even violent systems"[19] has brought to focus how victims and their families try to confront their perpetrators in the name of peace and healing.

From the lens of transitional justice, the usual form of trial and punishment system in criminal law may be seen as fraught with challenges. As scholars would put it, "there are clearly limits to law."[20] For one, it may be difficult to prosecute all perpetrators in the case of widespread culpability. This often leads to a subjective selection process in which those with the greatest responsibility for human rights violations are first prosecuted. There are also considerable political restraints that tend to hamper the arrest, evidence gathering, and prosecution of the offenders. An often-overzealous prosecution can also prevent a lasting sustainable peace and stability in a war-torn community.[21]

But instead of treating justice as the antithesis of peace, one should think that justice goes hand-in-hand with healing. Processing the trauma through activities that document the truth helps in restoring the dignity of the survivors and victims' families, as they seek to find justice through formal legal proceedings.

Here, transitional justice and the theory of reparative justice are holistic. Post-conflict situations are both difficult for the state and its citizens, and there is no one-size-fits-all framework that may be recommended because of the unique circumstances of each case and the culture of the community involved.[22] Transitional justice thus combines the twin goals of justice and peace. It strives for accountability in holding perpetrators liable; gives redress for survivors and victims in the form of reparation; provides an avenue for truth seeking and giving a chance for survivors and victims to reconcile with the past; aims for prevention that serves as a deterrence for individual perpetrators to repeat similar injuries;

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[18] *Id.* at IX19-23.

[19] Boraine, *supra* note 1, at 18.

[20] *Id.* at 19.

[21] *Id.* at 20.

[22] Jane E. Stromseth, *Peacebuilding And Transitional Justice: The Road Ahead*, MANAGING CONFLICT IN A WORLD ADRIFT, 577 (2015).

and finally, gives reconciliation a chance so that the divisions and antagonisms among contending factions are highlighted and overcome.[23]

More importantly, transitional justice views justice from the eyes of the offended. By offering a plethora of initiatives (mechanisms) to an engaged community, transitional justice veers away from the politics and looks to community participation "for catalyzing local support for fair-minded judicial remedies."[24]

But these considerations do not necessarily mean that criminal law and its concept of retributive justice need to be disregarded. Instead, it may be argued that criminal justice complements transitional justice in a way that gives "considerable benefit in the establishment of a just society."[25] And reparations may be seen as the *missing link* between retributive justice and transitional justice, because it is the single most tangible manifestation of a perpetrator's effort to remedy the harms inflicted upon the survivors and victims.[26] Pablo de Greiff said that "a freestanding reparations program, unconnected to other transitional justice processes, is also more likely to fail, despite its direct efforts for victims, [so that] [t]he provision of reparations without the documentation and acknowledgement of truth can be interpreted as insincere, or worse, the payment of blood money."[27] Because "all transitions are characterized by a disparity between needs and resources,"[28] transitional regimes are often confronted with this "justice gap."[29] The most common gap-filling measure deployed are truth commissions and reparations, with the latter "providing recognition and partial redemption for victims while imposing on abusers direct or derivative liability."[30] Reparations, therefore, play an important role in achieving justice.

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[23] *Id.* at 573.
[24] *Id.* at 577.
[25] Boraine, *supra* note 1, at 19.
[26] *Id.* at 24.
[27] *Id.* at 25.
[28] Gray, *supra* note 14, at 1051.
[29] *Id.* at 1052.
[30] *Id.*

III. Reparations in the ICC and the TFV

A. Legal Regime under the ICC

In a 2018 conference conducted by the ICC on the Colombia situation, Deputy Prosecutor to the ICC Mr. James Stewart emphasized the role of the tribunal in transitional justice, underscoring the need for justice and accountability to achieve sustainable peace in post-conflict situations.[31] He explained that the term "transitional justice system" embraces a wide array of measures (i.e., "criminal justice, mechanisms for the establishment of the truth, reparations programs and guarantees of non-recurrence") that deal with post-conflict situations, but with the ICC relating mainly to the criminal justice component.[32] This, however, does not necessarily mean that there is no significant engagement between the ICC's processes on criminal justice and the other measures stated.

Generally, ICC-ordered reparations are often only seen as the extension of retributive justice, inasmuch as only those found guilty and punished may be made liable for reparations. This goes into the notion of "blame and responsibility,"[33] a concept commonly seen in criminal or tort law.[34] However, this mistake – appreciating reparations as a species of tort claim[35] – only undermines the possible benefits of reparations in serving the ends of transitional justice.

The reality is that reparations in the ICC are both a tool and a process – they are a tool to usher transitional justice, but they also involve a technical process that guides the ICC in deciding when to award them.

In its technical sense, reparation is a legal framework and mandate which allow the Court to directly order a convicted person to pay compensation to the victims. Article 75 of the Rome Statute gives this power to the ICC, including a wide latitude of discretion on how reparations may be made. In fact, the Trial Chamber may, either upon request or on its own motion in exceptional

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[31] *See* James Stewart, *The Role of the ICC in the Transitional Justice Process in Colombia*, (2018), ICC, https://www.icc-cpi.int/iccdocs/otp/201805SpeechDP.pdf.

[32] *Id.* at item 42.

[33] Gray, *supra* note 14, at 1048.

[34] *Id.* at 1071.

[35] *Id.* at 1050.

circumstances, determine the scope and extent of any damage, loss, and injury to, or in respect of, victims and state the principles on which it is acting.[36]

In determining whether to award reparations, the ICC must first grapple with the principles of proportionality and causality, in keeping with the *Chorzow Factory* case which said that "reparation must, as far as possible, wipe out all consequences of the illegal act and reestablish the situation which would, in all probability have existed if that act had not been committed."[37]

The principle of proportionality states that reparation must be proportional to the injury caused by the wrongful act, with the injury not necessarily resulting to some form of material damage upon the victim.[38] This definition was further enhanced in the *Lubanga* case by including the element of participation by the convicted person in the commission of the crime for which he or she was found guilty. In *Lubanga,*[39] the proportionality principle may be restated as "[a] convicted person's liability for reparations… [which is] proportionate to the harm caused and, inter alia, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case."[40] Similarly, the principle of causality eliminates other damages that are not the result of the wrongful act, and so requires a "link between the illegal act and the harm suffered."[41]

While these two principles appear generally in international law, one must proceed with caution so as not to confuse international human rights law with international criminal law. The ICC, as a criminal tribunal, is still mandated to "craft principles that respond to the sense of moral wrong, as well as the other,

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[36] Art. 75(1): "The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting."

[37] *Case concerning the Factory at Chorzow* (Ger. v. Pol.), Merits, 1928 P.C.I.J. (ser. A) No. 17, at 47.

[38] Octavia Amezcua-Noriega, *Reparation Principles under International Law and their Possible Application by the International Criminal Court: Some Reflections*, UNIVERSITY OF ESSEX, 3 (2011), https://www1.essex.ac.uk/tjn/documents/Paper_1_General_Principles_ Large.pdf.

[39] Prosecutor v. Thomas Lubanga Dyilo (Order for Reparations), s*upra* note 4, at 5/20, item 21.

[40] Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06 A A 2 A 3, Judgment with Amended Order for Reparations, at 43/97, item 118 (Mar. 3, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_02631.pdf.

[41] Amezcua-Noriega*, supra* note 38, at 3.

more tangible, forms of harm inflicted by criminal conduct."[42] Moreover, the ICC's jurisdiction over individual criminal responsibility instead of states requires the institution to "fashion a range of reparation principles that are appropriate for the distinctive legal context in which it operates."[43]

Reparations in the ICC, however, are *not* punitive. Instead, they are meant to "so far as possible, wipe out all the consequences of the illegal act, and reestablish the situation which would, in all probability, have existed if that act had not been committed."[44] Reparations, therefore, are not meant "to punish the responsible party, but to address the harm or injury caused to the victims."[45]

Victims are legally defined in the Rome Statute. These are "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court,"[46] as well as institutions such as religious, education, and humanitarian organizations which may have sustained *direct* harm in the course of the illegal conduct.[47] The Court may also order reparation *in respect of* victims, which references to those indirectly harmed collectively such as family members or those filing on behalf of deceased victims.[48]

The *damage, loss, or injury suffered* must also emanate as a result of a crime for which the perpetrator is responsible,[49] leading to the conclusion that reparation in the ICC is only concerned with the harm to which a convicted person's criminal responsibility relates to.[50]

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[42] Conor McCarthy, *Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory*, 3 INT'L J. TRANSITIONAL JUST., 251 (2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1422417.

[43] *Id.* at 255.

[44] *Id.* at 256 (citing Factory at Chorzow, *supra* note 37, at 47.

[45] *Id.* at 257.

[46] ICC, *Victims*, (n.d.), https://www.icc-cpi.int/about/victims.

[47] Aberg, *supra* note 6, at 19; *cf.* Aberg, at 20. ("Could indirect victims, such as family members who are linked to the direct victim, also receive victim status? They may in fact have suffered harm as a result of a crime within the Court's jurisdiction. When drafting Rule 85 no agreement to expressly include family members of direct victims could be reached, but this should not be interpreted as to exclude family member only because of the fact that they are not explicitly mentioned in Rule 85.").

[48] *Id.* at 21.

[49] *Id.* at 19.

[50] *Id.* at 20.

These parameters are set out in the Rome Statute and the ICC's Rules of Procedure and Evidence. In fact, Article 75(1) of the Rome Statute practically gives the Court the leeway to determine the scope and extent of any damage, loss and injury in reparation procedures. Although only three modalities of reparations are mentioned in the Rome Statute (i.e., restitution, compensation, or rehabilitation),[51] satisfaction and guarantees of non-repetition, as listed in the *Basic Principles,* have been recognized by the ICC as permissible forms of reparation.[52]

1. Forms of Reparation

While reparation programs can be a complex topic, it can generally be organized into two groups: material and symbolic, and individual and collective.[53] It may also be categorized according to who contributes to the reparation fund. The paper *No-Excuse Approach to Transitional Justice*[54] uses a similar approach and posits a four-pronged matrix that best describes the form of reparation awarded, categorizing them according to who benefits, who contributes, and what is awarded.

More often than not, various forms of reparation are combined to maximize resources and cover a large number of victims.[55] Since there are different types of victims with specific needs, having a variety of options means reaching out to more of them.[56]

The most common form of reparation is the material type, which includes the payment of compensation in cash and provision of tangible benefits like

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[51] Rome Statute of the International Criminal Court (last amended 2010), art. 75(1), July 17, 1998, 2187 U.N.T.S. 3: "The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting."

[52] Aberg, *supra* note 6, at 23, *citing Prosecutor v. Lubanga*, *supra* note 40.

[53] OUN-HCHR, *infra* note 55, at 9.

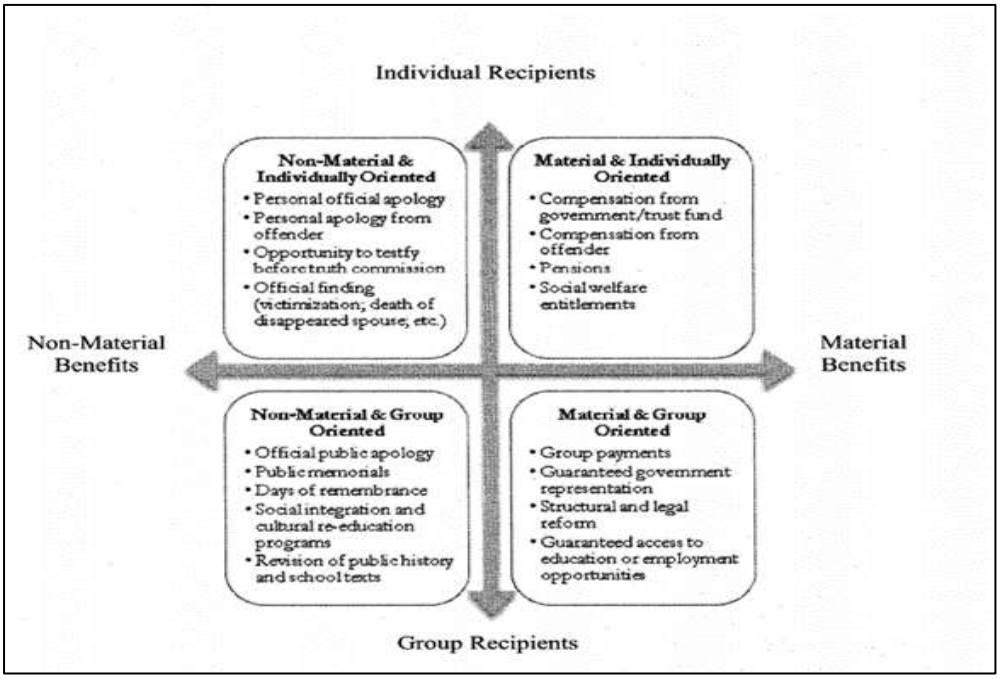
[54] Gray, *supra* note 14, at 1054.

[55] Office of the United Nations High Commissioner for Human Rights (OUN-HCHR), *Rule-Of-Law Tools For Post-Conflict States: Reparations Programme,* 22 (2008), https://www.ohchr.org/Documents/ Publications/reparationsProgrammes.pdf.

[56] *Id.*

housing, education, and health services.[57] The non-tangible or symbolic ones are "return of property, rehabilitation or symbolic measures such as apologies or memorials."[58] These measures are seen as "carriers of meaning"[59] and therefore help survivors reconcile their painful past with the future that is before them.[60] They also disburden the survivors with the "sense of obligation to keep the memory alive and allow them to move on"[61] and be recognized to be more than victims, but also as citizens and rights holders.[62]

Figure 1. Four-Pronged Matrix[63]



[57] *Id.* at 23-25.

[58] ICC, *Reparations/Compensation stage* (n.d.), https://www.icc-cpi.int/Pages/ReparationCompensation.aspx#:~:text=At%20the%20end%20of%20a,such%20as%20apologies%20or%20memorials.

[59] OUN-HCHR, *supra* note 55, at 23.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 25.

[63] Gray, *supra* note 14, at 1056.

In terms of who contributes to the reparation fund, the four-pronged matrix earlier mentioned may alternatively be viewed as a spectrum, since both states, corporations, and private individuals may contribute to reparations funds to fill in the void.[64] In the case of state-sponsored reparations, there is a blurring of lines between the state as a caretaker of reparation and the state in its previous role as an abuser.[65] It also perpetuates the continued dominance of the state, as the survivors and victims remain dependent upon state support and the subjective judgment of who may be considered as rightful recipients of reparation.[66] Until and unless a state in transition has a genuine desire to move forward from past atrocities, it will not be motivated enough to pursue reparation and instead delay, stop or constrain it altogether.[67]

The award may also be done on an *individual or collective basis*, the decision being made on which is the most appropriate for the victims of a particular case.[68] The strength of individual reparation is the recognition of a specific harm to an individual. This personal approach to reparation empowers an individual, as compared to collective reparation which responds to collective harms and sometimes negatively perceived as a political largesse or mass dole outs.[69] But individual reparations are also susceptible to critique such as line drawing[70] because not all applicants may qualify, given the limited resources.

Meanwhile, collective reparations may establish social cohesion and solidarity while maximizing the limited resources dedicated to reparations.[71] One of the advantages cited by the ICC in setting up a collective reparation is the community appeal that it gives, which allows the members of the community to "rebuild their lives [collectively], such as the building of victim services centres or the taking of symbolic measures."[72] It is also said that collective reparations

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[64] *Id.*

[65] *Id.* at 1064.

[66] *Id.*

[67] *Id.* at 1065.

[68] ICC, *Reparations/Compensation stage*, *supra* note 59.

[69] Naomi Roht-Arriaza and Katharine Orlovsky, *A Complementary Relationship: Reparations and Development,* INT'L CTR. TRANSITIONAL JUST. RES. BRIEF, 3 (2009), https://www.ictj.org/publication/complementary-relationship-reparations-and-development.

[70] Gray, *supra* note 14, at 1066.

[71] Roht-Arriaza & Orlovsky, *supra* note 69, at 3.

[72] ICC, *Reparations/Compensation stage*, *supra* note 59.

promote reconciliation among divided communities[73] by reinforcing activities that yield individual benefits, such as medical or psychological care, vocational training, and other income-generating activities.[74]

While group reparations are also criticized for failing to distinguish between victims and non-victims, such as those belonging to different generations (the issue of privity),[75] in the end, the form of reparations must be contextual and fit to the needs of the beneficiaries.

B. Legal Regime under the TFV

What is fitting to the needs of the beneficiaries is still a vague standard to base reparations on, leading the Court to rely on and employ experts in assessing a pool of evidence.[76] This is where the TFV comes in. Established by the states parties to the Rome Statute, the TFV serves as a lifeline of funds for the victims and their families should the convicted person be unable to compensate them out of his personal funds.[77] Specifically, the TFV has a two-fold mandate: "(i) to implement Court-Ordered reparations and (ii) to provide physical, psychological, and material support to victims and their families."[78] This is also called the *reparations* mandate and the *assistance* mandate, respectively.

While the ICC and the TFV are complementary institutions, they are distinct in terms of mandate, objectives and context of work. The ICC is focused on balancing the rights of the accused and the aim of delivering justice to the victims, while the TFV has an *equal* dual mandate in terms of reparations and assistance.

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[73] The Trust Fund for Victims (TFV), *Reparation Implementation*, (n.d.), https://www.trustfundforvictims.org/index.php/en/what-we-do/reparation-orders.

[74] *Id.*

[75] Gray, *supra* note 14, at 1063. ("Privity also suggests that only those who suffered direct or indirect harm may claim a right to reparation. Group reparations frequently threaten this intuition by failing to distinguish between victims and nonvictims. Privity is particularly relevant in the case of historical claims, such as proposals for slavery reparations in the United States. In this context, critics ask how 'a claimant (or alleged victim) [can] establish privity between himself (or his group) and the perpetrator when the latter belongs to a different era' and judges point out that "there is a fatal disconnect between the [slaves] and the plaintiffs.")

[76] Amezcua-Noriega, *supra* note 38, at 8.

[77] *Id.*

[78] ICC, *Trust Fund for Victims*, (n.d.), https://www.icc-cpi.int/tfv.

The ICC is also in a "legal reality" that is dictated by law and rules created by a political body, whereas the TFV deals with the realities of war on the ground.[79]

The hook of the TFV under its reparations mandate is that while the perpetrator is generally made liable to pay for the costs of reparation, more often than not, their indigency hampers the implementation of a reparation order. The personal nature of the ICC-imposed liability, however, does not detract from states and private donors contributing to reparation programs and freeing up resources, [80] which the TFV manages.

Should the ICC order an award for reparations be made through the Trust Fund, the TFV will be compelled to use its resources collected through fines or forfeiture and awards for the satisfaction of the same.[81] But the TFV's Board of Directors is free to determine whether it should complement the resources for awards with "other resources of the Trust Fund."[82] Because of lack of funding, the TFV is sometimes constrained to look for a variety of funding sources, including from the "fines and forfeitures of convicted persons, and through voluntary donations by member states and individual donors."[83] It also partners with national and international partners and, as with any other international organization, is also guided by procurement and bidding rules.[84]

On the other hand, the TFV's assistance mandate (i.e., to provide physical, psychological, and material support to victims and their families) is *outside* the scope of reparations. There is a deliberate decision by the drafters of the TFV Regulation to exclude the term "reparation" within this context, which signifies their intention to conceptually separate reparations within the meaning of Article 75 of the Rome Statute from the use of the TFV's *other resources*, which should be used to *benefit victims*. This enables the TFV to provide assistance to the victims

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[79] Alina Balta, Manon Bax & and Rianne Letschert, *Trial and* (*Potential*) *Error: Conflicting Visions on Reparations Within the ICC System*, 29(3) INT'L CRIM. JUST. REV. 221, 225 (2019), https://journals.sagepub.com/doi/pdf/10.1177/1057567718807542.

[80] Roht-Arriaza & Orlovsky, *supra* note 69, at 4.

[81] Aberg, *supra* note 6, at 31.

[82] ICC Assembly of States Parties, *Regulations of the Trust Fund for Victims ICC-ASP/4/Res.3*, ICC, Section III.56 (Dec. 3, 2005), https://www.icc-cpi.int/NR/rdonlyres/0CE5967F-EADC-44C9-8CCA-7A7E9AC89C30/140126/ICCASP432Res3_English.pdf.

[83] TFV, *Reparation Implementation, supra* note 73.

