the break-up of the Soviet Union. Albright, then Professor of International Affairs at Georgetown University, had to throw away all her notes and materials on the *Foreign Policy of the Soviet Union*, because the Soviet Union was no more. Goodman is thus the first to admit that he himself is not quite sure of anything anymore, and we live in a world and a time that few people truly understand. Goodman says that many of us are trained by people from a different century and are equipped to grapple with the realities of a different century.[49]

Bearing in mind the characteristics of the international system at this particular point in human history, the fundamental imperatives in the context of the effort to manage and organize international life have been identified. These imperatives are by no means comprehensive, and it is urged upon all who believe in the importance of international law to continue to develop a better understanding of such imperatives. As Dr. Goodman argues, this is an era in the process of being understood, and so the international community will have to adapt, innovate, and improvise along the way. Many of the conceptions and predictions about the world today may be proven wrong; but what is perhaps most important is for the international community to always cling to certain basic premises, or imperatives, as this article puts it. One can then with some degree of confidence fill in the blanks so to speak, as one goes along.

The international community can take consolation from one of the most poignant passages in historical literature that celebrates the greatness and vitality of our humanity:

> The dead civilizations are not "dead by fate;" and therefore a living civilization is not doomed inexorably in advance *migrare ad plures*: to join the majority of its kind that have suffered shipwreck. Though sixteen civilizations may have perished already to our knowledge, and nine others may now be at the point of death, and though Nature, in her wanton prodigality, may be wont to slay the representatives of a species, not by tens or scores, but by thousands and tens of thousands, before she rouses herself to create a new specific mutation, we need fear no evil from the encompassing shadow of Death; for we are not compelled to submit our fate to the blind arbitrament of statistics. *The divine spark of creative power is instinct in ourselves; and if we have the grace to kindle it into flame, then the stars in their courses cannot defeat our efforts to attain the goal of human endeavors.*[50]

49. Keynote Speech of Dr. Allan Goodman, International House, New York City, Sept. 22, 2002.

50. 4 TOYNBEE, A STUDY OF HISTORY 39 (1939) (emphasis supplied).

"The Generally Accepted Principles of International Law" as Philippine Law: *Towards a Structurally Consistent Use of Customary International Law in Philippine Courts*

*Aloysius P. Llamzon**

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ABSTRACT

Once considered largely irrelevant to the lives of individuals, contemporary International Law has moved far beyond its traditional role of regulating the conduct of states. Areas as diverse as human rights, commerce, and environment are now firmly established areas of international law, and have begun to regulate conduct between individuals and their states, even among individuals themselves. More than ever, international law is aimed at the internal workings of states, and the individuals that ultimately comprise them.

Yet for all its promise, international law remains stunted by an age-old problem — its lack of an effective central coercive mechanism to enforce its tenets. Reliance is thus placed upon National Courts, and the municipal judge, to bring universal norms of law and justice to enforceable fruition. This is a role, however, that judges are not always competent, or willing, or authorized by law, to assume.

Philippine courts are not exempted from these uncertainties. Through express constitutional mandate, the Philippines "adopts the generally accepted principles of international law as part of the law of the land;" thus, at least in theory, customary international law is automatically part of Philippine internal law, and is a direct source of rights and obligations without need for statutory confirmation. This theoretical certainty, however, is belied by the reality of how customary international law is identified and applied to resolve concrete cases in the Philippines. The Supreme Court has oscillated between approaching international law with expertise and an internationalist outlook, seeking harmonization with international conceptions of justice, and, in the majority of cases, an episodic, arbitrary, and disinterested manner of engaging international law, often displaying either hostility, a lack of sensitivity, or a lack of competence in the field.

This thesis consists of two related studies — first, from an exploration of the different legal theories underlying the interplay between international and municipal law, and an analysis of significant Supreme Court cases that have dealt with Public International Law, it will arrive at a singular theory concerning the jurisprudential attitude Philippine Courts display towards international law, and the proper manner through which international law should be approached, consistent with the Philippines' Constitutional architecture. This will, in turn, provide the legal tools necessary to propose a framework through which customary international law may systematically and consistently applied before Philippine Courts.

Right knows no boundaries and justice no frontiers; the brotherhood of man is not a domestic institution.