[84] *Id.*

even prior to a trial and employ various modalities, both individual and collective, to be able to assist the victims.[85]

This assistance mandate also puts into perspective the role of the TFV similar to an international aid organization, especially when it is able to address the needs of the victims that otherwise would not have been addressed by any government agency.[86] Against this backdrop is a perception that the TFV's assistance mandate acts as a "safety net" to its reparation mandate, as the Trial Chambers rely on the former to extend some form of assistance for victims outside the scope of the identified beneficiaries.[87] Scholars have sometimes likened this principle to the "Swiss cheese model in which the assistance mandate is seen as the filling in the gap that the limited reparations process was not able to provide."[88]

What these observations point out is the need for the ICC and the TFV to be able to cohesively work together and choose a mode of reparations and assistance that will best suit the needs of the victims who have suffered both direct and indirect harms, and the post-conflict situation they are in.

IV. Assessment of Court-Ordered Reparations in *Lubanga*

The seminal case of *Lubanga* tried before the ICC lays out the core principles and procedures of reparation to be observed by the tribunal.[89] While the ICC and the TFV has so far dealt with three Court-ordered reparations in the *Lubanga, Katanga* and *Al Mahdi* cases,[90] it is the *Lubanga* case which first "establishes a liability regime for reparations that is grounded in the principle of accountability of the convicted person towards victims."[91] Thus, the so-called "principle of liability to remedy harm" ties in both the punitive aspect of a criminal

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[85] Balta, et. al., *supra* note 79, at 233.

[86] Aberg, *supra* note 6, at 33.

[87] Balta, et. al., *supra* note 79, at 234.

[88] *Id.*

[89] Carsten Stahn, *Reparative Justice after the Lubanga Appeals Judgment on Principles and Procedures of Reparation,* BLOG EUR. J. INT'L L. (Apr. 7, 2015), https://www.ejiltalk.org/reparative-justice-after-the-lubanga-appeals-judgment-on-principles-and-procedures-of-reparation/.

[90] *See* Anne Dutton & Fionnuala Ní Aoláin, *Between Reparations and Repair: Assessing the Work of the ICC Trust Fund for Victims under Its Assistance Mandate*, 19 CHI. J. INT'L L. 490 (2018-2019), https://chicagounbound.uchicago.edu/cjil/vol19/iss2/4/.

[91] Stahn, *supra* note 89.

proceeding,[92] while addressing the harms suffered by the victims.[93] It has even been said that the *Lubanga* decision presented a "warning"[94] to future perpetrators that they will not only face incarceration, but also the consequences of their actions towards the victims of atrocities. The portion below focuses on the *Lubanga* case and its reparation orders.

Thomas Lubanga Dyilo (Lubanga) was a founder and once president of the *Union des patriotes congolais* (Union of Congolese Patriots or UPC), and Commander-in-Chief of the *Forces patriotiques pour la libération du Congo* (Patriotic Forces for the Liberation of the Congo or FPLC).[95] He was found guilty, on Mar. 14, 2012, of the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities (child soldiers); he was sentenced, on July 10, 2012, to a total of 14 years of imprisonment.

The ICC issued a Reparations Order setting the amount of Lubanga's liability for collective reparations at USD 10,000,000. The Chamber examined a sample of 473 representative victims' applications and concluded that 425 of them were "most likely direct or indirect victims of the crimes of which Lubanga was convicted."[96] The Chamber, however, acknowledged that there may be thousands more victims of Lubanga, some of whom were not able to or are no longer willing to participate in the reparation proceedings.[97]

Because of Mr. Lubanga's indigence, the Chamber instructed the TFV to determine whether earmarking or raising additional amounts are necessary to implement the collective reparations, as well as to coordinate with the Government of the Democratic Republic of the Congo (DRC) if the latter can contribute to the process.[98]

As far as allowable (due to confidentially conducted proceedings), the TFV has declared that it has implemented or will be implementing the following collective reparations: (a) symbolic reparations such as the construction of

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[92] *Id.*

[93] Serge Makaya, *Critical Considerations Regarding Reparations in the Thomas Lubanga Case at the ICC*, INT'L JUST. MONITOR (Sept. 19, 2016), *at* https://www.ijmonitor.org/ 2016/09/critical-considerations-regarding-reparations-in-the-thomas-lubanga-case-at-the-icc/.

[94] *Id.*

[95] ICC, *Lubanga case: Trial Chamber II issues additional decision on reparations* (Dec. 15, 2017), https://www.icc-cpi.int/Pages/item.aspx?name=pr1351.

[96] *Id.*

[97] *Id.*

[98] *Id.*

symbolic structures and holding of a mobile programme to host interactive symbolic activities and to reduce stigma against former child soldiers; and (b) service-based reparations such as mental and physical health services to address the trauma and bodily harm suffered, vocational training to account for the absence of skills learned during development years, and income-generating activities to enable their life project.[99] So far, the TFV has identified 854 beneficiaries, but is struggling to complete the total amount of reparations needed. The TFV has been able to complement half of the award and is currently seeking contributions for the remaining 4.25 million euros.[100]

A. Elements of a Reparation Order

The *Lubanga* decision noted that a judicially-issued reparation order must contain, at the minimum, five essential elements: "1) it must be directed against the convicted person; 2) it must establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order; 3) it must specify, and provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to rules 97 (1) and 98 of the Rules of Procedure and Evidence; 4) it must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it; and 5) it must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted."[101]

These requirements illustrate the tie-in approach earlier mentioned, that is, it balances the rights of the convicted person (through the requirement of specificity) which is an element of a criminal proceeding, with the need for victim accountability.[102] It also reinforces that "responsibility for reparations is markedly

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[99] TFV, *The Lubanga Case*, (n.d.), https://www.trustfundforvictims.org/what-we-do/ reparation-orders/lubanga.

[100] *Id.*

[101] *The Prosecutor v. Thomas Lubanga Dyilo* (Judgment with Amended Order for Reparations), *supra* note 40, at 7/97, item 1.

[102] Stahn, *supra* note 89.

different from the determination of individual criminal responsibility,"[103] and in the view of this paper, exemplifies best the role of the ICC in transitional justice.[104]

B. Standard of Proof

Likewise, the standard of proof in the reparation proceeding is more lenient than the criminal trial owing to the "'fundamentally different nature of reparation proceedings' and the potential 'difficulty victims may face in obtaining evidence.'"[105] In *Lubanga,* there need not be a proof beyond reasonable doubt that there is a causality between the crime proven and the harm suffered. Instead, the ICC merely required a "sufficient proof of causal link between the crime and harm suffered, based on the specific circumstances of the case."[106]

C. Criticisms to the Reparation Order

There were also criticisms of the reparations order in *Lubanga*. The first concern is the determination of who may be considered as victims. The Trial Chamber held that direct victims are the child soldiers, and the indirect victims are the parents of the child soldiers. Excluded in the indirect victims' category are persons attacked by a child soldier because this loss, damage, or injury is not linked to the harm inflicted on the child soldier. Victims of sexual- and gender-based violence were also excluded.[107] Against the TFV's initial estimation of 3,000

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[103] *Id.*

[104] *Id.* ("A second major contribution of the judgment is its articulation of the link between criminal conviction and reparation under Article 75. The ICC reparations regime differs from civil claim models due to its nexus to the criminal case, and specifically the focus on conviction. The judgment clarifies that 'reparation orders are intrinsically linked to the individual whose criminal responsibility is established in a conviction and whose culpability for these criminal acts is determined in a sentence' [AC, para. 65])"

[105] *Id.*

[106] *Prosecutor v. Thomas Lubanga Dyilo* (Order for Reparations), *supra* note 4, at 5/20 item 22.

[107] Balta, et. al., *supra* note 79, at 227; *see also* endnote 43. ("Whereas the Trial Chamber I held that the Court "should formulate and implement reparations awards that are appropriate for the victims of sexual and gender-based violence," the Appeals Chamber amended this Decision. See Lubanga Decision establishing Principles and Procedures, supra note 25, para. 207. Under the Assistance Mandate, however, the TFV developed several projects in the DRC to address the needs of victims, survivors of sexual- and gender-based violence. xxx In addition, it made reference to the Lubanga Sentencing Judgment, whereby acts of sexual violence could not be

direct and indirect victims eligible for reparations, the Trial Chamber only sifted through a sample of 473 applications, of which 425 were found to be eligible.[108] Limiting the number of beneficiaries despite the recommendations of the TFV creates a notion that there is a high threshold for victims to overcome before being able to access the ICC. It also reinforces the notion that a harm or suffering is only personal to the victims, and do not have a larger impact on society.[109]

Second, the Trial Chamber based Lubanga's liability (estimated to 8,000 euro per victim) to the harm caused even to nonidentified victims, ergo the nonidentified beneficiaries.[110] While it may appear to be a turnaround from the limitations the Court placed on who may be eligible beneficiaries, the amount is not something that can be realistically met by the convicted person due to his indigency. Therefore, although it is asserted that reparations ensure that the offenders account for their acts, the extent of accountability is at the moment limited to an apology.[111]

Moreover, because of the obvious limitation in resources, reparation may not be immediately implemented.[112] This results in a prolonged state of material and social inequality,[113] making the search for justice elusive and painful to the survivors and victims. An often-cited example by scholars is the "forty acres and a mule" reparation promised by General Sherman to former American slaves, which was not paid, and the lesser grants of land, goods, and money did not give a sense of justice to the former slaves.[114] Other examples cited are the South African and

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attributed to Lubanga, and neither could he be held responsible for the harm ensuing from these crimes. The Chamber referred the victims who did not meet the eligibility criteria to the assistance mandate.")

[108] *Id.* at 229. ("In setting the monetary liability of Lubanga, in addition to the harm caused to the 425 beneficiaries, which was estimated to 8,000 euro per victim, in a first of its kind, the Court also factored in the harm caused to nonidentified victims.")

[109] *See also* Balta, et. al., *supra* note 79, at 230.

[110] *Id.* at 229-230.

[111] *Id.* at 231; *c.f.* Stahn, *supra* note 89. ("The Chamber held expressly that the indigence of the convicted person is not an obstacle to the "imposition of liability for reparations" (AC, para. 104). This reading of Article 75 is a clear victory for victims who sought express judicial acknowledgment of accountability, independently of the perpetrator's indigence. It strengthens the expressivist dimensions of ICC reparations which are of key importance, in light of the limited resources of the Trust Fund.")

[112] Gray, *supra* note 14, at 1049.

[113] *Id.*

[114] *Id.*

Argentinian experiences, where even if the amount of reparation is quite significant, "political realities and abiding guilt among survivors concerned with spending 'cursed money' limit the capacity of reparations to significantly change the lot of victims or recipients."[115]

Third and relatedly, monetary reparations, regardless of the amount, are sometimes seen as an "equivalent" of the harms suffered by the survivors and victims. But how can one measure the monetary value of a harm suffered? As in tort law, material reparations are also criticized as a "'one-time pay-off trap' [that] essentially closes the door on any subsequent justice claims,"[116] with an unspecified or unreachable threshold that needs to be met through evidence.

The quick solution of the ICC and the TFV in the *Lubanga* case was to exclude individual reparations and instead provide for a collective one.[117] This was recommended by the TFV in light of the "limited number of victims participating in the trial and the time- and resources-consuming process of locating other victims was cumbersome for the purpose of individual reparations."[118] The TFV also believed that "collective reparations consisting of community-based programs and rehabilitation are most effective in this situation."[119]

In a way, non-material and symbolic reparations such as apologies and public monuments may not be necessarily enough for a given set of survivors and victims. It is this feeling of inadequacy that the recipients may feel trapped and feel that the system has failed them.[120] The victims in the *Lubanga* case have specifically requested for individual instead of collective reparations and the order of the ICC caused frustration to some, leading to the withdrawal of their participation from the proceedings.[121] There was also a belief that community-based services such as the construction of schools and hospitals would benefit the perpetrators who lived in the same community, so the victims instead sought for compensation, even though it may be limited to a small symbolic amount.[122] Both

[115] *Id.* at 1050.
[116] *Id.* at 1059.
[117] Balta, et. al., *supra* note 79, at 232.
[118] *Id.*
[119] *Id.*
[120] Gray, *supra* note 14, at 1061.
[121] *Balta, et. al., supra* note 79, at 232.
[122] *Id.* at 233.

the ICC and the TFV recognized that they indeed "missed the mark"[123] by awarding collective reparations despite the clear preference of the victims, resulting in the revision of the reparation order to grant the symbolic amount of 8,000 euro per victim.

Nevertheless, the TFV noted that it remained bound by the criteria of feasibility and declared that collective reparations shall be prioritized over individual ones.[124] This is not an unusual scenario, considering the circumstances that the TFV operates on the ground: a huge gap in resources but with a mandate to provide both reparations and assistance to a large group of victims.[125] The TFV is then constrained to follow a "pragmatic approach… [by helping] more victims, within both mandates, in case it uses collective reparations such as community-based assistance and symbolic projects that pursue reconciliation."[126] In a way, this can be seen as the blurring of the lines between the TVF's reparation and assistance mandates, and it acting as if it were an international aid organization.

Along this line of reasoning, it can be argued that reparation tends to inundate the role of development institutions. Development is generally described as that process by which a community and its members experience prosperity and welfare through various activities spearheaded by various institutions, such as infrastructure building, so that the members have "at least a minimum level of income or livelihood for a life with dignity."[127]

Even from an economic perspective, it is natural to confuse the notions of reparation and development in resource-poor areas. They may be different conceptually but are actually complementary within the context of transitional justice. Because both take place in post-conflict areas where state institutions tend to be weak,[128] reparation can increase the community's awareness of their rights and needs, which development can then support in the short and medium term.

The caveat here is that reparations programs must complement development efforts instead of duplicating them.[129] This could only happen if there is a community-centric plan that focuses on social integration and the needs of

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[123] *Id.*

[124] *Id.*

[125] *Id.* at 234.

[126] *Id.*

[127] Roht-Arriaza & Orlovsky, *supra* note 69, at 1.

[128] *Id.* at 2.

[129] *Id.* at 3.

the members, instead of merely focusing on what activities may be done at the get-go.

Similarly, reparation should never replace long-term development strategies.[130] Reparation is meant to develop the trust and confidence among survivors and the families of the victims – values that are intended to "set the stage for a more positive long-term interaction between the state and [its] citizens."[131] Reparations cannot go on forever, and genuine development must take over at some point.

Fourth and finally, the element of time is always an enemy of a court-ordered reparations program. As the ICC awards the reparation and sets the framework, it is incumbent upon the TFV to draft an implementation plan to be approved by the former. The succeeding back-and-forth of the document and the specificity which is required by the Trial Chamber in the *Lubanga* case (i.e., "the plan should consist of a list of potential beneficiaries, an evaluation of the harm suffered by the victims, proposals for the reparative projects, the expected costs of these projects, and the monetary amount that the TFV could potentially allocate to the reparations"[132]) somehow contributed to the decline in victim participation in the proceedings for fear of revealing their identities or having waited too long to receive reparation.[133]

V. Strengthening Reparations in the ICC as A Form of Transitional Justice

It has been said that the Rome Statute framework is "uniquely receptive to balancing the rights of victims with the rights of the accused in criminal justice processes."[134] As the ICC takes a more proactive role in transitional justice with its groundbreaking decision in *Lubanga,* there is a plethora of principles and practices that both the ICC and TFV can look into to strengthen its reparations regime. These recommendations are premised on the need for the ICC and the

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[130] *Id.*

[131] *Id.*

[132] Balta, et. al., *supra* note 79, at 235.

[133] *Id.* at 236.

[134] Marissa R. Brodney, *Implementing International Criminal Court-Ordered Collective Reparations: Unpacking Present Debates,* 2016(1) J. OXFORD CTR. SOCIO-LEGAL STUD. 1, 35, http://nrs.harvard.edu/urn-3:HUL.InstRepos:34818043.

TFV to actively work together and deliver a reparation regime that is responsive to the needs of the victims.

A. Assistance Mandate

In a research study conducted by scholars Anne Dutton and Fionnuala Ní Aoláin in the work of the TFV under its *assistance* mandate in Northern Uganda, certain indicators of success were identified "in hopes of illuminating best practices on repair, at both a conceptual and operational level [by] using the assistance mandate as a lever to explore broader themes and practicalities."[135] The study was driven by the request of the ICC during the conclusion of the *Lubanga* criminal trial to states, organizations and other stakeholders to provide the Court with "information to inform its judicial decision-making on past and current reparations projects for former child soldiers and on collective reparations."[136]

The result was a comprehensive list of indicators, drawn upon from numerous interviews with the victims and their families, communities and staff of the TFV, implementing partners and the government. Some of these indicators include the following: (a) indicators of success in individuals, including establishing connection with others, participation in economic activity, self-accept and of past experiences, feeling a restored sense of hope, increased use of healthy coping mechanisms, experiencing fewer/lesser symptoms of mental illness, and improvement in physical health; (b) indicators of success in families, including decreased stigma within families, improved family relationships, reconciliation of spouses, and increase in economic power; (c) indicators of success in communities, including culture of togetherness and supportive communities; (d) indicators of success in implementing partners, including implementing partners seen as trusted leaders and increased professionalization among the ranks; and (e) indicators of success in government, including government empowerment and accountability, and long-term programmatic success.[137]

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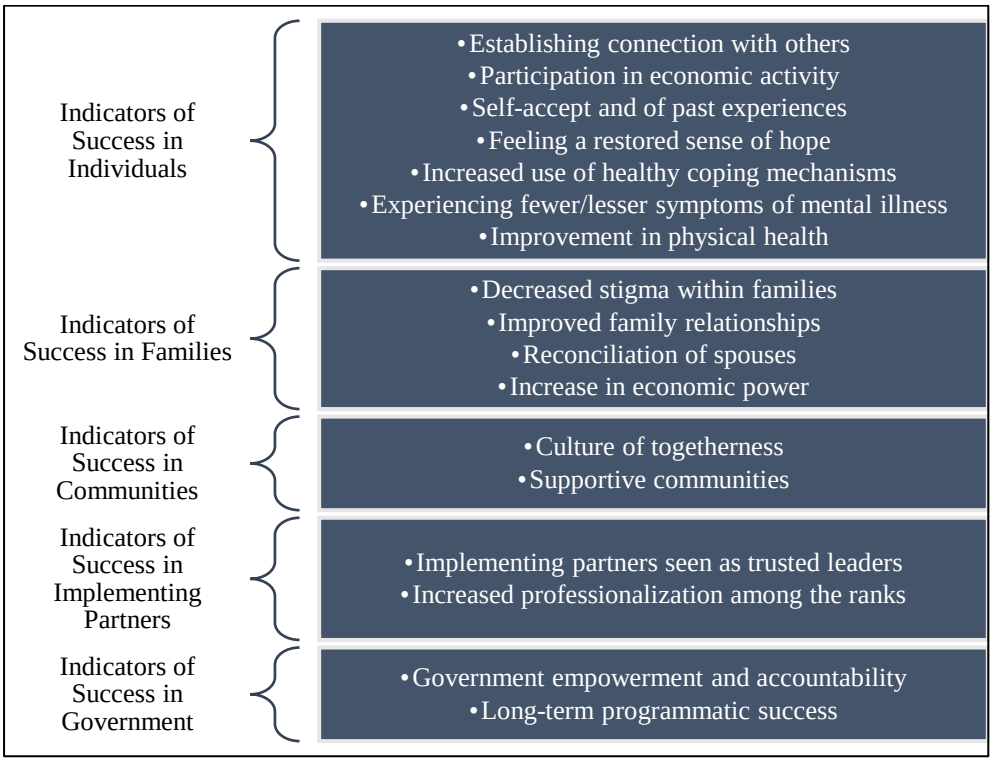
[135] Dutton & Aoláin, *supra* note 90, at 9.

[136] *Id.*

[137] *See* Dutton & Aoláin, *supra* note 90.

Figure 2. List of Indicators of Success



Taking off from these indicators, it appears that the *assistance* mandate of the TFV, when done correctly, posits a great deal of benefits in accomplishing a sense of justice familiar to the victims. While an argument can be made (and has certainly been posited by several scholars in the past) that the assistance mandate has no place in the ICC's framework as a criminal tribunal and because it competes with the reparations mandate on the allocation of the Fund's limited resources,[138] there is considerable value for the TFV to provide this form of general assistance.

[138] *See* Regina E. Rauxloh, *Good intentions and bad consequences: The general assistance mandate of the Trust Fund for Victims of the ICC*, 34(1) LEIDEN J. INT'L L. 203 (2021), https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/abs/good-intentions-and-bad-consequences-the-general-assistance-mandate-of-the-trust-fund-for-victims-of-the-icc/F4831BF9DBB0C617AB1FD8DE70B5D7DB. ("Indeed, the victim is understood to be at the heart of ICL. But this argument overlooks the fact that there must be a clear distinction between victims as protagonists of a trial and victims in the sense of beneficiaries of the Trust Fund's general assistance mandate. This article does not advocate limiting rights of the former, nor does it deny

One, the TFV is seen as the human face of the ICC[139] and helps build credibility for the court. As most victims may not have the capacity to understand the legal hermeneutics in a reparation order, the assistance mandate may be the institution's best response in engaging not just the victims, but also the state and other interested parties. This also ties in with the role of the TFV during a reparation proceeding in which it is asked to evaluate circumstances on the ground and propose an implementation plan. Without such significant engagement, the implementation plan cannot be crafted realistically.

Second, because the assistance programs can precede the reparation proceedings, they can serve as a cushion to victims who might be burdened over the technical thresholds required by the ICC or who may not have the capacity to wait for so long before an implementation plan may be approved. This also complements the view that "the earlier the intervention which engages directly with trauma and the direct physical and psychological legacies of violence for victims will be more likely to ensure that victims can move forward positively with their lives."[140]

Finally, as the ICC itself in the *Lubanga* case acknowledged that there can be more (thousands even) victims[141] than what it was able to examine, limiting the award of reparation to those who were only able to file a claim and able to keep up with the process (i.e., those identified under the reparation mandate) may run counter to the principles of justice that the ICC espouses.

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that the survivors of mass atrocities are in dire need of concrete support. What is argued here is that any support coming from the Court needs to be limited to those victims who have been identified by the Court as victims of the specific case. The general assistance mandate on the other hand extends the concept of victim to all those who have severely suffered in the atrocities. xxxx The ICC is only one part in the range of international and national responses to gross human rights violations. Due to its financial and jurisdictional limitations it will only ever be a symbolic court that can only deal with a small part of atrocities. But this symbolic value depends on the legitimacy of the Court and its procedures. The general assistance mandate is not only a drain on scarce resources but more importantly, severely impacts on the legitimacy the Court. Needs-based assistance for victims and the justice mandate of the ICC are incompatible and therefore need to be institutionally separated.")

[139] Katharina Peschke, *The Role and Mandates of the ICC Trust Fund for Victims*, *in* THORSTEN BONACKER, VICTIMS OF INTERNATIONAL CRIMES: AN INTERDISCIPLINARY DISCOURSE 13 (Jan. 2013), https://www.researchgate.net/publication/291242359_The_Role_and_Mandates_of_the_ICC_Trust_Fund_for_Victims.

[140] Dutton & Aoláin, *supra* note 90, at 59.

[141] ICC, *Lubanga case: Trial Chamber II issues additional decision on reparations*, *supra* note 95.

B. Reparation Mandate

In terms of the thresholds imposed by the ICC on the application for reparation and the TFV's reparations mandate, there is a need to re-examine these principles and take cue from some practices outside the scope of the ICC.

1. Definition of "Victim" and "Harm"

One of the limitations of an ICC-ordered reparation is the need to comply with the essential elements earlier noted,[142] specifically that the order must identify the direct and indirect victims of the crimes for which the perpetrator was convicted from. This involves a link among the identified victims, the harm they suffered, and the crime established, and necessarily requires that the crime be first established before the victims may be able to prove their standing in court.

In contrast, the Extraordinary Chambers in the Courts of Cambodia ("ECCC") took on a different approach by allowing the victims to choose between the reparation ordered or those that may be achieved through third parties. In the *latter* case, the ECCC amended its rules so that victims were "afforded the status of civil parties as long as they proved that the harm visited on them was directly related to the factual circumstances set out in the Introductory and Supplementary Submissions."[143] This means that the crimes alleged were determined at a later time, resulting in a lower threshold (i.e., the link between the crime proved and the harm to the victims) than that imposed by the ICC.[144] It also frees up a tribunal from deciding on the admissibility of victims as civil parties, enabling as many victims as possible to participate in the proceeding.[145] Those who choose reparation through third parties are then endorsed to the ECCC Victims Support Section to participate in the drafting of an implementation plan.[146] This is similar to the TFV's present practice of also seeking funding from donors to implement both its assistance and reparation mandate.

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[142] *Prosecutor v. Thomas Lubanga Dyilo* (Judgment with Amended Order for Reparations), *supra* note 101.

[143] Balta, et. al., *supra* note 79, at 231.

[144] *Id.*

[145] *Id.*

[146] *Id.*

If this mechanism is adopted by the ICC, claimants will be given the two viable options: "[r]eparations ordered against indigent accused, which must abide by strict procedural rules to safeguard the rights of the accused, or through donations by third parties, [which] might be more worthwhile in terms of delivering meaningful justice to victims."[147] Either way, casting a wide net on who may be considered as victims does away with the criticism that the ICC only provides selective justice.

2. Standard of Proof

Perhaps aware of the limitations of the ICC in hearing all the claims, as well as due regard to the difficulties faced by the victims, the Court had rightly veered away from the usual standard of proof used in criminal proceedings (i.e., proof beyond reasonable doubt), and used the rather flexible "sufficient proof of causal link"[148] from the crime committed and the harm suffered.

There are, however, suggestions on numerous scholarships that the ICC can further relax this standard by using certain *presumptions* in favor of the victims.[149] After all, a reparation proceeding is distinct from the trial relating to criminal liability.

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[147] *Id.* at 233; *c.f.* Brodney, *supra* note 134, at 12. ("However, reparations claimants at the ECCC are civil parties to proceedings, unlike prospective reparation beneficiaries at the ICC who may qualify for reparations but may not have applied for reparations or participated in the context of proceedings that precede authorization of an award.")

[148] *Prosecutor v. Thomas Lubanga Dyilo* (Order for Reparations), *supra* note 4, at 5/20, item 22.

[149] Even the Prosecution in Lubanga attempted to use the presumption method, but the Trial Chamber proceeded to assess the evidence instead. *See Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06 A 5, Judgment, 163/193, item 454 (Dec. 1, 2014), https://www.icc-cpi.int/CourtRecords/CR2014_09844.PDF. ("Mr Lubanga's latter arguments are analysed elsewhere in this judgment. With respect to the first argument, the Prosecutor contends that, even applying the standard of a "virtually certain consequence", the Trial Chamber would have found that conscription, enlistment and use of children under the age of fifteen years to actively participate in hostilities was a virtually certain or almost inevitable consequence of the implementation of the common plan. xxxx Accordingly, the Appeals Chamber finds that the Trial Chamber, contrary to Mr Lubanga's allegation, sufficiently addressed the underlying evidence and finds that the Trial Chamber's conclusion was not unreasonable.")

In *Suarez Rosero v. Ecuador,*[150] the Inter-American Court of Human Rights ("IACHR") did not require any proof of suffering from the victim, his wife, and daughter to be awarded damages, holding that "it is human nature to suffer in the circumstances he had been through,"[151] given the totality of circumstances in the case. Mr. Suarez Rosero here was arrested without warrant in Ecuador for illegal drug trafficking, but was not, at any given stage, summoned to appear before a judicial authority or informed of the charges against him.[152] In the *Plan de Sanchez Massacre*,[153] the IACHR stated that "taking into account, inter alia, the circumstances of the case… there are sufficient grounds for presuming the existence of damage,"[154] and proceeded to award damages to the identified members of the community. In 1982 and during Guatemala's civil war, several people of Achi Maya descent were abused and murdered by the members of the armed forces in the town of Plan de Sanchez.[155] Similarly, the truth telling commission in Chile, *the National Commission on Illegal Detention and Torture*, indicated that "victims who were able to prove detention in certain detention facilities in Chile at a certain time were presumed to have been tortured due to evidence of systematic torture being used in those facilities at that time."[156]

Another principle that may be used is the *cy-pres* doctrine ("as near as possible")[157] to endow certain groups when the original intended beneficiaries can no longer be found or has ceased to exist. There is a generational component in the doctrine, in that reparations could be extended to the children of the victims

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[150] Suarez Rosero v. Ecuador, Merits, Judgment, Inter-Am. Ct. H.R. (Nov. 12, 1997), https://www.corteidh.or.cr/corteidh/docs/casos/articulos/seriec_35_ing.pdf.

[151] Dinah Shelton & Thordis Ingadottir, *The International Criminal Court Reparations to Victims of Crimes* (*Article 75 of the Rome Statute*) *and the Trust Fund* (*Article 79*)*: Recommendations for the Court Rules of Procedure and Evidence*, Center on International Cooperation, at 8 (1999), *available at* http://www.vrwg.org/downloads/reparations.pdf.

[152] Suarez Rosero v. Ecuador, *supra* note 150.

[153] Plan de Sanchez Massacre v. Guatemala, Reparations, Judgment, Inter-Am. Ct. H.R. (Nov. 19, 2004), https://www.corteidh.or.cr/docs/casos/articulos/seriec_116_ing.pdf.

[154] *Id.* at 74.

[155] *Id.* at 24.

[156] REDRESS, Justice for Victims: The ICC's Reparations Mandate, 66 (2011), https://redress. org/wp-content/uploads/2018/01/REDRESS_ICC_Reparations_May2011.pdf.

[157] *Id.* ("Footnote 301: The cy-près doctrine is a legal doctrine that first arose in courts of equity in relation to the execution of trusts. The term is translated 'as near as possible' or 'as near as may be.' The doctrine has been applied in the context of class action settlements in the United States as well as international mass claims processes in the post conflict context.")

in post-conflict situation. The doctrine was also used in the United States where a trust fund was established for the abolition of slavery; but once the purpose was achieved, the funds were instead appropriated for individuals of African descent needing assistance.[158] So, the doctrine could be appropriate where "collective awards or fixed lump sums are foreseen for a large number of victims, and where the extent of individual harm and suffering within a given category is immaterial."[159]

3. Engagement of Victims and Stakeholders

The criticisms with the ICC somehow tie up to how well the court and the TFV prioritizes *victim participation* in the reparation proceedings, vis-à-vis the protection of the rights of the accused. Apart from that balancing act, it can be seen in the *Lubanga* case that victim participation can be resource intensive for both the victims and the ICC, to the point that critics have remarked that the claimants have been "relegated to mere third parties."[160] Moreover, because of the volume of claims, victim participation also affects the ICC's procedural efficiency, which in turn disappoints the victims and limits their "legal agency to exercise their rights" at the court.[161]

While there are both substantive and procedural challenges to victim participation in a reparation proceeding, justice from the lens of the victims cannot be simply disregarded. The ICC should, in its broad powers under Article 75(1), consider formalizing a participation regime where the victims can air their concerns for the consideration of the court, as well as "encourage victim-oriented complementarity through domestic mechanism that enable victim participation (which in itself would improve the public transparency of investigations and trials)."[162]

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[158] *Id.* at 67.

[159] *Id.*

[160] Juan-Pablo Perez-Leon-Acevedo, *Victims and appeals at the International Criminal Court (ICC): evaluation under international human rights standards*, INT'L J. HUM. RTS. (2021), *available at* https://www.tandfonline.com/doi/full/10.1080/13642987.2020.1859483.

[161] *Id.*

[162] Luke Moffett, *Meaningful and Effective? Considering Victims' Interests Through Participation at the International Criminal Court*, 26(2) CRIM. L. F. 255, 24 (2015), https://pureadmin.qub.ac.uk/ws/portalfiles/portal/15375987/Journal_article_Meaningful_and_effective_Considering_victims_interests_through_participation_at_the_International_Criminal_Court.pdf.

The matter of complementarity can also be an important tool in ensuring "sustainability and effectiveness" of a reparation program[163] amid the backdrop of stakeholder engagement. The reality is that there is a need for the TFV to form broad political coalitions, as well as exercise creative judgment that combines legal, political, social and economic approaches[164] to be able to ensure that reparations are able to serve their purpose. An example of this is the *Truth Commission in Guatemala* in which a National Reparations Committee was created by legislation. The Guatemalan government representatives publicly affirmed the commitment of the state to recognize responsibility for human rights violations committed during the armed conflict, which led to a snowball of government efforts in facilitating reparation applications.[165]

4. Modality of Reparations

A point to consider by the ICC and the TFV is that the form of reparation, whether in the assistance or reparations mandate, depends on a variety of factors, including "cultural attitudes towards money or the lost goods, and social structures of gender, class, urbanizations, age, education, and access to capital."[166]

The ICC and TFV can take cue from several best practices which exist in other transitional justice mechanisms. For instance, the reparation program in Nepal's Internal Armed Conflict is one that "acknowledges the importance of reparations to women victims."[167] Thus, the wives of the disappeared individuals or *desaparacidos* were not repeatedly required to prove their status, but instead prioritized in programs relating to access to education, scholarships, land distributes, and asset ownership.[168] The point of the reparation program is that a

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[163] REDRESS, *No Time To Wait: Realising Reparations for Victims Before the International Criminal Cour*t, 14, 65 (2019), https://redress.org/wp-content/uploads/2019/02/ 20190221-Reparations-Report-English.pdf.

[164] Boraine*, supra* note 1, at 25.

[165] E. Christine Evans, *The Right to Reparations in International Law for Victims of Armed Conflict: Convergence of Law and Practice?* LSE THESES ONLINE, 150 (2010), http://etheses.lse.ac.uk/2215/

[166] *Roht-Arriaza & Orlovsky, supra* note 69, at 3.

[167] Amrita Kapur, *Overlooked and invisible: the women of enforced disappearances*, OPENDEMOCRACY (Apr. 14, 2015), https://www.opendemocracy.net/en/opensecurity/ overlooked-and-invisible-women-of-enforced-disappearances/; *see also* International Center for Transitional Justice, *Reparations*, (n.d.), https://www.ictj.org/our-work/transitional-justice-issues/reparations.

[168] *Id.*

gender-responsive reparation program should also address pre-existing gender discrimination.[169]

This is in stark contrast to the experience in *Sri Lanka* where reparations for internally displaced resettlement did not reach women beneficiaries because "customary practices of holding property in men's names meant that women had few legal protections to buttress their reparations claims;"[170] in *Rwanda* where war widows are not awarded reparations because local laws do not include women with inheritance rights;[171] or in the *Philippines* during the martial law reparations proceedings when the calculation of damages was based on the loss of earnings that are pegged at the women-victims' salary, which is considerably lower compared to male workers.[172]

Meanwhile, the Truth Commission in East Timor resorted to a grassroots approach in which a high percentage of its staff were hired locally, thus "enhanc[ing] its legitimacy and sense of national ownership."[173] The Commission worked closely with the community and went as far as proposing that 50% of the reparations should go to women in an effort to balance their underrepresentation during the proceedings.[174]

A word of caution: while it has been said that reparations can sometimes infringe on the role of developmental aid, this can only happen if there is a lack of a community-centric plan that does not consider existing development efforts and proceeds to duplicate instead of complementing them. Stakeholder engagement is key to avoiding this pitfall.

5. Resources

The limited resources of the TFV, can and remains to be a bane to its potential. Experts have pointed out that for all its reparation programs to be considered as sustainable, the TFV must raise a total of €40 million in voluntary

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[169] *Id.*

[170] Vasuki Nesiah, *Truth Commissions and Gender: Principles, Policies, and Procedures, Gender Justice Series, International Center for Transitional Justice*, ICTJ, 35 (2006), https://www.ictj.org/sites/default/files/ICTJ-Global-Commissions-Gender-2006-English_0.pdf.

[171] *Id.*

[172] *Id.* at 36.

[173] E. Christine Evans, *supra* note 165, at 188.

[174] Nesiah, *supra* note 170, at 36.

contributions and private donations by 2021.[175] This is a tall order that the TFV does not seem to meet year in, year out.

A good financial management plan is necessary for the TFV to be able to address its resource needs. For example, to be able to expand its fundraising capacity, the TFV must enhance its present communication plan and raise awareness to its objectives.[176] The TFV can emphasize to its stakeholders that they have a buy-in in supporting the peace and healing of communities in post-conflict situations and point out the long-term effects of reparation to future generations.

The TFV must also improve its capability in tracing, freezing and seizing of the perpetrator's assets.[177] The ICC must be able to closely cooperate with states parties and develop effective mechanisms that will ensure the capture of the perpetrator's assets for reparation purpose.[178] The 2018 Resolution on Strengthening the International Criminal Court and the Assembly of States Parties ("Omnibus Resolution") articulates this position and must be immediately adhered to.[179]

6. Precautions

Outside the ICC are also precautionary examples. One of this is the *Special Court and Truth Commission in Sierra Leone*.[180] Here, the Truth Commission provided a Final Report "with in-depth analysis of human rights violations, their consequences for victims, elements of state responsibility and clear proposals for the establishment of a reparations programme."[181] But the Special Court did not take advantage of these information and recommendations, and the "lack of coordination between the two transitional justice institutions was a missed opportunity to leave a stronger legacy in favour of [the] victims."[182] As for the ICC,

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[175] REDRESS, *No Time To Wait*, *supra* note 163, at 12, 34.

[176] *Id.* at 34.

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] Christine Evans, *Case Study, Reparations in Sierra Leone*, *in* CHRISTINE EVANS, THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT 164 (2012).

[181] *Id.* at 184.

[182] *Id.* at 164.

the TFV must remain a key player in providing recommendations to the court on the appropriate reparations program for a given context.

Similarly, the *Colombian* experience provides a stronger case for the ICC to separate its reparations program from the criminal proceeding and provide the TFV with enough leeway to navigate its mandate freely without the burden of dealing with the said proceeding. The Colombian precedent here involved "de-linking" reparations from the prosecution stage because of the collusion between state agents and armed groups.[183]

VI. Conclusion

It has been said that the ICC "occupies a unique space as a forum to discuss [and advance] both criminal and transitional justice, and the Court's different institutional players give voice to concerns of each field in legal debates about transitional justice measures in a criminal justice context."[184] While the court to this day grapples with legitimate balancing concerns between the rights of the accused and the needs of the victims, its pronouncements in *Lubanga* is a step in the right direction, by setting a different standard for the reparations regime from those of the criminal proceedings.

Nevertheless, there is always room for improvement. The broad discretion given to the ICC under Article 75(1) of the Rome Statute should enable it to craft policies and processes that will enhance its coordinative relationship with the TFV and empower victims to not only to be able to participate, but also fully take advantage of reparations awarded to them. A summary of these recommendations is outlined below.

a. To strengthen the role of the ICC in propagating a viable reparations regime as a tool of transitional justice, it must first reconcile the seemingly competing mandates of the TFV. Both the ICC and the TFV should strongly advocate for the retention of the TFV's assistance mandate, as it provides a great deal of benefits in accomplishing a sense of justice familiar to the victims. It does not compete, but instead complements, the reparations mandate of the TFV.

[183] E. Christine Evans, *supra* note 165, at 207.

[184] Brodney, *supra* note 134, at 35.

The assistance mandate is the ICC's best response in engaging not just the survivors and victims, but also the state and other interested parties, and provides the TFV an opportunity to craft a realistic implementation plan based on these interactions. Also, because the assistance programs can precede the reparations proceedings, they can serve as a cushion to victims who might be burdened over the technical thresholds or long waiting time for a reparation proceeding to conclude.

b. As regards the ICC's reparations mandate, the ICC should consider widening its net in recognizing victim-claimants. The Court can take cue from the ECCC which offers the option of a court-ordered reparation against the accused (and uses the standards of a criminal proceedings) or one offered by third parties (and provides an efficient means of delivering justice).

c. The ICC can also consider utilizing presumptions and lower standards of proof (e.g., the *cy-pres* doctrine) in the interest of delivering justice that is no more burdensome than the difficulties already experienced by the victims in filing a claim and gathering evidence. It has, in *Lubanga,* already rightly adopted a more flexible approach in the standard of proof required from victims to make a causal link between the crime proven and the harm suffered, and the proposition to use presumptions and lower standards of proof are very much aligned to this flexible approach.

d. The ICC should improve its engagement with the victims and other stakeholders by formalizing a participation regime where the victims can air their concerns for the consideration of the court, as well as encourage victim-oriented complementarity through domestic mechanisms.

e. The ICC should be creative and consider various forms of reparation that is responsive to the needs of the victims. For instance, it can adopt a reparation program that is not only gender-sensitive, but also addresses gender discrimination. But to be able to do this, a grassroots or community-centric approach is necessary to be able to understand such cultural context, avoid duplication of existing developmental efforts, and enhance the legitimacy and sense of national ownership of the reparation program implementors.

f. To address the resource gaps, the TFV should devise a sustainable financial management plan that expands its fundraising capacity through a series of communication programs. The TFV should also improve its capability in tracing, freezing and seizing of the perpetrator's assets to be able to meets its funding goals.

g. Finally, there is also a plethora of precautions outside the ICC which should put the institution into notice on how to best coordinate with the TFV. One of these examples is the *Sierra Leone* experience in which the Special Court disregarded the findings of the Truth Commission. Translated into the work of the ICC, it should give due regard to the recommendations of the TFV, as the latter is expected to do the groundwork to ensure that the implementation plan is both viable and responsive to the needs of the victims.