- Learned Hand[1]

There is no mystic over-law to which even the United States must bow.

- Oliver Wendell Holmes, Jr.[2]

I. INTRODUCTION

International law has passed the time when it was considered mere intellectual stimulation, but of no real significance in the ordinary work of lawyers and judges. Thanks to national laws that incorporate it within domestic legal systems and of judges increasingly willing to give it effect, international law is now reaching a stage of great practical importance. It is a change that reflects the great strides in the scope and content of international law itself. In an age that has seen international law evolve geometrically in scope and promise, it becomes almost trite to say that contemporary international law no longer confines itself to regulating relations between States. International law has indeed changed radically from what it was a half-century ago, when Oppenheim could confidently conclude that "States solely and exclusively are the subject of international law" [3] to the extent that it can now legitimately lay claim as the

1. Addresses and Lectures of Judge Billings Learned Hand (May 20, 1961), *in* GEORGE SELDES, THE GREAT THOUGHTS 174 (1985).
2. *In re* Western Maid, 257 U.S. 419, 432 (1922). Justice Holmes more extensively stated:

   In deciding this question we must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic over-law to which even the United States must bow. When a case is said to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules.
3. 1 OPPENHEIM, INTERNATIONAL LAW § 13 (1st ed. 1905). Reflective of the shift in paradigm, the latest edition of Oppenheim now reads: "States are the principal subjects of international law." 1 OPPENHEIM'S INTERNATIONAL LAW 16 (Robert Jennings & Arthur Watts eds. 9th ed., 1992).

groundwork for the transnational affairs of private individuals and companies and, to a more limited extent, the internal workings of States, most notably in the fields of human rights, international environmental law, and trade.[4]

Yet it is that same dynamism which ironically exposes international law's timeless weakness with even more urgency, given the multifarious problems the global polity faces which international law seeks to address — the absence of an effective central coercive mechanism to enforce international norms remains a serious stumbling block for international law.[5] Indeed, in an arena where all the players are both sovereign and equal, the difficulty of effective enforcement is unsurprising.

International law thus turns towards States themselves to give international norms teeth. The U.S. Supreme Court has observed that "[u]ntil international tribunals command a wider constituency, the courts of the various countries afford the best means for the development of a respected body of international law."[6] Much reliance is placed on the coercive powers of domestic courts, and international lawyers commonly

4. *See* D.J. HARRIS, INTERNATIONAL LAW: CASES AND MATERIALS 16 (5th ed. 1998); LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 280 (1995) [hereinafter HENKIN, INTERNATIONAL LAW]. The word "transnational," of course, is terminology that carries the coinage of Judge Jessup, who suggested that the traditional divisions between public international law and private international law, and even some national law, might be "submerged in an ocean of 'transnational law." PHILIP C. JESSUP, TRANSNATIONAL LAW 15-16 (1956).

5. One recalls the standard Austinian criticism that international law is not true 'law' because of its absence of direct coercive power. Indeed, when measured against the classic positivist definition of law (as the command of a sovereign, in turn defined as a person who received the habitual obedience of members of an independent political society and who did not owe such obedience to any other person), international law does not qualify as 'positive law'. *See generally* AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832), *cited in* HARRIS, *supra* note 4, at 6. This anachronistic view has been scathingly, and somewhat defensively, criticized by international lawyers many times over. Judge Fitzmaurice, for example, maintains that "there has always been a respectable body of international lawyers that has both considered enforceability to be a necessary characteristic of any system of law, properly so called, and has also believed that international law possessed this characteristic, even if only in a rough and rudimentary form." Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement,* 19 MODERN L. REV. 1 (1956). While these observations stray somewhat from the object of this work, they do serve to highlight the often overlooked fact that States themselves, through their respective courts, possess the potential to give effect and enforcement to international law, and can supply the necessary coercive power international law is perceived to lack in many cases.