It was earlier argued that reparation is the *missing link* between retributive justice and transitional justice, giving the ICC not just the *human* face, but also a tangible way, to deal with the sufferings of the victims amid a protracted criminal trial. With the *Lubanga* milestone at the forefront of this reparation regime and perhaps, a willingness by the ICC to consider emerging reparation trends outside its scope, the Court's potential as a cog in transitional justice may soon be realized.

DOMESTICATING INTERNATIONAL LAW: RESOLVING THE UNCERTAINTY AND INCONGRUENCE[*]

Rommel J. Casis[**]

Abstract

This paper analyzes the issues that arise from the domestication of international law in the Philippine legal system. The first part of the paper discusses the methods of domestication generally and as found in the Philippine context. The second part of the paper analyzes the questions on transcendence and ratification that arise from the various methods of domestication. The paper also looks at how executive agreements are defined and construed vis-à-vis treaties and other international agreements, as well as the absence of rules on the third class of sources of international law – General Principles of Law. Finally, the last part of the paper provides recommendations on resolving the identified questions through legislative action, judicial construction, and executive correction.

I. Introduction

A. International Law and its Sources

International law can be defined in numerous ways,[1] but the gist of these definitions is that it provides for the rules that govern the relationship between states. It is also generally accepted that Article 38 of the International Court of Justice ("ICJ") Statute provides for the sources of international law.[2] These sources are treaties, customs, and general principles of law.

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[*] This paper is a revised and expanded version of the author's Edgardo Angara Professorial Chair Lecture delivered in December 2020.

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[1] Stephen Neff argues that "the ambiguity of the term 'international law' leads to various different answers to the question of when international law 'began'". Stephen C. Neff, *A Short History of International Law*, *in* MALCOLM EVANS (ED.), INTERNATIONAL LAW 30 (2nd ed., 2006).

[2] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW (OUP, 8th ed., 2012).

An international convention[3] or treaty is "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[4]

A custom[5] is a general practice of states recognized as a legal obligation. This definition is derived from the twin requirements of state practice and *opinio juris* for establishing custom.[6]

While there is no unanimity on its definition, general principles can be defined as rules derived from national laws.[7]

One way of looking at these sources is that these are the three forms international law takes.

B. Meaning of Domestication

While international law defines the relationship between states, it also provides for rules that states must apply within their territories. For example, international human rights law provides for obligations of states to protect the rights of persons within their jurisdiction.

To apply international law within the domestic sphere, it must be "domesticated." This paper defines *domestication* as the process by which national law applies international law. A rule of international law is domesticated "when a State incorporates it and weaves it into its own domestic legislation and rule-making procedures."[8]

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[3] Article 38 (1) (a) of the ICJ Statute states: "International conventions, whether general or particular, establishing rules expressly recognized by the contesting states."

[4] Vienna Convention on the Law of Treaties, art. 2(a), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

[5] Article 38 (1) (b) of the ICJ Statute states: "international custom, as evidence of a general practice accepted as law."

[6] *See* Rommel J. Casis, *Re-Customizing Customary International Law*, 2019 PHIL. Y.B. INT'L L. 3.

[7] Hugh Thirlway, *The Sources of International Law*, *in* EVANS (ED.), *supra* note 1.

[8] Anthony D'Amato, *The Coerciveness of International Law,* 52 GERMAN Y.B. INT'L L. 437, 443 (2009).

In the Philippines, the Constitution provides the rules on the domestication of international law. Specifically, the Incorporation Clause[9] and Treaty Clause[10] of the Philippine Constitution supplies the domestication rules. However, apart from these rules, there seem to be other methods (i.e., extra-constitutional rules) to apply international law in the Philippines. This paper refers to these constitutional and extra-constitutional rules as the *domestication* process.

II. Methods for Domestication

A. According to International Law

1. The Dualist and Monist Perspectives

The dualist perspective "emphasizes the distinct and independent character of the international and national legal systems."[11] It considers them as "distinct legal systems that exist alongside each other."[12] Thus, under dualism, international law and municipal law[13] are two separate legal systems.

The consequence of this separation is that international law must be "formally incorporated into municipal law before it would be enforceable before a municipal court."[14]

Another consequence of the dualist perspective is that "[n]either legal order has the power to create or alter rules of the other."[15]

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[9] Article II, Section 2 of the Philippine Constitution states: "The Philippines renounces war as an instrument of national policy, **adopts the generally accepted principles of international law as part of the law of the land** and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations." (emphasis supplied)

[10] Article VII, Section 21 of the Philippine Constitution states: "No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate."

[11] CRAWFORD, *supra* note 2, at 48.

[12] G. Ferreira & A. Ferreira-Snyman*, The Incorporation of Public International Law into Municipal Law and Regional Law against the Background of the Dichotomy between Monism and Dualism,* 17 POTCHEFSTROOM ELEC. L.J. 1470, 1471 (2014).

[13] Municipal law refers to national or domestic law of each state.

[14] Fereira & Ferreira-Snyman, *supra* note 14, at 1471.

[15] CRAWFORD, *supra* note 4, at 48.

Crawford explains the dualist perspective further stating that:

> When international law applies in whole or in part within any national legal system, this is because of a rule of that system giving effect to international law. In case of a conflict between international law and national law, the dualist would assume that a national court would apply national law, or at least that it is for the national system to decide which rule is to prevail.[16]

On the other hand, the monist perspective "postulates that national and international law form one legal order, or at least a number of interlocking orders which should be presumed to be coherent and consistent."[17] In other words, to the monist public international law and municipal law is "a single system of law."[18]

A single legal system implies that "international law can be applied directly within the national legal order."[19] Specifically, international law "is directly enforceable before municipal courts without any need for incorporation into municipal law."[20]

However, not all legal systems are purely monist or dualist, as some legal systems display elements of both.[21] As will be discussed later in this paper, the Philippines is an example of a state with dualist and monist tendencies.

2. *The Philippine Position*

The Philippines is believed to follow the dualist model.[22] This belief is said to be justified by the incorporation and treaty clauses of the constitution.

The Philippine Supreme Court has ruled that "international law can become part of the sphere of domestic law either by **transformation** or **incorporation**."[23]

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[16] *Id.*

[17] *Id.*

[18] Fereira & Ferreira-Snyman, *supra* note 12, at 1471.

[19] CRAWFORD, *supra* note 2, at 48.

[20] Fereira & Ferreira-Snyman, *supra* note 12, at 1471.

[21] *Id.* at 1471-72.

[22] MERLIN MAGALLONA, THE SUPREME COURT AND INTERNATIONAL LAW: PROBLEMS AND APPROACHES IN PHILIPPINE PRACTICE 2 (2010); Sep. Op. of J. Vitug in Government of the United States of America v. Purganan, G.R. No. 148571 (Resolution), Dec. 17, 2002.

[23] Pharmaceutical and Health Care Association v. Duque III, G.R. No. 173034, Oct. 9, 2007.

According to the Court, the transformation method requires that international law be transformed into domestic law through a constitutional mechanism.[24] In the Philippines, transformation applies to treaties that require Senate concurrence for validity.

Generally speaking, transformation results from dualism as the latter requires that "an international treaty norm should [not] automatically be part of national legal systems."[25] Furthermore, it is also a function of sovereignty: "that when a nation undertakes an international obligation, that nation is entitled to determine for itself its method of implementing or fulfilling that obligation, so long as it does so in good faith."[26] Furthermore, some states have little democratic participation in the treaty-making process "giving no formal role to parliaments or structuring the government so that control over foreign relations is held by certain elites."[27] Thus, "the act of transformation serves as an important democratic check on the treaty-making process."[28] Furthermore, "legislatures may also wish to tailor the act of transformation… by rewording the treaty to match domestic circumstances."[29]

On the other hand, the incorporation method applies when, by mere constitutional declaration, international law is deemed to have the force of domestic law.[30] Incorporation appears to be an application of the monist perspective.

The advantage of incorporation is that it "increases [the] importance and weight"[31] of treaties and customs and likewise "decreases the likelihood that national authorities will refuse or neglect to provide for transforming the treaty norms into domestic law."[32] Furthermore, "direct application better assures the other parties that all parties will carry out their obligations under the treaty."[33]

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[24] *Id.*

[25] John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86(2) AM. J. INT'L L. 310, 323 (1992).

[26] *Id.*

[27] *Id.*

[28] *Id.* at 324.

[29] *Id.*

[30] Pharmaceutical, *supra* note 23.

[31] Jackson, supra note 25, at 322.

[32] *Id.*

[33] *Id.*

As further discussed in the following section, the Philippines appears to use both incorporation and transformation as domestication methods.

B. According to Domestic Law

1. Constitutional Methods

a. Incorporation Clause

Section 2 of Article II (Declaration of Principles and State Policies) of the Philippine Constitution provides that the State "adopts the generally accepted principles of international law as part of the law of the land." This rule is known as the Incorporation Clause.

Philippine jurisprudence has interpreted "generally accepted principles of international law" as referring to customary international law.[34] The Court has also applied it to argue that customs such as *pacta sunt servanda*,[35] state immunity,[36] and the provisions of the Vienna Convention on Diplomatic Relations[37] are binding on the Philippines. Strangely, the Court has sometimes applied the Incorporation Clause to treaties[38] and principles not clearly identified as customs.[39] It must also be noted that the Court sometimes applies the

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[34] Government of Hongkong Special Administrative Region v. Olalia, Jr., G.R. No. 153675, Apr. 19, 2007.

[35] Manila International Airport Authority v. Commission on Audit, G.R. No. 218388, Oct. 15, 2019; Air Canada v. Commissioner of Internal Revenue, G.R. No. 169507, Jan. 11, 2016; Land Bank of the Phils. v. Atlanta Industries, Inc., G.R. No. 193796, July 2, 2014; Tañada v. Angara, G.R. No. 118295, May 2, 1997.

[36] JUSMAG Philippines v. National Labor Relations Commission, G.R. No. 108813, Dec. 15, 1994; Baer v. Tizon, G.R. No. L-24294, May 3, 1974.

[37] Reyes v. Bagatsing, G.R. No. L-65366, Nov. 9, 1983.

[38] Liban v. Gordon, G.R. No. 175352, Jan. 18, 2011; Sehwani, Inc. v. In-N-Out Burger, Inc., G.R. No. 171053, Oct. 15, 2007; Ebro III v. National Labor Relations Commission, G.R. No. 110187, Sept. 4, 1996; Agustin v. Edu, G.R. No. L-49112, Feb. 2, 1979.

[39] In Bayan Muna v. Romulo, G.R. No. 159618, Feb. 1, 2011 the Court seemed to have applied the Incorporation Clause to this statement: "By their voluntary act, nations may decide to surrender or waive some aspects of their state power or agree to limit the exercise of their otherwise exclusive and absolute jurisdiction." In Vinuya v. Romulo, G.R. No. 162230, Aug. 12, 2014 the Court considered "commitment to the laws of war and humanity" as enshrined in the Incorporation Clause.

Incorporation Clause to apply to other international law sources. In one case, the Court added "international jurisprudence"[40] as part of the law of the land.[41] This is problematic because, under Article 38 of the ICJ Statute, judicial decisions are merely material sources, unlike custom, which is a formal source.[42]

Thus, because the Incorporation Clause allows the direct application of customary international law in Philippine cases, one can argue that the Philippines follows the monist approach.

However, the counterargument is that the incorporation clause is how customary law is internalized into national law. This means that the constitutional process transforms customary international law into national law.[43] If this is the case, the Philippines is dualist in the application of customary international law. Jurisprudence supports this characterization. In one case, the Philippine Supreme Court noted that "the established pattern…would show a leaning toward the dualist model."[44]

Notice, however, that Philippine law does not require legislative action for customary international law to be applicable in the Philippines. All that is needed is the determination by a competent court that the custom exists and is applicable. However, in doing so, the courts usually do not undertake an independent determination of the existence of the customary norm by weighing the evidence for state practice and *opinio juris*.

b. Treaty Clause

i. Transformation by Ratification and Concurrence

Treaties become part of the law of the land through transformation under Article VII, Section 21 of the Constitution, which provides that "[n]o treaty or

[40] Bayan Muna, *supra* note 39.

[41] *Id.*

[42] Crawford explains that "Formal sources are those methods or the creation of rules of general application which are legally binding on their addressees. The material sources provide evidence of the existence of rules which, when established are binding and of general application. CRAWFORD, *supra* note 2, at 20]

[43] MAGALLONA, *supra* note 22, at 3.

[44] J. Vitug *supra* note 22.

international agreement shall be valid and effective unless concurred in by at least two-thirds of all the members of the Senate."[45]

The Court has explained that "[w]hile the President has the sole authority to negotiate and enter into treaties, the Constitution provides a limitation to his power by requiring the concurrence of 2/3 of all the members of the Senate for the validity of the treaty entered into by him."[46] The Court added:

> The participation of the legislative branch in the treaty-making process was deemed essential to provide a check on the executive in the field of foreign relations. By requiring the concurrence of the legislature in the treaties entered into by the President, the Constitution ensures a healthy system of checks and balance necessary in the nation's pursuit of political maturity and growth.[47]

Curiously, no similar check is made on courts when they identify customary international law, which the Philippines is bound to comply with. It may be said that when a court recognizes a new custom, it is establishing a new rule as new legislation establishes a new rule.

The Court has stated that "[f]ollowing ratification by the Senate, no further action, legislative or otherwise, is necessary. Thereafter, the whole of government—including the judiciary—is duty-bound to abide by the treaty, consistent with the maxim *pacta sunt servanda*."[48]

But this is not always true.

Treaties would generally require a certain number of ratifications before they enter into force. Thus, Senate concurrence alone would not be sufficient if the requirement for the entry into force of the treaty (e.g., number of ratifications required) has not been complied with.

Treaties may require implementing legislation. Thus, if the treaty requires implementing legislation, further legislation is needed after the concurrence, before a treaty becomes binding.

Because a treaty is not required to be transformed into a statute, one can argue that this is monist. However, similar to the Incorporation Clause argument,

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[45] Pharmaceutical, *supra* note 23.

[46] Pimentel, Jr. v. Office of the Executive Secretary, G.R. No. 158088, July 6, 2005.

[47] *Id.*

[48] David v. Senate Electoral Tribunal, G.R. No. 221538, Sept. 20, 2016.

the constitutional provision itself may be considered the mechanism for transforming a treaty into national law.

However, if this is the case (i.e., the constitutional provisions provide for how custom and treaty become applicable under Philippine law), then there is only one process and not two (i.e., transformation and incorporation). The domestication process for both treaty and custom is via the constitution. The only difference is that the incorporation is via judicial action for custom, while for treaties, the transformation is via executive and legislative action.

ii. Transformation by Legislation

Jurisprudence also seems to recognize another type of transformation.

Specifically, some cases suggest that ratification and concurrence are not enough to make treaties applicable in the Philippines.

The Court said:

- [t]he transformation method requires that an international law be transformed into a domestic law through a constitutional mechanism such as local legislation;[49]
- treaties or conventional international law must go through a process prescribed by the Constitution for it to be transformed into municipal law that can be applied to domestic conflicts;[50] and
- there must be an act more than ratification to make a treaty applicable in our jurisdiction.[51]

Thus, based on these statements, there is a need for local legislation to make treaties applicable in the Philippines. This principle was applied in *Pharmaceutical and Health Care Association v. Duque III.*[52] The Court ruled that while the instruments in question were not treaties, they transformed into domestic law through local legislation, the Milk Code.

[49] Pharmaceutical, *supra* note 23.

[50] *Id.*

[51] Wilson v. Ermita, G.R. No. 189220, Dec. 7, 2016.

[52] Pharmaceutical, *supra* note 23.

2. Extra-Constitutional Methods

There have been cases where the Philippines has recognized the applicability of international law outside of the treaty or incorporation clause. This does not mean that these methods are unconstitutional. It only implies that the constitutional mechanisms are not exclusive nor exhaustive.

a. Custom Without an Incorporation Clause

The Court has ruled that "[e]ven without the affirmation from incorporation clause, principles of International Law are deemed incorporated as part of the law of the land as a condition and consequence of our admission in the society of nations."[53] This statement implies that the Philippines is bound by customary international law even without the incorporation clause.

The Court has also said that:

> even in the absence of an express declaration in the Constitution that the generally accepted principles of international law are made a part of the law of the Nation, we are bound to uphold the immunities above referred to. And this should be true as long as the civilized world or majority of the independent countries composing it still abide by the rules of international law, and as long as the Philippines continues, as it must continue, to have an intercourse with such countries.[54]

It seems that the Court argued for the binding effect of custom despite the absence of the incorporation clause on the basis of the Philippines' membership in the society of nations or as a requirement to maintaining its relationship with other countries.

In *Republic v. Sandiganbayan*,[55] the Court held that while the Bill of Rights under the 1973 Constitution was not operative during the period after the People

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[53] United States of America v. Guinto 182 SCRA 644, Feb. 26, 1990; The Holy See v. Rosario, Jr., G.R. No. 101949, Dec. 1, 1994.

[54] Dizon v. Commanding General of the Philippine Ryukus Command, U.S. Army, G.R. No. L-2110, July 22, 1948.

[55] Rep. of the Phil. v. Sandiganbayan, G.R. No. 104768, July 21, 2003.

Power Revolution and before the promulgation of the Provisional Constitution, the protection afforded to individuals under the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights remained in effect during the interregnum. It explained that the revolutionary government, after installing itself as the de jure government, assumed responsibility for the State's good faith compliance with the Covenant to which the Philippines is a signatory. As for the Declaration, it said that "the Court considers the Declaration as part of customary international law, and that Filipinos as human beings are proper subjects of the rules of international law laid down in the Covenant." Thus, in this case, the Court applied either customary or conventional human rights law without internalization or transformation via the Philippine Constitution.

b. Administrative Issuances

The Executive branch of government uses administrative issuances to implement international law obligations in the absence of explicit implementing legislation. Perhaps the best example of this is how the Philippines implements multilateral environmental agreements ("MEAs").

For example, to implement the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), the Department of Environment and Natural Resources ("DENR") issued its Department Administrative Order (D.A.O.) 91-55. This department issued the order pursuant to Article VIII, Section 1 of CITES, which in turn requires parties to penalize trade in or possession of specimens. D.A.O. 91-55 declares the *dugong* or sea cow a protected marine mammal and thus prohibits the killing or taking the same for whatever purpose. On the other hand, D.A.O. 90-46 states that it was issued in furtherance of CITES Article VII (4).[56] To implement the Montreal Protocol, the DENR issued DENR A.O. 2013-25, which provided for the phase-out schedule and control of the importation of the hydrochlorofluorocarbons.

[56] This provides that ""[s]pecimens of an animal species included in Appendix I bred in captivity for commercial purposes, or of a plant species included in Appendix I artificially propagated for commercial purposes, shall be deemed to be specimens of species included in Appendix II."

In addition to implementing treaty provisions, administrative issuances also invoke international law principles (e.g., precautionary principle) as basis for rules,[57] implying their binding nature in this jurisdiction.

III. Analysis of Problems

A. Questions of Transcendence

1. Supremacy of Domestic Law

In several Philippine cases, the Supreme Court has upheld the supremacy of Philippine law over international law.

In *Bayan Muna v. Romulo,* it said that "in the domestic sphere, [treaties or executive agreements] can be held invalid if it violates the Constitution."[58]

In *Gonzales v. Hechanova*, it said that "an international agreement may be invalidated by Philippine courts, because under the Constitution, the Supreme Court may not be deprived of its jurisdiction to "review, revise, reverse, modify, or affirm all cases in which the constitutionality or validity of any treaty, law, ordinance, or executive order or regulation is in question."[59] The Court interpreted this to mean that the Philippine Constitution authorizes the nullification of a treaty when it conflicts with the fundamental law and when it runs counter to an act of Congress.

The fact that a valid treaty under international law can be considered invalid under Philippine law demonstrates the view that national law is supreme over international law. Only a superior law can invalidate another law.

2. The Primacy of International Law

The Court has also upheld the primacy of international law over Philippine law.

In *Tañada v. Angara,* the Court recognized that "while sovereignty has traditionally been deemed absolute and all-encompassing on the domestic level,

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[57] *See* Rommel J. Casis, *A Brief review of the Precautionary Principle as Observed from Philippine State Practice,* 2017 PHIL. Y.B. INT'L L. 91 (2017).

[58] Bayan Muna, *supra* note 39.

[59] Gonzales v. Hechanova, G.R. No. L-21897, Oct. 22, 1963.

it is, however, subject to restrictions and limitations voluntarily agreed to by the Philippines, expressly or impliedly, as a member of the family of nations." [60] It further added:

> By their inherent nature, treaties really limit or restrict the absoluteness of sovereignty. By their voluntary act, nations may surrender some aspects of their state power in exchange for greater benefits granted by or derived from a convention or pact. After all, states, like individuals, live with coequals, and in pursuit of mutually covenanted objectives and benefits, they also commonly agree to limit the exercise of their otherwise absolute rights.[61]

It further argued that "[t]he sovereignty of a state therefore cannot in fact and in reality be considered absolute. Certain restrictions enter into the picture: (1) limitations imposed by the very nature of membership in the family of nations and (2) limitations imposed by treaty stipulations." The Court went further and used as evidence the UN Charter and other multilateral and bilateral treaties, that involve limitations on Philippine sovereignty. The Court concluded by ruling that "a portion of sovereignty may be waived without violating the Constitution."[62]

The Court has also said that: "On the rationale that the Philippines has adopted the generally accepted principles of international law as part of the law of the land, a portion of sovereignty may be waived without violating the Constitution."[63]

The Court has noted the obligation of the Philippines to adjust its laws in relation to international law:

> As an integral part of the community of nations, we are responsible to assure that our government, Constitution and laws will carry out our international obligation. Hence, we cannot readily plead the Constitution as a convenient excuse for non-compliance

[60] Tañada, *supra* note 35.
[61] *Id.*
[62] Tañada, *supra* note 35.
[63] Bayan Muna, *supra* note 39.

> with our obligations, duties and responsibilities under international law.[64]

This statement from the Court makes the Constitution subservient to international law.

3. Equality of International and Philippine Law

In some cases, the Court has ruled that international law is equal to domestic law.

It has been argued that while a treaty would constitute part of the law of the land, it would not be superior to a statute, an enactment of the Congress, but rather it would be in the same class as the latter.[65] Thus, the Court considered a treaty as a law of the same level as a statute in this case.

In another case, the Court ruled that Philippine law on trademarks "must subordinate an international agreement inasmuch as a municipal tribunal is deciding the apparent clash."[66] The Court added:

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

So, in these cases, the Court places international law at the same level as local law.

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

[65] Abbas v. COMELEC, G.R. No. 89651, Nov. 10, 1989.

[66] Philip Morris v. CA, G.R. No. 91332, July 16, 1993.

B. The Incongruence of International and Domestic Concepts

1. The Ratification Question

The Vienna Convention on the Law of Treaties ("VCLT") identifies ratification as one of the acts whereby a State establishes its consent to be bound by a treaty on the international plane.[67]

The Court has defined ratification as "the formal act by which a state confirms and accepts the provisions of a treaty concluded by its representative [and] is generally held to be an executive act, undertaken by the head of the state or of the government."[68] In another case, it said that it is "the act by which the provisions of a treaty are formally confirmed and approved by a State [and by doing so]… a state expresses its willingness to be bound by the provisions of such treaty."[69] These definitions appear to correspond to the VCLT rule that ratification is the final act that indicates a state's consent to be bound.

The Court has also explained that under our Constitution:

> the power to ratify is vested in the President, subject to the concurrence of the Senate. The role of the Senate, however, is limited only to giving or withholding its consent, or concurrence, to the ratification. Hence, it is within the authority of the President to refuse to submit a treaty to the Senate or, having secured its consent for its ratification, refuse to ratify it.[70]

The Court has further clarified that "[i]n our jurisdiction, the power to ratify is vested in the President and not, as commonly believed, in the legislature. The role of the Senate is limited only to giving or withholding its consent, or concurrence, to the ratification."[71]

This clarification becomes necessary because, under the Treaty Clause, a treaty will only be valid and effective if at least two-thirds of all the members of

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[67] VCLT, *supra* note 4, art. 2 (b).

[68] Pimentel, Jr. v. Office of the Executive Secretary, G.R. No. 158088, July 6, 2005.

[69] *Id.*

[70] *Id.*

[71] Bayan, *supra* note 64.

the Senate concurs.[72] Being a step after the president approves a treaty and being a requirement for the validity of a treaty, it is understandable why the Senate concurrence may be considered the "ratification" referred to in the VCLT. However, the Court is adamant in defining ratification as the act of the president.

Defining ratification as the act of the president gives rise to several questions:

> First, when ratification is required under international law, it is the final act to demonstrate the state's consent to be bound to a treaty. But if ratification is the act of the president of the Philippines, it is not the final act as concurrence by the Senate follows it. So at what point is the Philippines bound by a treaty? It seems that based on these cases, the treaty is binding on the Philippines earlier under international law than under Philippine law.
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> Second, what is the effect of violation by the Philippines of a treaty obligation after ratification by the President but before Senate concurrence? Under Philippine law, before Senate concurrence, the treaty would still not be binding on the Philippines. But if the president ratifies, the Court's statement means that the Philippines is bound.
>
> Third, is it possible to consider the Senate concurrence as what constitutes ratification under international law? This would seem to be the case since it comes later and is the act that makes a treaty binding on the Philippines under Philippine law. However, that would mean that what the Court identifies as ratification is not ratification under international law.[73]
>
> Fourth, is it possible to consider the combined process of presidential ratification and senate concurrence as ratification under international law? This seems logical as a treaty requires executive and legislative action to be valid under Philippine law. However, the plain text of the Court's decisions does not support this view.

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[72] Art. VII, Sec. 21 "No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate."

[73] This poses a problem for Philippine Bar examinees if they are asked the question: "What is ratification?" Should they answer on the basis of Philippine jurisprudence or international law?

2. Executive Agreements

The topic of executive agreements deserves its own paper or even a book because of its long history and the number of issues involved. Thus, the following discussion is only a superficial treatment intended only to identify the general concerns.

a. Basis for Validity

In *Saguisag v. Ochoa*,[74] the Court has upheld the power of the President to enter into executive agreements on a wide range of subjects. It said:

> The power of the President to enter into *binding* executive agreements without Senate concurrence is already well-established in this jurisdiction. That power has been alluded to in our present and past Constitutions, in various statutes, in Supreme Court decisions, and during the deliberations of the Constitutional Commission. They cover a wide array of subjects with varying scopes and purposes, including those that involve the presence of foreign military forces in the country.[75]

In *Bayan v. Exec Sec Zamora,*[76] the Court stated that it had recognized the binding effect of executive agreements even without the concurrence of the Senate or Congress.[77]

According to these cases, the basis for the validity of executive agreements are:

- allusions in the present and past Constitutions;
- allusions in various statutes;
- Supreme Court decisions; and
- deliberations of the Constitutional Commission.

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[74] Saguisag v. Ochoa, Jr., G.R. Nos. 212426 & 212444, Jan. 12, 2016.

[75] *Id.*

[76] Bayan *supra* note 64.

[77] It must be noted that the treaty in question in this case was not an executive agreement.

b. The Distinction Between Executive Agreements and Treaties

The cases above state that an executive agreement does not require Senate concurrence. This position implies that an executive agreement is not a treaty under Philippine law because a treaty requires Senate concurrence to be valid under the Constitution.

Executive Order No. 459 ("EO 459") defines executive agreements as "similar to treaties except that they do not require legislative concurrence." Interestingly, EO 459 defines an executive agreement based on the consequence of its nature (i.e., non-necessity of Senate concurrence) rather than what qualifies as an instrument as an executive agreement.[78]

Under EO 459, treaties and executive agreements are two types of international agreements. It defines an international agreement as:

> a contract or understanding regardless of nomenclature, entered into between the Philippines and another government in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments.[79]

On the other hand, EO 459 defines treaties as "international agreements entered into by the Philippines which require legislative concurrence after executive ratification."[80]

The Court, citing foreign secondary sources, has explained that:

> a treaty has greater "dignity" than an executive agreement, because its constitutional efficacy is beyond doubt, a treaty having behind it the authority of the President, the Senate, and the people; a ratified treaty, unlike an executive agreement, takes precedence over any prior statutory enactment.[81]

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[78] It may be said that the whole point in defining an executive agreement is to determine whether it needs Senate concurrence. Defining the term in this way prevents any meaningful distinction between it and a treaty.

[79] Exec. Order No. 459, sec. 2(a).

[80] Exec. Order No. 459, sec. 2(b).

[81] Bayan Muna, *supra* note 39.

However, in *Bayan v. Exec Sec Zamora,* the Court went on to say that "in international law, there is no difference between treaties and executive agreements in their binding effect upon states concerned, as long as the negotiating functionaries have remained within their powers."[82] It is strange that the Court would base the distinction between treaties and executive agreements on whether the negotiators acted within their authority.[83]

The next statement made by the Court was that: "[i]nternational law continues to make no distinction between treaties and executive agreements: they are equally binding obligations upon nations."[84] Thus, the Court invokes international law as the basis for the rule that treaties and executive agreements are equally binding.[85]

In another case, the Court explained the difference between executive agreements and treaties:

> *First*, executive agreements must remain traceable to an express or implied authorization under the Constitution, statutes, or treaties. The absence of these precedents puts the validity and effectivity of executive agreements under serious question for the main function of the Executive is to enforce the Constitution and the laws enacted by the Legislature, not to defeat or interfere in the performance of these rules. In turn, executive agreements cannot create new international obligations that are not expressly allowed or reasonably implied in the law they purport to implement.
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> *Second*, treaties are, by their very nature, considered superior to executive agreements. Treaties are products of the acts of the Executive and the Senate unlike executive agreements, which are solely executive actions. Because of legislative participation through the Senate, a treaty is regarded as being on the same level as a statute. If there is an irreconcilable conflict, a later law or treaty takes precedence over one that is prior. An executive agreement is treated

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[82] Bayan, *supra* note 64.

[83] Certainly, the Court could not possibly mean to say that if they acted within their authority, the instrument would be a treaty and if not, it would be an executive agreement.

[84] Bayan, *supra* note 64.

[85] The Court in making this assertion cites foreign secondary sources and not any of the three formal sources of international law.

> differently. Executive agreements that are inconsistent with either a law or a treaty are considered ineffective. Both types of international agreement are nevertheless subject to the supremacy of the Constitution.[86]

Regarding the first requirement, there is a need to clarify "express or implied authorization." Under Philippine law, every treaty needs to be consistent with the Philippine Constitution. Is this consistency sufficient to constitute "express or implied authorization"? If this is the case, then the first requirement is not a high threshold because proponents of an executive agreement would have to show that it does not violate the constitution, other treaties, or Philippine laws.

c. Coverage of Executive Agreements

One way to distinguish between treaties and executive agreements may be to limit the scope of the latter. The Court has pointed out that:

> save for the situation and matters contemplated in Sec. 25, Art. XVIII of the Constitution—when a treaty is required, the Constitution does not classify any subject, like that involving political issues, to be in the form of, and ratified as, a treaty. What the Constitution merely prescribes is that treaties need the concurrence of the Senate by a vote defined therein to complete the ratification process. [citations omitted].[87]

Thus, while treaties may cover any area, executive agreements may be limited to particular areas. This limitation can be the justification for not requiring Senate concurrence.

In *Commissioner v. Eastern Sea Trading,* the Court stated that:

> International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. But international agreements embodying *adjustments of detail* carrying

[86] Saguisag, *supra* note 74.

[87] Bayan Muna, *supra* note 39.

out well-established national policies and traditions and those involving arrangements of a more or less *temporary* nature usually take the form of executive agreements.[88]

However, the Court has more recently noted that:

almost half a century has elapsed since the Court rendered its decision in *Eastern Sea Trading*. Since then, the conduct of foreign affairs has become more complex and the domain of international law wider, as to include such subjects as human rights, the environment, and the sea. In fact, in the US alone, the executive agreements executed by its President from 1980 to 2000 covered subjects such as defense, trade, scientific cooperation, aviation, atomic energy, environmental cooperation, peace corps, arms limitation, and nuclear safety, among others. Surely, the enumeration in *Eastern Sea Trading* cannot circumscribe the option of each state on the matter of which the international agreement format would be convenient to serve its best interest.[89]

The Court has also ruled that:

the categorization of subject matters that may be covered by international agreements mentioned in *Eastern Sea Trading* is not cast in stone. There are no hard and fast rules on the propriety of entering, on a given subject, into a treaty or an executive agreement as an instrument of international relations. The primary consideration in the choice of the form of agreement is the parties' intent and desire to craft an international agreement in the form they so wish to further their respective interests. Verily, the matter of form takes a back seat when it comes to effectiveness and binding effect of the enforcement of a treaty or an executive agreement, as the parties

[88] Commissioner of Customs v. Eastern Sea Trading, G.R. No. L-14279, Oct. 31, 1961.
[89] Bayan Muna, *supra* note 39.

> in either international agreement each labor under the *pacta sunt servanda* principle.[90]

This is an interesting argument from the Court as it allows the government to characterize any international agreement as an executive agreement to avoid constitutional requirements. It also characterizes the difference between an executive agreement and a treaty as merely one of form. It further reiterates that an executive agreement is just as binding as a treaty as it is subject to the *pacta sunt servanda* principle.

More recently, and gleaning from the discussion of the Constitutional Commission, the Court summarized the relationships between treaties and executive agreements:[91]

> 1. Treaties, international agreements, and executive agreements are all constitutional manifestations of the conduct of foreign affairs with their distinct legal characteristics.
>
> a. Treaties are formal contracts between the Philippines and other States-parties, which are in the nature of international agreements, and also of municipal laws in the sense of their binding nature.
> b. International agreements are similar instruments, the provisions of which may require the ratification of a designated number of parties thereto. These agreements involving political issues or changes in national policy, as well as those involving international agreements of a permanent character, usually take the form of treaties. They may also include commercial agreements, which are executive agreements essentially, but which proceed from previous authorization by Congress, thus dispensing with the requirement of concurrence by the Senate.

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[90] *Id.*

[91] Saguisag, *supra* note 74.

c. Executive agreements are generally intended to implement a treaty already enforced or to determine the details of the implementation thereof that do not affect the sovereignty of the State.

2. Treaties and international agreements that cannot be mere executive agreements must, by constitutional decree, be concurred in by at least two-thirds of the Senate.

3. However, an agreement—the subject of which is the entry of foreign military troops, bases, or facilities—is particularly restricted. The requirements are that it be in the form of a treaty concurred in by the Senate; that when Congress so requires, it be ratified by a majority of the votes cast by the people in a national referendum held for that purpose; and that it be recognized as a treaty by the other contracting State.

4. Thus, executive agreements can continue to exist as a species of international agreements.

Noticeably, the description of international agreements is confusing. First, it says that international agreements are "similar instruments" to treaties, implying a separate category. Subsequently, it says that "agreements involving political issues or changes in national policy, as well as those involving international agreements of a permanent character, usually take the form of treaties." This implies that treaties are a category of international agreements. Also, the fact that such agreements are "usually" in the form of treaties means that they may be in the form of international agreements that are not treaties. However, can they be executive agreements? Based on what the Court said, it is possible.

It said that executive agreements are "generally intended to implement a treaty already enforced or to determine the details of the implementation thereof that do not affect the sovereignty of the State." This implies that all executive agreements must be connected to the implementation of an existing treaty.

C. Absence of Rules for GPL

General principles of law ("GPL") constitute the third class of formal sources of international law.[92] International law scholars generally consider GPL as principles of domestic law that international courts can use where there is no custom or treaty applicable and avoid non-liquet.

Under the constitution, there seems to be no explicit rule for general principles of law, unlike customs and treaties. However, the Court, at least in one case,[93] seemed to be confused about GPL. First, it said that international law "springs from general principles of law" and cites Article 38 of the ICJ Statute. While GPL is one of the three formal sources, it certainly is not the source of international law itself. If one had to choose, a better choice would have been custom.

The Court then went on to say that:

> General principles of law include principles of equity, *i.e.*, the general principles of fairness and justice, based on the test of what is reasonable. The Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Discrimination in Education, the Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation—all embody the general principle against discrimination, the very antithesis of fairness and justice.

While *equity* has been recognized as a GPL,[94] what the Court cites are international instruments which contain provisions on the prohibition against discrimination. While the principle against discrimination may arguably be GPL, the proper evidence would have been municipal law instruments to show that it is found in a substantial number of jurisdictions worldwide. The fact that the Court used the Universal Declaration of Human Rights and international law treaties to

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[92] Article 38 (1) (c) states "the general principles of law recognized by civilized nations."

[93] International School Alliance of Educators v. Quisumbing, G.R. No. 128845, June 1, 2000.

[94] *Id.*

defend the principle of non-discrimination suggests that what it was referring to was custom and not GPL.

Finally, the Court said that "[t]he Philippines, through its Constitution, has incorporated this principle as part of its national laws."[95] The Court seems to be referring to the Incorporation Clause. This means that the Court has identified the Incorporation Clause as the portal through which GPL can be applied under Philippine law.

However, considering that the Court has misunderstood the meaning of GPL under international law, can the Court's pronouncement, in this case, be regarded as a binding rule. It might actually be referring to custom and not GPL.

Thus, there is no explicit constitutional rule for the application of GPL under Philippine law, unlike treaties and customs.

IV. Proposed Solutions

A. Legislative Action

When concurring with the ratification of the President, the Senate may decide whether implementing legislation is necessary. This initial determination should be binding unless challenged in the courts. This would preclude any uncertainty as to whether treaties are self-executing or not.

The legislature may also consider operationalizing customary norms into statutes. Ordinarily, customary norms do not come with specific rules for their operationalization. Some of these particular rules are found in international law instruments that are binding (i.e., treaties) and non-binding (e.g., UN GA resolutions) or decisions of international tribunals.

However, it may be best for the legislature to tap the expertise of an institution like the University of the Philippines Law Center to draft necessary legislation to operationalize customary international law principles. The same institution may also keep track of developments in customary international law. This would also lessen the burden on the courts in determining the existence of customary international law and evaluating its specific local application.

Regarding the uncertainty in the nature of executive agreements in relation to treaties, Congress may enact a statute establishing clear rules on international

[95] International School Alliance of Educators, *supra* note 95.

agreements that are required to be in treaty form and may be in the form of executive agreements. A statute will allow for greater specificity than a judicial pronouncement.

B. Judicial Reconstruction

Inconsistent jurisprudence or jurisprudential rules which deviate from international norms create problems of incongruence. It is therefore up to the Court to make the necessary corrections to resolve this incongruence. The difficulty is that the Court will only have an occasion to align doctrine when there is an actual case.

However, one way to make doctrinal adjustments without waiting for a case is by establishing rules of procedure. The Court may consider setting rules for proving the existence of a custom or general principles of law. This may include what type of evidence is admissible or the probative value of different types of evidence. For example, the Court adopted the precautionary principle in the Rules of Procedure for Environmental Cases.[96]

As discussed earlier, the terms transformation and incorporation found in jurisprudence to describe the domestication process are problematic. In the case of incorporation, what happens essentially is that the courts recognize the existence of custom. It is this recognition that makes the customary rule binding in this jurisdiction. There is actually no transformation in the case of treaties except in the case where treaty provisions are written into a statute. In cases where the Senate merely concurs with the Presidential ratification, what actually happens is also recognition of the binding effect of the treaty because all the constitutional requirements are complied with. Even in cases where treaties require implementing legislation, the latter is not what makes the treaty binding.

Thus, in the case of customary international law or general principles of law, domestication occurs by judicial recognition of the rule. In contrast, in the case of treaties, domestication occurs by executive and legislative recognition of the treaty. The Court may want to adopt the term "recognition" to describe the process of domestication rather than "transformation" and "incorporation." Treaties and

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[96] Rules of Procedure For Environmental Cases, A.M. No. 09-6-8-SC (2010); *See* Rommel J. Casis, *Green Rules: Gray Areas and Red Flags,* 86(4) PHIL. L. J. (2012).

customs are incorporated into Philippine law by recognition by the relevant branch of government.

C. Executive Correction

EO 459 defines international agreements, treaties, and executive agreements in a manner that appears to be inconsistent with the Constitution and international law. This should be corrected. A full and comprehensive analysis on why EO 459 may be unconstitutional and inconsistent with international law principles requires its own and paper and cannot be accomplished here.

However, it may be helpful to point out that the definition of the terms under EO 459 is an excellent place to start this correction. Particularly, the distinction between treaties and executive agreements provided for by EO 459 is unhelpful.

If what distinguishes treaties from executive agreements is the necessity of Senate concurrence, then executive agreements can never have the force and effect of treaties because all treaties require Senate concurrence for validity under the Constitution. While decades of practice may recognize executive agreements as a sub-species of international agreements, this cannot override the Constitution. Therefore, it would be best that EO 459 be revised to indicate clear rules when an international agreement qualifies as an executive agreement.

For instance, executive agreements may be limited to inter-governmental contracts not involving *acts jure imperii* but only *jure gestionis*. Agreements where government agencies merely coordinate efforts to solve cross-border problems (e.g., smuggling, illegal fishing, transboundary environmental damage, etc.) and that do not require sovereignty's diminution may be subject to executive agreements.

Without this executive correction, the continued practice of executive agreements is nothing more than a means to circumvent the constitutional requirement for Senate concurrence.

REPORTS

REPORTS

INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR'S REPORT ON PRELIMINARY EXAMINATION ACTIVITIES – PHILIPPINES (EXTRAJUDICIAL KILLINGS)[1]

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 recalled that those who incite or engage in crimes within the jurisdiction of the Court arepotentially liable to prosecution before the Court, and indicated that the Office would closely follow relevant developments in the Philippines.

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,

[1] December 14, 2020. Pages 45-49, Paragraphs 176-197.

namely from 1 November 2011 up to and including 16 March 2019. Furthermore, the 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.

Subject-Matter Jurisdiction

The subject-matter assessment has examined the nationwide anti-drug campaign by the Philippine National Police ("PNP"), following President Duterte's pronouncement to eradicate illegal drugs during the first six months of his term. In the context of the 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.

In conducting its subject-matter assessment, 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 unlawful 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 with, the government's anti-drug campaign. In this regard, it has also been alleged that some of these vigilante-style executions purportedly 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, most of the victims of the alleged crimes in question were persons reportedly suspected by authorities to 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 with 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.

The Office is satisfied that information available provides a reasonable basis to believe that the crimes against humanity of murder (article 7(1)(a)), torture (article 7(1)(f)) and the infliction of serious physical injury and mental harm as other inhumane Acts (article 7(1)(k)) were committed on the territory of the Philippines between at least 1 July 2016 and 16 March 2019, in connection to the WoD campaign launched throughout the country.

Admissibility Assessment

During the reporting period, the Office continued to collect, receive and review information from a variety of sources on investigations and prosecutions at the national level. The Office has also mapped out the various investigative and prosecutorial authorities conducting investigations and proceedings relevant to the potential cases that would likely be the focus of any investigation.

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 limited 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.

In June 2020, Justice Secretary Menardo Guevarra announced the creation of an inter-agency panel to reinvestigate deaths in police WoD operations. The Office has been and will continue to closely monitor developments relating to this body.

While in principle, only national investigations that are designed to result in criminal prosecutions can trigger the application of article 17(1)(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, administrative cases against policemen allegedly involved in WoD-related killings, writ of amparo cases and cases brought in front of the Office of the Ombudsman.

During the reporting period, the Office has analysed qualitative and quantitative open source information as well as information received from a variety of stakeholders relevant to the Office's gravity assessment.

OTP Activities

During the reporting period, the Office finalised its subject-matter analysis and collected and assessed open source information on any relevant national proceedings being conducted by Philippine authorities. The Office has also collected and analysed information relevant to gravity. 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.

The Office has also been following with concern reports of threats, killings and other measures apparently taken against human rights defenders, journalists and others, 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

The Office's goal, announced last year,49 to bring the preliminary examination to a conclusion during the reporting period was impacted by the COVID-19 pandemic and capacity constraints. Nonetheless, the Office anticipates reaching a decision on whether to seek authorisation to open an investigation into the situation in the Philippines in the first half of 2021.

TREATIES & AGREEMENTS

SUMMARY OF
BILATERAL TREATIES AND AGREEMENTS

RUSSIA

Treaty Between the Republic of the Philippines and the Russian Federation on Extradition

Objective/s:

To provide for more effective cooperation between the Contracting States in the suppression of crimes by concluding a treaty on the reciprocal extradition of criminal offenders on the basis of mutual respect for sovereignty, equality, non-intervention in the internal affairs of the Contracting States, and for mutual benefit.

Obligation/s of the Parties:

The Contracting States agree to extradite to each other, pursuant to the provisions of this Treaty, persons whom the authorities in the Requesting State have charged with, or convicted of, an extraditable offense.

Status of Ratification and Effectivity:

The Treaty took effect on Mar. 12, 2020.

Treaty Between the Republic of the Philippines and the Russian Federation on Mutual Legal Assistance in Criminal Matters

Objective/s:

To strengthen the legal foundation of providing mutual legal assistance in criminal matters and to improve the effectiveness of activity of both Contracting States in combating crimes, including crimes related to terrorism, through cooperation and mutual legal assistance in criminal matters.

Obligation/s of the Parties:

Legal assistance shall be provided in accordance with this Treaty if the offense, in connection with which the request was made, is criminally punishable according to the laws of both Contracting States. The requested State may, upon its own consideration, grant legal assistance also in case the offense, in connection with which the request was made, is not criminally punishable under its laws. Where a request is made for a search and seizure of evidence, restraint, or confiscation of the proceeds of a crime, the Requested State may render assistance in accordance with its domestic laws.

Legal assistance shall also be granted in connection with investigations or proceedings relating to criminal offenses concerning taxation, customs and similar duties, international transfer of financial assets, including the ones which to the requesting State appears to be furthering organized criminal activity and crimes concerning public security.

Status of Ratification and Effectivity:

The Treaty took effect on Mar. 12, 2020. Either Contracting State may terminate the Treaty at any given time by giving notice to the other Contracting State, through diplomatic channels, of its desire to terminate the Treaty.

TURKEY

Memorandum of Understanding Between the Anti-Money Laundering Council (AMLC), the Financial Intelligence Unit of the Republic of the Philippines and the Ministry of Finance, Financial Crimes Investigation Board (MASAK) of the Republic of Turkey Concerning Cooperation in the Exchange of Financial Intelligence Related to Money Laundering and Financing of Terrorism

Objective/s:

The MOU aims at promoting cooperation between the competent authorities of both countries to gather, develop, and analyze information and documents in their possession concerning financial transactions suspected of

being related to money laundering or criminal activities connected to money laundering and financing of terrorism, which may be relevant to their investigation and prosecution and subject to their respective national legislations.

Obligation/s of the Parties:

Authorities of both Parties will exchange, spontaneously or upon request, available financial intelligence that may be relevant to the investigation by the authorities into financial transactions related to money laundering and financing of terrorism and the persons or companies involved, subject to the requirements for their respective national legislation.

Status of Ratification and Effectivity:

The Memorandum of Understanding was signed on Nov. 16 2012 and Dec. 20, 2012 by the Philippines and Turkey, respectively. The MOU entered into force on May 26, 2020.

USA

Agreement Between the Government of the Republic of the Philippines and the Government of the United States of America on Scientific and Technological Cooperation

Objective/s:

The Agreement will promote scientific collaboration, build relationships between the Philippines' and United States' respective scientific institutions and communities, and provide opportunities for capacity-building and exchange of ideas and information on emerging topics in science and technology, especially in the areas of public health, marine sciences, environmental protection, disaster risk resilience, climate change, renewable energy, and Science, Technology, Engineering, and Mathematics (STEM) education. This will serve as the new agreement between the two Governments following the expiration of the 2012 PH-US Agreement on Science and Technology in 2015.

Obligation/s of the Parties:

The Parties shall encourage cooperation through appropriate means including: exchanges of scientific and technical information; exchanges, training, and education of scientists and technical experts; the convening of joint seminars and meetings; the conduct of joint research projects; access to scientific and technical facilities; and such other forms of scientific and technological cooperation as may be mutually agreed upon.

Status of Ratification and Effectivity:

The Agreement entered into force on June 3, 2020. The Agreement shall remain in force for ten (10) years and may be extended for further ten-year periods by written agreement of the Parties.

SUMMARY OF
ASEAN TREATIES AND AGREEMENTS

ASEAN FRAMEWORK AGREEMENT ON THE FACILITATION OF CROSS BORDER TRANSPORT OF PASSENGERS BY ROAD VEHICLES

Objective/s:

To promote, develop, and enhance tourism, investment, trade and culture exchanges among ASEAN member states by simplifying and harmonizing transport, customs, immigration and quarantine procedures, and requirements for the facilitation of transport of passengers between and among the contracting parties by road vehicles.

Obligation/s of the Parties:

Contracting parties shall grant to each other the right to undertake cross border transport of passengers by road vehicles and endeavor to provide facilities for such transport. They agree to designate cross border transport routes and points of entry and exit as specified in the Agreement. In addition, each contracting party shall allow the use of road vehicles registered in other contracting parties to provide cross border transport of passenger services in its territory. They shall also accord recognition of inspection certificates and domestic driving licenses issued by other contracting parties. Finally, passengers, drivers, and other persons on board the road vehicles shall agree to comply with immigration requirements and to be subjected health, sanitary, and customs inspections of when crossing the border of other contracting parties.

Effectivity:

The Agreement was signed on Oct. 13, 2017 and took effect on Jan. 18, 2020.

PROTOCOL TO IMPLEMENT THE NINTH PACKAGE OF COMMITMENTS ON AIR TRANSPORT SERVICES UNDER THE ASEAN AGREEMENT ON SERVICES

Objective/s:

To enhance cooperation in services, eliminate substantially restrictions to trade in services among member states, and liberalize trade in services by setting out the specific commitments that each member state shall undertake.

Obligation/s of the Parties:

The member states agree to accord preferential treatment in air transport services to one another on a Most-Favoured Nations Basis subject to each member state's Schedules of Specific Commitments and the Lists of Most-Favoured Nation Exemptions.

Effectivity:

The Protocol was signed on Nov. 6, 2015 and entered into force on Jan. 19, 2020.

SUMMARY OF
MULTILATERAL TREATIES AND AGREEMENTS

ILO CONVENTION NO. 187: PROMOTIONAL FRAMEWORK FOR OCCUPATIONAL SAFETY AND HEALTH CONVENTION

Objective/s:

To promote continuous improvement of occupational safety and health to prevent occupational injuries, diseases, and deaths by the development, in consultation with the most representative organizations of employers and workers, of a national policy, national system, and national programme.

Obligation/s of Parties:

Each member shall undertake to formulate a national policy to promote a healthy working environment. This shall be done through consultations with organizations of employers and workers. A periodic review of the national system for occupational safety and health.

Effectivity:

The Convention took effect on June 17, 2020.

CONVENTION IN THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS (SERVICE CONVENTION)

Objective/s:

To create appropriate means to ensure that judicial and extrajudicial documents to be brought to the notice of the addressee in sufficient time.

Obligation/s of Parties:

The contracting states shall have a designated Central Authority which will receive requests for service coming from other contracting states. The Central Authority of each contracting state shall serve the document or shall arrange to have it served by an appropriate agency either pursuant to its local laws or by a particular method requested by the applicant (unless it is incompatible with the contracting state's local laws).

Effectivity:

The Convention was adopted on Nov. 15, 1965. The Convention remains in for five years and without tacit denunciation, it shall be renewed tacitly every five years. It entered into force on Oct. 1, 2020.

MINAMATA CONVENTION ON MERCURY

Objective/s:

To protect the human health and the environment from anthropogenic emissions and releases of mercury and mercury compounds.

Obligation/s of Parties:

The parties shall not allow the establishment of new mercury mines and shall phase-out existing ones. Parties shall also enact measures to phase-out and phase-down mercury use in a number of products and processes; control measures on emissions to air and on releases to land and water; and regulate the informal sector of artisanal and small-scale mining.

Effectivity:

The Convention was ratified on June 2, 2020 and entered into force on Oct. 9, 2020.

JUDICIAL DECISIONS

JUDICIAL DECISIONS

CYNTHIA A. GALAPON, Petitioner, vs. REPUBLIC OF THE PHILIPPINES, Respondent
[G.R. No. 243722. Jan. 22, 2020.]

CAGUIOA, J:

FACTS

Cynthia, a Filipina, and Park, a South Korean national, secured a divorce decree by mutual agreement in South Korea. Cynthia then filed before the Regional Trial Court a Petition for Judicial Recognition of Foreign Divorce which was granted. The Office of the Solicitor General ("OSG") opposed the petition arguing that absolute divorce is not allowed in the Philippines and that considering that the divorce was obtained mutually, Cynthia is not qualified to avail of the benefits provided under Article 26 of the Family Code. The Court of Appeals agreed with the OSG and reversed the Regional Trial Court's decision. It ruled that for Article 26 to apply, the divorce must have been initiated and obtained by the foreigner spouse. Further, owing to the nationality principle under Article 15 of the Civil Code and considering that Cynthia is a Philippine national, she is covered by the policy against absolute divorces.

In granting the petition, the Supreme Court reiterated its decision in the case of *Republic v. Manalo* which broadened the scope of Article 26(2) to include divorce decrees obtained by the Filipino spouse. It discussed that a plain reading of the provision would show that the provision does not require that the alien spouse should be the one who initiated the divorce proceeding, only that there should be a divorce validly obtained abroad.

RULING

The petition is granted.

In the recent case of *Manalo*, the Court *en banc* extended the scope of Article 26 (2) to even cover instances where the divorce decree is obtained solely by the Filipino spouse. The Court's ruling states, in part:

Paragraph 2 of Article 26 speaks of *"a divorce x x x validly obtained abroad by the alien spouse capacitating him or her to remarry."* Based on a clear and plain reading of the provision, it only requires that there be a divorce validly obtained abroad. The letter of the law does not demand that the alien spouse should be the one who initiated the proceeding wherein the divorce decree was granted. It does not distinguish whether the Filipino spouse is the petitioner or the respondent in the foreign divorce proceeding. The Court is bound by the words of the statute; neither can We put words in the mouths of the lawmakers. "The legislature is presumed to know the meaning of the words, to have used words advisedly, and to have expressed its intent by the use of such words as are found in the statute. *Verba legis non est recedendum,* or from the words of a statute there should be no departure."

Assuming, for the sake of argument, that the word *"obtained"* should be interpreted to mean that the divorce proceeding must be actually initiated by the alien spouse, still, the Court will not follow the letter of the statute when to do so would depart from the true intent of the legislature or would otherwise yield conclusions inconsistent with the general purpose of the act. Laws have ends to achieve, and statutes should be so construed as not to defeat but to carry out such ends and purposes. As held in *League of Cities of the Phils., et al. v. COMELEC, et al.:*

> The legislative intent is not at all times accurately reflected in the manner in which the resulting law is couched. Thus, applying a *verba legis* or strictly literal interpretation of a statute may render it meaningless and lead to inconvenience, an absurd situation or injustice. To obviate this aberration, and bearing in mind the principle that the intent or the spirit of the law is the law itself, resort should be to the rule that the spirit of the law controls its letter.

To reiterate, the purpose of paragraph 2 of Article 26 is to avoid the absurd situation where the Filipino spouse remains married to the alien spouse who, after a foreign divorce decree that is effective in the country where it was rendered, is no longer married to the

> Filipino spouse. The provision is a corrective measure to address an anomaly where the Filipino spouse is tied to the marriage while the foreign spouse is free to marry under the laws of his or her country. Whether the Filipino spouse initiated the foreign divorce proceeding or not, a favorable decree dissolving the marriage bond and capacitating his or her alien spouse to remarry will have the same result: the Filipino spouse will effectively be without a husband or wife. **A Filipino who initiated a foreign divorce proceeding is in the same place and in like circumstance as a divorce proceeding is in the same place and in like circumstance as a Filipino who is at the receiving end of an alien initiated proceeding. Therefore, the subject provision should not make a distinction. In both instance, it is extended as a means to recognize the residual effect of the foreign divorce decree on Filipinos whose marital ties to their alien spouses are severed by operation of the latter's national law.**

Pursuant to the majority ruling in Manalo, Article 26 (2) applies to mixed marriages where the divorce decree is: (i) obtained by the foreign spouse; (ii) **obtained jointly by the Filipino and foreign spouse jointly by the Filipino and foreign spouse;** and (iii) obtained solely by the Filipino spouse.

WHEREFORE, premises considered, the Petition is **GRANTED.** By virtue of Article 26, paragraph 2 of the Family Code and the Certification of the Cheongju Local Court dated July 16, 2012, petitioner Cynthia A. Galapon is declared capacitated to remarry under Philippine law.

SO ORDERED.

EDNA S. KONDO, Represented by Attorney-In-Fact, LUZVIMINDA S. PINEDA, Petitioner, vs. CIVIL REGISTRAR GENERAL, Respondent

[G.R. No. 223628. Mar. 4, 2020]

LAZARO-JAVIER, J:

FACTS

After nine years of marriage, petitioner Edna S. Kondo, a Filipina, and Katsuhiro Kondo, a Japanese national obtained a divorce decree in Japan. Edna filed a petition for judicial recognition of the divorce decree. The trial court denied

the petition on the ground that under Article 26 (2) of the Family Code, the foreign divorce should have been obtained by the alien spouse, not by mutual agreement. Moreover, the provisions of the Japanese Civil Code, as presented before the trial court, did not show that Katsuhiro was allowed to remarry upon obtaining a divorce. This was later affirmed by the Court of Appeals, emphasizing further that Rule 37, Section 2 (2) of the Rules of Court requires supporting evidence by way of affidavits of witnesses or duly authenticated documents to be presented.

In granting the petition, the Supreme Court employed the liberal application of its rules for cases involving the recognition of foreign decrees to Filipinos in mixed marriages and it further found that petitioner has actually presented certified documents establishing the fact of divorce.

RULING

We grant the petition.

xxx

The Court has time and again granted liberality in cases involving the recognition of foreign decrees to Filipinos in mixed marriages and free them from a marriage in which they are the sole remaining party. In previous cases, the Court has emphasized that procedural rules are designed to secure and not override substantial justice, especially here where what is involved is a matter affecting lives of families.

The Court sees no reason why the same treatment should not be applied here. Consider:

First. Edna presented an Authenticated Report of Divorce in Japanese Language; an English translation of the Report of Divorce; and an Authenticated Original copy of the Family Register of Katsuhiro. Too, she actively participated throughout the proceedings through her sister and attorney-in-fact, Luzviminda, despite financial and logistical constraints. She also showed willingness to provide the final document the trial court needed to prove Katsuhiro's capacity to remarry.

Second. As the OSG noted, the present case concerns Edna's status. Hence, res judicata shall not apply and Edna could simply refile the case if dismissed. This process though would be a waste of time and resources, not just for both parties, but the trial court as well. In ***RCBC v. Magwin Marketing Corp.***, the Court surmised that there was no substantial policy upheld had it simply dismissed the case and

required petitioner to pay the docket fees again, file the same pleadings as it did in the proceedings with the trial court, and repeat the belabored process. This reenactment would have been a waste of judicial time, capital, and energy.

Third. In its Comment, the OSG did not object to Edna's prayer to have the case remanded.

xxx

Finally. The present case stands on meritorious grounds, as petitioner had actually presented certified documents establishing the fact of divorce and relaxation of the rules will not prejudice the State.

Verily, a relaxation of procedural rules is in order.

ACCORDINGLY, the petition is **GRANTED**. The case is **REMANDED** to the Regional Trial Court for presentation in evidence of the pertinent Japanese law on divorce and the document proving Katsuhiro was recapacitated to marry.

SO ORDERED.

JOINT SHIP MANNING GROUP INC., Petitioner, vs.
SOCIAL SECURITY SYSTEM, Respondent
[G.R. No. 247471. July 7, 2020.]

GESMUNDO, J.:

FACTS

Petitioners assailed the constitutionality of Section 9-B of R.A. 11199, otherwise known as the "Social Security Act of 2018," which mandates compulsory Social Security System ("SSS") coverage for overseas Filipino workers ("OFWs") on the ground it violates due process and the equal protection of rights of manning agencies. Under the Section 9-B, manning agencies are considered employers of sea-based OFWs and are solidarily liable with their principals for liabilities incurred in violation of R.A. 11199. In contrast, for land-based OFWs, recruitment agencies are not considered as employers and are not solidarily liable. Land-based OFWs are also considered self-employed members of the SSS. They contend that there is no justification for the difference in treatment. Finally, they argue that the SSS coverage of sea-based OFWs is already provided in the 1988 Memorandum of Agreement between the Department of Labor and Employment and SSS, the 2006

Maritime Labor Convention to which the Philippines is a party to, and the 2010 amendment to the Philippine Overseas Employees Association Standard Employment Contract, thus, Sec. 9-B is no longer required.

The Supreme Court denied the petition ruling that Section 9-B of R.A. 11199 was passed into law to fulfill the country's existing treaty and contractual obligations. In spite of the Philippines' ratification of the 2006 MLC, participation in the 74th Maritime Session of the ILO, and the 1988 MOA between the SSS-DOLE, all mandating social security coverage to seafarers, some seafarers were left unregistered with the SSS. Thus, Section 9-B is a necessary piece of legislation to ensure the proper enforcement and implementation of the aforementioned obligations.

RULING

The Court finds the argument that Sec. 9-B of R.A. No. 11199, which imposes mandatory SSS coverage for sea-based OFWs, is superfluous and unreasonable and that it is improper to treat manning agencies as employers under R.A. No. 11199 specious.

There are several provisions in contracts and existing regulations that mandate the SSS coverage of seafarers. The 74th Maritime Session of the International Labor Organization ("ILO"), held on Sept. 24 to Oct. 9, 1987, which was participated in by the Philippines, stated that there shall be social security protection for seafarers, including those serving in ships flying flags other than those of their own country. It was observed by the Court in Sta. Rita that after a series of consultations with seafaring unions and manning agencies, it was the consensus that Philippine social security coverage be extended to seafarers under the employ of vessels flying foreign flags. In accordance thereto, the SSS and the Department of Labor and Employment ("DOLE") executed the 1988 MOA, which states that there shall be a stipulation in the standard employment contract ("SEC") providing for coverage of the Filipino seafarer by the SSS. In the latest Philippine Overseas Employment Administration ("POEA")-SEC, the foreign ship owners are still primarily required to extend SSS coverage to the seafarers.

Similarly, the 2006 MLC, to which the Philippines is a signatory, states that the members therein must provide social security protection to all seafarers:

Regulation 4.5 — Social Security

> *Purpose: To ensure that measures are taken with a view to providing seafarers with access to social security protection*

1. Each Member shall ensure that all seafarers and, to the extent provided for in its national law, their dependents have access to social security protection in accordance with the Code without prejudice however to any more favorable conditions referred to in paragraph 8 of article 19 of the Constitution.
2. Each Member undertakes to take steps, according to its national circumstances, individually and through international cooperation, to achieve progressively comprehensive social security protection for seafarers.
3. Each Member shall ensure that seafarers who are subject to its social security legislation, and, to the extent provided for in its national law, their dependents, are entitled to benefit from social security protection no less favorable than that enjoyed by shoreworkers.

In spite of the 74th Maritime Session of the ILO, 1988 MOA of the SSS-DOLE, 2010 POEA-SEC, and 2006 MLC, the mandatory coverage of social security to seafarers was not faithfully complied with.

WHEREFORE, the petition is **DENIED.** Section 9-B of Republic Act No. 11199, or the Social Security Act of 2018, insofar as sea-based Overseas Filipino Workers are concerned, is **CONSTITUTIONAL.**

SO ORDERED.

KARL WILLIAM YUTA MAGNO SUZUKI A.K.A. YUTA HAYASHI, Petitioner, vs. OFFICE OF THE SOLICITOR GENERAL, Respondent

[G.R. No. 212302. Sept. 2, 2020.]

INTING, J:

FACTS

Petitioner Suzuki was born in Manila and born to Sadao Kumai Suzuki, a Japanese national, and Lorlie Lopez Magno, a Filipino citizen. Petitioner's parents later divorced and Lorlie married another Japanese national, Hikaru Hayashi. Petitioner was adopted by Hayashi based on Japanese law and the same was reflected in Hayashi's Family Register. When the petitioner was twenty-four years old he sought to have his adoption under Japanese law recognized in the Philippines. Hence, he filed a petition for Judicial Recognition of Foreign Adoption

Decree before the Regional Trial Court. The lower court dismissed the petition for being contrary to law and public policy.

The Supreme Court granted the petition and held that applying the nationality principle, Philippine courts can only determine whether to extend the effects of the adoption to petitioner but it cannot determine Hayashi's family rights, status, condition and legal capacity concerning the foreign judgment. Also, it found that the adoption may be validly effected in accordance with the provisions of R.A. 8552 or the Domestic Adoption Act of 1998. Finally, it discussed that foreign judgments are recognized and enforced domestically because such act of recognition is part of what is considered as the "generally accepted principles of international law."

RULING

The petition is meritorious.

The RTC erroneously ruled that a foreign judgment of adoption of a Filipino citizen cannot be judicially recognized based on the view that such recognition would render nugatory the Philippine laws on adoption. It bears to emphasize that there are two parties involved in an adoption process: the adopter and the adoptee. The RTC in this case failed to consider that Hayashi, the adopter, is a Japanese citizen.

Article 15 of the Civil Code states 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*." Owing to this nationality principle, the Philippine laws on adoption are thus binding on petitioner. However, with respect to the case of Hayashi, who is a Japanese citizen, it bears stressing that the Philippine courts are precluded from deciding on his "family rights and duties, or on [his] status, condition and legal capacity" concerning the foreign judgment to which he is a party. Thus, as to the foreign judgment of adoption obtained by Hayashi, if it is proven as a fact, the Philippine courts are limited to the determination of whether to extend its effect to petitioner, the Filipino party.

xxx

Special laws on adoption have been passed by Congress subsequent to the promulgation of the Family Code. In 1995, RA 8043 was enacted to establish the rules governing inter-country adoptions of Filipino children. The Inter-Country

Adoption Board ("ICAB") was created to serve as the central authority in matters relating to inter-country adoptions. Meanwhile, in 1998, RA 8552 was passed to set out the rules and policies on domestic adoption.

xxx

Apparently, the adoption of petitioner by Hayashi may be validly effected in accordance with the provisions of RA 8552. However, the Court disagrees with the RTC's view that adoption decrees involving Filipino citizens obtained abroad cannot be judicially recognized in the Philippines for being contrary to law and public policy.

As emphasized by Associate Justice Edgardo L. Delos Santos (Justice Delos Santos), the availability of RA 8552 as a means to adopt petitioner should not automatically foreclose proceedings to recognize his adoption decree obtained under Japanese law. Justice Delos Santos reminds that the principle behind the recognition and enforcement of a foreign judgment derives its force not only from our Rules of Court but from the fact that such act of recognition is considered part of what is considered as the "generally accepted principles of international law." It is characterized as such because aside from the widespread practice among States accepting in principle the need for such recognition and enforcement, the procedure for recognition and enforcement is embodied in the rules of law, whether statutory or jurisprudential, in various foreign jurisdictions.

As already established, the adoption by an alien of the legitimate child of his/her Filipino spouse is valid and legal based on Article 184 (3) (b) of the Family Code and Section 7 (b) (i), Article III of RA 8552. Thus, contrary to the RTC's sweeping conclusion against foreign adoption decrees, the Court finds that the adoption of petitioner by Hayashi, if proven as a fact, can be judicially recognized in the Philippines. Justice Delos Santos aptly propounds that the rules on domestic adoption should not be pitted against the recognition of a foreign adoption decree; instead, the better course of action is to reconcile them and give effect to their respective purposes.

xxx

It is an established international legal principle that final judgments of foreign courts of competent jurisdiction are reciprocally respected and rendered efficacious subject to certain conditions that vary in different countries. "*In the recognition of foreign judgments, Philippine courts are incompetent to substitute*

their judgment on how a case was decided under foreign law." They are limited to the question of whether to extend the effect of the foreign judgment in the Philippines. Thus, in a foreign judgment relating to the status of adoption involving a citizen of a foreign country, Philippine courts will only decide whether to extend its effect to the Filipino party.

WHEREFORE, the petition is **GRANTED**.

SO ORDERED.

ZUNECA PHARMACEUTICAL, et. al., Petitioners, vs. NATRAPHARM, INC., Respondent

[G.R. No. 211850. Sept. 8, 2020.]

CAGUIOA, J.:

FACTS

Respondent Natrapharm filed a complaint against Petitioner Zuneca alleging that Zuneca's "ZYNAPS" is confusingly similar to its registered trademark, "ZYNAPSE," and that the confusion is dangerous because these medical drugs are intended for different types of illnesses. Zuneca countered that it has been selling the medical drug under the mark "ZYNAPS" since 2004, and that it was impossible that Natrapharm was unaware of its existence before the latter had registered the name "ZYNAPSE" because Natrapharm and Zuneca had advertised its products in the same publications and conventions. Finally, Zuneca argued that as the prior user, it is the owner of the mark "ZYNAPS."

The Supreme Court held that Natrapharm is the lawful registrant of the "**ZYNAPSE**" but petitioners are considered prior users in good faith and may continue to use "**ZYNAPS.**" The Court discussed that the intent of the lawmakers was to adopt a system of acquiring rights over marks wherein the mode of acquiring ownership is registration. In the sponsorship speech of Senator Raul Roco for the IP Code, he discussed that owing to the country's adherence to the Paris Convention for the Protection of Industrial Property, specifically in adopting the Lisbon Act, the Philippines was required to adopt a system of registration of marks based not on use in the Philippines but on foreign registration.

RULING

The Supreme Court affirmed the RTC's decision that respondent Natrapharm is the lawful registrant of the "ZYNAPSE" mark but ruled that petitioners, as prior users in good faith of the "ZYNAPS" mark, may continue to use its mark.

The legislative intent is to abandon the rule that ownership of a mark is acquired through use.

The lawmakers' intention to change the system of acquiring rights over a mark is even more evident in the sponsorship speech of the late Senator Raul Roco for the IP Code. The shift to a new system was brought about by the country's adherence to treaties, and Senator Roco specifically stated that the bill abandons the rule that ownership of a mark is acquired through use, thus:

> "Part III of the Code is the new law on trademarks.
>
> On September 27, 1965, Mr. President, the Philippines adhered to the Lisbon Act of the Paris Convention for the Protection of Industrial Property (Paris Convention). This obliged the country to introduce a system of registration of marks of nationals of member-countries of the Paris Convention which is based not on use in the Philippines but on foreign registration. This procedure is defective in several aspects: first, it provides to a foreign applicant a procedure which is less cumbersome compared to what is required of local applicants who need to establish prior use as a condition for filing a trademark; and second, it is incompatible with the "based on use" principle which is followed in the present Trademark Law.
>
> Furthermore, Mr. President, our adherence to the Paris Convention binds us to protect well-known marks. Unfortunately, the provisions of the Paris Convention on this matter are couched in broad terms which are not defined in the Convention. This has given rise to litigation between local businessmen using the mark and foreigners who own the well-known marks. The conflicting court decisions on this issue aggravate the situation and they are a compendium of contradictory cases.
>
> **The proposed [IP] Code seeks to correct these defects and provides solutions to these problems and make a consistency in ruling for future purposes.**

> To comply with [the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)] and other international commitments, **this bill no longer requires prior use of the mark as a requirement for filing a trademark application. It also abandons the rule that ownership of a mark is acquired through use by now requiring registration of the mark in the Intellectual Property Office.** Unlike the present law, it establishes one procedure for the registration of marks. This feature will facilitate the registration of marks."

WHEREFORE the petition is **PARTLY GRANTED** and the Court hereby declares petitioners **ZUNECA PHARMACEUTICAL AND/OR AKRAM ARAIN AND/OR VENUS ARAIN, M.D., AND STYLE OF ZUNECA PHARMACEUTICAL** as the prior users in good faith of the "ZYNAPS" mark and accordingly protected under Section 159.1 of the Intellectual Property Code of the Philippines.

The assailed Decision and Resolution of the Court of Appeals are **AFFIRMED** insofar as they declared respondent **NATRAPHARM, INC.** as the lawful registrant of the "ZYNAPSE" mark and are **SET ASIDE** insofar as they hold petitioners liable for trademark infringement and damages, directed the destruction of petitioners' goods, and enjoined petitioners from using "ZYNAPS."

SO ORDERED.

ANACLETO BALLAHO ALANIS HI, Petitioner, vs. COURT OF APPEALS, CAGAYAN DE ORO CITY, et. al., Respondents

[G.R. No. 216425. Nov. 11, 2020.]

LEONEN, J.:

FACTS

Petitioner filed a Petition before the RTC of Zamboanga to change his name on his birth certificate, using his mother's maiden name, "Ballaho," in place of his father's surname, "Alanis III." He also wished to change his first name from "Anacleto" to "Abdulhamid" arguing that he had been using this name since childhood. The RTC denied this holding that the petitioner failed to prove any of

the grounds to warrant a change of name and that to allow him to drop his last name was to disregard the surname of his natural and legitimate father, in violation of the Family Code and Civil Code, which provide that legitimate children shall principally use their fathers' surnames.

The Supreme Court held that as the Constitution and the Convention on the Elimination of All Forms of Discrimination Against Women, an international convention to which the Philippines is a party to, ensures and protects the fundamental equality and women and men before the law, petitioner should be allowed to use his mother's maiden name.

RULING

This Court grants the Petition.

xxx

The fundamental equality of women and men before the law shall be ensured by the State. This is guaranteed by no less than the Constitution, a statute, and an international convention to which the Philippines is a party.

In 1980, the Philippines became a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women and is thus now part of the Philippine legal system. As a state party to the Convention, the Philippines bound itself to the following:

Article 2

xxx

(f) to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs, and practices which constitute discrimination against women;

Article 5

xxx

To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of

> the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women[.]
>
> Non-discrimination against women is also an emerging customary norm. Thus, the State has the duty to actively modify what is in its power to modify, to ensure that women are not discriminated.
>
> xxx
>
> In keeping with the Convention, Article II, Section 14 of the Constitution requires that the State be active in ensuring gender equality.
>
> xxx
>
> With the Philippines as a state party to the Convention, the emerging customary norm, and not least of all in accordance with its constitutional duty, Congress enacted Republic Act No. 7192, or the Women in Development and Nation Building Act.
>
> xxx
>
> Courts, like all other government departments and agencies, must ensure the fundamental equality of women and men before the law. Accordingly, where the text of a law allows for an interpretation that treats women and men more equally, that is the correct interpretation.
>
> Thus, the Regional Trial Court gravely erred when it held that legitimate children cannot use their mothers' surnames.
>
> **WHEREFORE**, the Petition is **GRANTED.** As prayed for in his Petition for Change of Name, petitioner's name is declared to be **ABDULHAMID BALLAHO.**
>
> **SO ORDERED.**

DOJ ISSUANCES

DOJ ISSUANCES

MARAWI COMPESATION BILL
DOJ Opinion No. 006, s. 2020
Feb. 28, 2020

MENARDO I. GUEVARRA

SUMMARY

This was issued in response to a request by Representative Mohaman Khalid Q. Dimaporo, TWG Chairperson of the Marawi Compensation Bills House Committee on Disaster Management, for an opinion on whether the Philippine Government is liable or should be held liable to compensate private properties destroyed in the Marawi siege and its implications if such a measure is passed into law.

The Department of Justice ("DOJ") expressed that it had no objection on the three (3) Marawi Compensation bills, namely, House Bill Nos. (HBN) 3418, 3543 and 3922, introduced by Representatives Ansaruddin Abdul Malik Alonto Adiong, Mujiv S. Hataman and Amihilda J. Sangcopan and Yasser Alonto Balindong, respectively, provided that the criteria to be used in evaluating claims for compensation are clearly outlined therein. The DOJ also opined that the bill, if passed into law, will become a standard for compensation for losses in times of armed conflict, war, strife, among others, and will have an effect on the country's obligations under the "War Clause" in existing bilateral investment treaties and free trade agreements ("FTAs"). Further, because the issue of compensation losses is controversial under international humanitarian law and international investment law, the DOJ recommended further study on the subject.

DISCUSSION

It was also stated in the latter part of our Position Paper that should this bill be passed into law, this will serve as standard insofar as compensation for losses in times of armed conflict, war, strife, among others, is concerned, and has an effect on the country's obligations under the "War Clause" in existing bilateral

investment treaties as well as in the investment chapter of free trade agreements ("FTAs").

An example of the said article on "Compensation for Losses" reads, as follows:

> Each Party **shall accord to investors of another Party,** and to covered investments, with respect to measures it adopts or maintains relating to losses suffered by investments in its territory **owing to armed conflict, civil strife or state of emergency, treatment no less favourable than that it accords, in like circumstances, to:**
>
> (a) its own investors and their investments; and
> (b) investors of any other Party or non-Party and their investments.

This means that should the proposed bill become a law and later on, incidents similar to the Marawi siege happen and there are affected covered investments of investors of an FTA partner of the Philippines, the Philippines will also have to provide compensation to the said foreign investors in the same manner that the Philippines compensates its nationals.

This Department is aware that compensation for losses in times of war or civil disturbance is a controversial issue both under international humanitarian law and international investment law, and, therefore, **should be studied carefully.**

In this regard, the TWG may also wish to seek the views of relevant international organizations so that the TWG may be apprised on how other countries with similar experience as the Marawi City siege approach said matter. It is also suggested that the comments of the Board of Investments, which chairs the Inter-agency Committee on Investments, and which leads the negotiations of the country's bilateral investment treaties be also obtained.

DOF LOAN WITH AUSTRALIA
DOJ Opinion No. 050, s. 2020
Nov. 16, 2020

MENARDO I. GUEVARRA

SUMMARY

This opinion was issued in response to a request on the DOJ's opinion on two (2) loan propositions from the Export Finance Australia ("EFA") for the government's procurement of six (6) OPVs for the Philippine Navy:

1. That it may be contracted under Presidential Decree (P.D.) No. 415;
2. That the Government of the Philippines may borrow an amount exceeding US $300 million and with a tenor of more than ten (10) years from the Government of Australia.

On the first proposition, the DOJ opined that it is not an Official Development Assistance undertaking because its purpose is for procuring military equipment which does not pursue economic development, thus, failing to meet the first criteria to be considered an ODA. Accordingly, the law which applies is P.D. No. 415 which specifically applies to defense contracts.

As regards the second loan proposition, the DOJ discussed that it must not exceed US $ 300 million and the terms of payment must not be less than ten (10) years. The DOJ also noticed that under the proposed Government-to-Government Arrangement, a designated supplier has already been identified to supply the six OPVs from Australia. Thus, it reiterated its previous opinion on the same subject which states that the determination that an agreement is an executive agreement, including a Government-to-Government arrangement, would exempt it from the competitive public bidding requirement under the prescribed procurement procedures between the parties or from the requirement under RA No. 9184 and its Revised Implementing Rules and Regulations.

DISCUSSION

Following the DOF's interpretation of Section 3 of PD No. 415, the President is authorized to enter into two (2) kinds of arrangements in behalf of the Republic of the Philippines:

> Clause 1: the President of the Philippines is hereby authorized in behalf of the Republic of the Philippines, to contract such **loans, credits or indebtedness including supplier's credit, deferred payment arrangements** upon such terms and conditions as may be agreed upon with any local or foreign source or lender not exceeding Three hundred million United States dollars, or its equivalent in other foreign currencies at the exchange rate prevailing at the time of the contracting of the loans, credits, or indebtedness, suppliers credits and deferred payment arrangements and at terms of payment of not less than ten years; and
>
> Clause 2: to enter into and conclude **bilateral agreements involving other forms of official assistance such as grants and commodity credit arrangement or indebtedness** as may be necessary with Government of foreign countries with whom the Philippines has diplomatic or trade relations or which are members of the United Nations, their agencies, instrumentalities or financial institutions or with reputable international organizations or non-governmental national or international lending institutions or firms extending supplier's credit or deferred payment arrangements.

The DOF is of the opinion that the proposed loan falls under the second clause which has no amount and term limit. Hence, the DOF is convinced that it could obtain the proposed US575 million loan with a 12-year tenor from the Government of Australia under PD No. 415. We, unfortunately, beg to differ.

xxx

Meanwhile, we readily noticed under the attached Annex 2 of the proposed Government-to-Government ("G2G") Arrangement that it will involve a three-tier

structure, and that a designated supplier has already been identified to supply the purported procurement of the six (6) OPVs from Australia, to wit:

> 1. The two governments, through duly appointed authorities will execute a Financing Cooperation Agreement establishing legal and institutional framework for financing cooperation, including procurement processes;
> 2. Supply Contract will be executed between the Department of National Defense (as implementing agency), and **Austal Limited** (as supplier); and
> 3. Facility Agreement will be executed by and between the Australian Government through Export Finance Australia (as Lender) and the Philippine Government through the Department of Finance (as Borrower) for the financing of the Project. (Emphasis supplied)

Relative thereto, we would like to reiterate this Department's previous opinion on the same subject which states that the determination that an agreement is an executive agreement, including a G2G arrangement, would not justify its exemption from the requirement of competitive public bidding under the prescribed procurement procedures between the parties or from the requirement of RA No. 9184 15 and its Revised Implementing Rules and Regulations (RIRR). The designation of Austal Limited as the supplier of the OPVs, in the absence of the required public bidding, may cause serious legal consequences.

As a matter of fact, Section 4 of RA No. 9184 specifically provides that it shall apply to the procurement of infrastructure projects, goods and consulting services, regardless of source of funds, whether local or foreign, by all branches and instrumentalities of Government, its department, offices and agencies, including government-owned and/or controlled corporations and local government units.

Books

BOOK WRITEUPS

HUMAN TRAFFICKING: INTERNATIONAL AND NATIONAL PERSPECTIVE

Author: Jose Cabrera Montemayor, Jr.
Quezon City, Central Book Supply, Inc. 2020

Authored by Dr. Jose Cabrera Montemayor, *Human Trafficking: International and National Perspective* provides an overview of human trafficking in the global and domestic arena. According Dr. Montemayor, it is vital that lawyers understand the basic principles of laws encompassing human trafficking thus, this work was authored to form an important bridge between law on the one hand and everyday development and progress on the other that involve hazing issues.

The book starts off with a synopsis into human trafficking, its current state of affairs, the treaties agreed upon, and organizations formed by the international community to help combat human trafficking. Thereafter, the book goes into a deep dive discussion of the different manifestations of human trafficking such as Bride-Buying, Child-Prostitution, and Organ Trade, among others. Specifically, the author details the history of these practices and why they continue to be prevalent. The reader is also presented with a picture of how these practices are carried out in specific countries and how each one's context and culture slow down efforts to suppress them. Additionally, the author breaks down efforts done by different governments to put a stop to these practices through domestic legislation, international agreements, and human rights organizations. Finally, the book is concluded with a national viewpoint of human trafficking. This part recounts stories of human trafficking activities occurring in specific parts of the Philippines, and attempts to bring such activities to light, as well as legal developments, and international intervention to suppress them.

TRADE AND ENVIRONMENT GOVERNANCE AT THE WORLD TRADE ORGANIZATION COMMITTEE ON TRADE AND ENVIRONMENT

Author: Manuel Antonio J. Teehankee
Kluwer Law International, 2400 Alphen aan den Rijn, The Netherlands

Written by Ambassador Manuel Teehankee, *Trade & Environment Governance at the World Trade Organization Committee on Trade & Environment* is an attempt to evaluate and understand the twenty-five years of work of the World Trade Organization Committee on Trade and Environment ("CTE") by providing an examination of the work outputs, proceedings and workings of the CTE. According to the author's preface, this book focuses on a "more nuanced and contextualized approach at assessing the work processes and deliberations of the CTE, as part of the general evolution of the trade, development, and environment legal and policy regimes."

Here, the author introduces the CTE, narrating its history and formation, structure, workings of the secretariat, and chair processes. He discusses the formal ten-point work mandate and program of the CTE grouped into the five thematic areas of work: (i) Norm Hierarchy and Specific Trade Obligations in multilateral environmental agreement, (ii) Transparency, (iii) Carbon, standards, and eco-labeling, (iv) market access issues, and (v) the special issues of domestically prohibited goods, trade-related aspects of intellectual property rights ("TRIPS") and Services. The book also details the specific work areas of the CTE, specifically on the interface of trade rules and environmental policy-making, and the significance of the theoretical frameworks of increased international coordination, cooperation, and transparency mechanisms. This part also affords further insight into the product of the CTE's work in bringing greater understanding to the areas of Carbon, Standards, Eco-labelling, DPGs, TRIPS, and market access. Finally, the book concludes with an integration of the author's findings, key insights, and recommendations on the work of the CTE, one of which is for the committee to put greater effort into fostering awareness in the thematic work areas of the CTE and its theoretical frameworks to allow for the growth of globalized trade and environment governance mechanisms and for the empowerment of stakeholders in devising localized solutions for environmental issues.

LAW, SUSTAINABLE DEVELOPMENT, AND FOREIGN FINANCING OF INFRASTRUCTURE: LEGAL SAFEGUARDS FOR ECONOMIC, ENVIRONMENTAL AND SOCIAL SUSTAINABILITY OF FOREIGN FUNDED INFRASTRUCTURE PROJECTS IN THE PHILIPPINES

Author: Johanna Aleria P. Lorenzo

Quezon City, U.P. Law Complex 2020

This monograph, authored by Dr. Johanna Aleria P. Lorenzo (JSD, Yale), a supervising legal officer (2019-2020) at the U.P. Law Center's Institute of International Legal Studies, highlights the positive and complementary roles of domestic and international law in ensuring the economic, environmental, and social sustainability of infrastructure projects and the international economic agreements underlying them.

It recommends reforms to the current Philippine legal and regulatory framework governing foreign-funded infrastructure projects – such as requiring the conduct of a sustainability impact assessment – based on international law, multilateral standards and global best practices that integrate environmental, social, and human rights concerns in economic decision-making and activities.

As the initial output of the Institute's International Economic Law research program, this project in part responds to the invitation by the United Nations Environment Programme for the academic community to assist in addressing the urgent need to draw the attention of policymakers to the issue of sustainable infrastructure and its centrality within the United Nations 2030 Agenda for Sustainable Developments.[1]

[1] *Law, Sustainable Development, and Foreign Financing of Infrastructure*, UP COLLEGE OF LAW, https://law.upd.edu.ph/IILS/pages/law-sustainable-development-and-foreign-financing-of-infrastructure/.

INTERNATIONAL LAW: A PHILIPPINE PERSPECTIVE
Authors: Harry S. Roque, John R. Castriciones, and
David Robert C. Aquino
Quezon City, Central Book Supply, Inc. 2020

Authored by Presidential Spokesperson Harry S. Roque, Department of Agrarian Reform Secretary John R. Castriciones, and Atty. David Robert C. Aquino, this work entitled *International Law: A Philippine Perspective* aims to aid in the study of international law, containing discussions and illustrations on concepts, principles, doctrines, and cases to allow the reader to have a clear understanding of the field. Topics are explained briefly by citing both international and domestic jurisprudence and laws, followed by a compilation of short digests of cases related to each subject. It is worthy to note that aside from summarizing the facts and decisions of the Court, the authors also discuss important doctrines, and, in some sections, compare rulings and examine the evolution of the Court's decisions. Subject matters discussed in the book include international law principles such as *pacta sunt servanda, erga omnes* and *jus cogens,* international organizations like the United Nations and ASEAN, and other pressing matters on law of the sea, women and children's rights and armed conflict.

According to its authors, this book does not intend to be provide an exhaustive exposition of the subject, but it is their "humble attempt to introduce the reader to the dynamic, intertwined and ever-changing subject we call – international law." This work is their "over-all attempt to stay true, though guided by international definitions and conventions, to our very own perspective in appreciating generally accepted principles of International law."

EVENTS

EVENTS

DEPOSIT OF THE PHILIPPINES' INSTRUMENT OF ACCESSION TO THE SERVICE CONVENTION

On Mar. 4, 2020, the Philippines, through Department of Foreign Affairs Undersecretary for Administration J. Eduardo Malaya, deposited the Instrument of Accession to the Service of Process Convention during the meeting of the Council on General Affairs and Policy of The Hague Conference on Private International Law ("HCCH") at the Peace Palace in The Hague, Netherlands. Among those who witnessed the deposit were Philippine Ambassador to the Netherlands Jaime Victor B. Ledda, Philippine Supreme Court Chief Justice Diosdado M. Peralta, and Court Administrator Jose Midas P. Marquez. In his remarks, Undersecretary Malaya expressed that with the deposit of the accession, the Philippines further strengthened its engagement with the HCCH and this would leave the door wide open for future accession to other HCCH conventions. Chief Justice Peralta also expressed that the accession will improve the overall administration of justice. The Convention primarily provides for the transmission of documents which are transmitted from one State Party to the Convention to another State Party.[1]

[1] *PH Deposits Instrument of Accession to the Hague Conference on Private International Law*, DEPARTMENT OF FOREIGN AFFAIRS, (March 4, 2020) https://dfa.gov.ph/dfa-news/news-from-our-foreign-service-postsupdate/26142-ph-deposits-instrument-of-accession-to-the-hague-conference-on-private-international-law.

INSTRUMENT OF ACCESSION TO THE HCCH SERVICE CONVENTION

Office of the President
of the Philippines
Malacañang

0017095

17 September 2018

DEPARTMENT OF FOREIGN AFFAIRS
OFFICE OF THE SECRETARY
RECEIVED
SEP 20 2018
BY:
NO.

Secretary ALAN PETER S. CAYETANO
Department of Foreign Affairs
Pasay City

Dear Secretary Cayetano:

May we respectfully transmit the herein attached Instrument of Accession to the ***"Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters,"*** signed by President Rodrigo Roa Duterte.

For your information and appropriate action.

Very truly yours,

SALVADOR C. MEDIALDEA
Executive Secretary

GGAO
RL182284
BTF/LDM/MAMG

Encl: a/s

MALACAÑANG
MANILA

INSTRUMENT OF ACCESSION

TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

KNOW YE, that whereas, the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters* was concluded on 15 November 1965;

WHEREAS, the Convention establishes a streamlined means to effect service of judicial and extrajudicial documents from one State Party to another;

WHEREAS, the Convention provides for the designation of a Central Authority which will undertake to receive requests for service of documents coming from other Contracting States, and proceed to act on such requests by serving the document itself or arranging to have it served by an appropriate agency;

WHEREAS, the Convention requires the Central Authority to complete a certificate that the document is served, with information on the method, place and date of service and the person on whom the document was delivered; and

WHEREAS, Article 28 of the Convention provides that it shall enter into force for the acceding State on the first day of the month following the expiration of the period of six months from receipt of the other State Parties to the Convention of the notification of accession from the Ministry of Foreign Affairs of the Netherlands;

NOW, THEREFORE, be it known that **I, RODRIGO ROA DUTERTE,** President of the Republic of the Philippines, after having seen and considered the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters*, do hereby accede to the same.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the Republic of the Philippines to be affixed.

GIVEN under my hand at the City of Manila, this 17th day of **September** in the year of Our Lord Two Thousand and Eighteen.

By the President:

SALVADOR C. MEDIALDEA
Executive Secretary

REPUBLIC OF THE PHILIPPINES
PHRD 2018 - 009923

THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW CONVENTIONS WEBINAR SERIES

Last Sept. 16 - 18, 2020, the Supreme Court of the Philippines-Philippine Judicial Academy and the Office of the Court Administrator, in partnership with the Department of Foreign Affairs through its Office of Treaties and Legal Affairs, conducted an online webinar focused on the discussion of the various international conventions under the Hague Conference on Private International Law ("HCCH").[2]

The webinar was conducted with the goal of raising awareness and attention to the impact of HCCH's work on Philippine legal practice. The webinar series was also accredited under the Mandatory Continuing Legal Education program in the Philippines.[3]

Over the course of the three-day webinar, there were presentations and discussions on The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, the Convention on the Civil Aspects of International Child Abduction, and the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents[4] from Philippine subject-matter experts and authorities as well as legal practitioners and experts from the HCCH Permanent Bureau.

The HCCH webinar commenced with welcome messages from Department of Foreign Affairs ("DFA") Assistant Secretary for Treaties and Legal Affairs Igor Bailen, Secretary of Foreign Affairs Teodoro L. Locsin, Jr., Chief Justice Diosdado Peralta, and Secretary General Dr. Christophe Bernasconi. Speakers for the first day included DFA Undersecretary J. Eduardo Malaya, International Country Adoption Board Executive Director Bernadette Abejo, DOJ Office of the Chief State Counsel George Ortha II, DFA Office of Consular Affairs Assistant Secretary Neil Frank R. Ferrer, and Court Administrator Jose Midas Marquez.[5]

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[2] THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (HCCH) CONVENTIONS WEBINAR SERIES, https://philja.judiciary.gov.ph/hcch/index.html (last visited August 26, 2021).

[3] *Id.*

[4] Day 1 Program 16 September 2020, THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (HCCH) CONVENTIONS WEBINAR SERIES, https://philja.judiciary.gov.ph/hcch/day1.html#day1 (last visited August 26, 2021).

[5] *Id.*

For the second day, among those who presented were Court Administrator Jose Midas Marquez, Integrated Bar of the Philippines President Atty. Domingo Egon Cayosa, HCCH First Secretary Philippe Lortie, HCCH Support Coordinator Jean-Marc Pellet, HCCH expert and UP College of Law Professor Elizabeth Aguiling-Pangalangan, HCCH Legal Officer Elizabeth Zorrilla, and Supreme Court Rules Committee Member Atty. Tranquil Gervacio Salvador III.[6] The final day concluded with lectures from HCCH Senior Legal Officer Dr. Ning Zhao and Supreme Court Rules Committee Member Justice Maria Filomena Singh and closing remarks by Philippine Judicial Academy Chancellor, retired Justice Adolfo Azcuna.[7]

The HCCH is an intergovernmental organization whose purpose is "to work towards the progressive unification of the rules of private international law." At present, the Conference has 85 Members: 84 States and 1 Regional Economic Integration Organization (European Union). The Philippines became a member of the Conference in 2010 and is a State Party to four of the 39 conventions: 1) Adoption, 2) Abduction, 3) Apostille, and 4) Service.[8]

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[6] Day 2 Program 17 September 2020, THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (HCCH) CONVENTIONS WEBINAR SERIES, https://philja.judiciary.gov.ph/hcch/day2.html#day2 (last visited August 26, 2021).

[7] Day 3 Program 18 September 2020, THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (HCCH) CONVENTIONS WEBINAR SERIES, https://philja.judiciary.gov.ph/hcch/day3.html#day3 (last visited August 26, 2021).

[8] *Id.* at 371.

IN LARGER FREEDOM: 75 YEARS OF THE PHILIPPINES AND THE CHARTER OF THE UNITED NATIONS

On Oct. 8, 2020, the Department of Foreign Affairs, in partnership with the Philippine Society of International Law and the Philippine Association of Law Schools, held a virtual web conference entitled "In Larger Freedom: 75 Years of the Philippines and the Charter of the United Nations." The purpose of the forum was to commemorate the 75th anniversary of the Charter of the United Nations ("UN") which gave the organization its vision and mission.

Foreign Affairs Secretary Teodoro Locsin, Jr. delivered the opening remarks for the event, highlighting the UN Charter's inclusivity by examining the historical context that led to the country's admission into the UN, and its significance for the international community.

The main speakers for the event were Ambassador Enrique A. Manalo and Prof. Andre Palacios. Ambassador Manalo, the country's Permanent Representative to the UN, emphasized the Special Committee's work on the UN Charter and its efforts to strengthen the role of the organization. Prof. Palacios, an expert in the field of international law, discussed how the Philippines' participation in the mission of the UN contributed to the progressive development of international law. Department of Justice Undersecretary Emmeline Aglipay-Villar, Consul Zoilo Velasco, Professor Romel Bagares, and Professor Maria Luisa Isabel Rosales served as reactors.

In addition to these discussions, the web conference also included messages from Department of Tourism Secretary Bernadette Romulo-Puyat, Former UN Undersecretary-General for the UN Office for Internal Oversight Services Heidi Lloce Mendoza, and Former Aide to the Special Representative to Iraq Marilyn Manuel. Also featured were musical performances by Bayang Barrios, Rice Lucido, Nityalila, and Ja Quintana, and the virtual launch of the publication, "Filipino Footprints in the UN."

To conclude the event, Undersecretary for Administration J. Eduardo Malaya underscored the country's contributions to the UN since the organization's inception, and emphasized that "the UN and its Charter embody our principles, values and aspirations for peace, justice and prosperity for our neighbors and ourselves." [9]

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[9] DEPARTMENT OF FOREIGN AFFAIRS, *DFA Webinar Commemorates UN'S 75th Anniversary, Highlights PH Contributions, Department of Foreign Affairs* (Oct. 23, 2020),

PHILIPPINE PARTICIPATION IN VARIOUS MOOT COURT COMPETITIONS IN 2020

Last Jan. 7-9, 2020, the University of the Philippines ("UP") College of Law and the UP Law Center Institute of International Legal Studies hosted the 24th Annual Stetson International Environmental Moot Court Competition Southeast Asian Regional Rounds wherein the UP Law team, who finished as finalists[10], and Ateneo de Manila University School of Law, who finished as semi-finalists, both advanced to the international rounds of the competition.[11] In the international rounds, which were held virtually on April 2-4, 2020 because of the pandemic, Ateneo de Manila University School of Law bagged the Runner-up for Best Memorial Award while Urania Estrellita Amelia Remedios P. Lindo and Beatriz Anna Balbacal, both belonging to the UP Law team, were awarded Best Oralist and 3rd Best Oralist, respectively, in the Preliminary Rounds.[12]

In Feb. 21-23, 2020, the 2020 DivinaLaw Philippines Jessup Cup was held at the Century Park Hotel in Manila. The UP Law Jessup Team was crowned Overall Champion and awarded Best Memorial for Respondent. University of Santo Tomas ("UST") finished as runner-up of the competition and garnered two memorial awards - Overall Best Memorial and Best Memorial for Applicant. Abelardo Hernandez of the UP Law team also won Best Oralist of the championship match.[13] The UP Law and UST Law teams were supposed to represent the Philippines in the Jessup Competition's international rounds which was, however, cancelled due to the COVID-19 pandemic. In lieu of this, a virtual tournament, the 2020 "After Jessup" International Moot Court Competition was organized by the International Association of Law Schools in cooperation with the

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https://dfa.gov.ph/authentication-functions/78-newsroom/dfa-releases/28124-dfa-webinar-commemorates-un-s-75th-anniversary-highlights-ph-contributions (last visited Mar. 19, 2021).

[10] *UP Law is in the Finals of the 2020 SEARR,* UP COLLEGE OF LAW, https://law.upd.edu.ph/up-law-finishes-in-the-finals-of-the-2020-stetson/ (last visited August 26, 2021).

[11] *Ateneo Society of International Law Off To A Good Start,* ATENEO DE MANILA UNIVERSITY, (January 14, 2020), https://www.ateneo.edu/aps/law/news/ateneo-society-international-law-good-start.

[12] *Results of the 24th Annual Stetson International Environmental Moot Court Competition,* STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT COMPETITION, https://www.stetson.edu/law/international/iemcc/ (last visited August 26, 2021).

[13] DivinaLaw Philippines Jessup Cup, FACEBOOK (March 2, 2020), https://www.facebook.com/DivinaLawJessup/posts/2712068552223301.

International Law Students Association. The UP Law Jessup Team was proclaimed International Champions after beating the South African team in the finals.[14]

After winning the National Championship of the Red Cross International Humanitarian Law ("IHL") Moot Court Competition last September of 2019, the UP Law IHL team represented the Philippines in the 18th Red Cross IHL Moot Court Competition wherein it prevailed over 22 other teams and was declared Overall Champions. In addition to winning the tournament, the Philippine contingent also earned the 3rd Best Prosecutorial Memorial Award.[15] The international rounds of the competition which was held last July 18-Aug. 27, 2020 consisted of a memorial-only competition. It was co-organized by the Hong Kong Red Cross and the International Committee of the Red Cross in collaboration with the University of Hong Kong and the Chinese University of Hong Kong. [16]

[14] 2020 *"After Jessup" International Moot Court Champions*, UP COLLEGE OF LAW, https://law.upd.edu.ph/up-law-wins-2020-after-jessup-international-moot-court-competition/#:~:text=The%20UP%20College%20of%20Law,African%20Team%20in%20the%20finals (last visited August 26, 2021).

[15] UP Law Debate and Moot Court Union, *UP Law Wins The 18th Red Cross International Humanitarian Law (IHL) Moot Court Competition*, FACEBOOK (August 27, 2020), https://www.facebook.com/UP.LDMU/posts/up-law-wins-the-18th-red-cross-international-humanitarian-law-ihl-moot-court-com/1710528185769334.

[16] THE 18TH RED CROSS INTERNATIONAL HUMANITARIAN LAW MOOT (2020), https://www.redcross.org.hk/en/moot18/index.html (last visited August 26, 2021).