6. First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 775 (1972) (Powell, J.).

refer to national courts in particular, as a reliable, though diffused, system for ensuring compliance with international norms, urging judges to apply these norms rigorously.[7] Many consider national judges as the best candidates within national systems to grapple with this important task, because of their independent status and apolitical role.[8] Viewed in this context, the State may be considered an organ of international law,[9] and the national judge, its foremost champion. The great modernist Hans Kelsen took a similar view, considering municipal courts as a sanctioning force bringing international law closer to the traditional conception of law.[10] A more practical reason for international law's reliance upon individual States, however, lies in the simple fact that the vast majority of international rules can only be put into operation if the domestic legal systems of States are ready to implement them.[11]

Unfortunately, municipal law[12] itself is often unprepared, or unwilling, to assume the responsibility of effecting international law. While it is true

7. Eyal Benvenesti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts,* 4 EUR. J. INT'L. L. 159 (1993). As Professor Benevesti noted, many publicists embrace the prospects of having national courts as enforcers of international obligations. *See generally* Harold Hongju Koh, *Transnational Public Law Litigation,* 100 YALE L.J. 2347 (1991); Charney, *Judicial Deference in Foreign Relations,* 83 AM. J. INT'L. L. 805 (1989); Andreas Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued,* 84 AM. J. INT'L. L. 444 (1990); Brilmayer, *International Law in American Courts: A Modest Proposal,* 100 YALE L.J. 2277 (1991); Philip R. Trimble, *A Revisionist View of Customary International Law,* 33 UCLA L. REV. 665 (1986).

8. Benvenesti, *supra* note 7.

9. *See* PHILIP C. JESSUP, THE USE OF INTERNATIONAL LAW 63 (1959) (citations omitted).

10. *See* HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 4 (1949). *Cf.* AUSTIN, *supra* note 5 and accompanying text.

11. Antonio Cassese, *Modern Constitutions and International Law,* 192 RECEUIL DES COURS 335, 341 (Academie de Droit International, 1985) [hereinafter Cassese, *Modern Constitutions*]. For example, extradition treaties, conventions on diplomatic immunities, and customary rules on the treatment of foreigners, in particular on the expropriation or nationalization of foreign assets, can only achieve their intended effects if national authorities behave in the way prescribed by international law.

12. International law uses this term to refer to the law of individual States. The International Law Association has observed that the term 'Municipal Law' carries a negative connotation, and has advocated the use of the less loaded term "National Law." *See* INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 66TH CONFERENCE 326 *et seq.* (1994). For purposes of this work, however, the term "Municipal Law" shall continue to be used, as that term has retained its currency in International Law literature.

that many constitutions contain explicit references to international law that determine the status of international law within their domestic legal systems,[13] judges across the world usually refuse to live up to the vision of international lawyers, unwilling to give effect to international law if such would mean the abdication of short-term governmental interests.[14]

The Philippines is not spared from these uncertainties. While the Constitution categorically declares "the generally accepted principles of international law [as] part of the law of the land,"[15] an examination of the Philippine Supreme Court's occasional decisions that delve into international law reveals a Court that oscillates between an embrace of international law and a global outlook, and a more protectionist, insular judicial attitude that would readily eschew international norms,[16] indicative of the absence of strong philosophical foundations as to the proper role and place international law has under Philippine law. This is not altogether unexpected. The essence of our democracy mandates that the Constitution be given the highest fealty; under its framework, the incorporation of principles of international law by the Judicial branch must compete and harmonize itself with other equally revered (if not more important, at least

13. The Constitutions of Austria, Italy, Germany, Bulgaria, and Russia, among others, all declare that the generally recognized principles of international law shall form part of the domestic legal system. *See* AUSTRIAN CONST. art. 9 ("The generally recognized rules of international law shall be considered as component parts of the Federal Law."); ITALY CONST. art. 10 ("Italian law shall be in conformity with the generally recognized rules of international law."); F.R. GERMANY CONST. art. 25 ("The general rules of public international law are an integral part of federal law."); *See* BULG. CONST. art. 5(4) (adopted 1991) (providing that international treaties ratified by Bulgaria have the force of domestic law and supercede contrary provisions of national law); KONST. RUSSIAN FED. art. 15 (adopted 1993) ("The commonly recognized principles and norms of international law and international treaties of the Russian Federation shall be a component part of its legal system. If an international treaty of the Russian Federation stipulates other rules than those stipulated by law, the rules of the international treaty shall apply.").

14. Benvenisti, *supra* note 7 (identifying from his survey of municipal cases from various States dealing with international law the "judicial tendency to defer to the Government" in three distinct stages: (1) Courts tend to interpret narrowly the articles of their national constitutions that import international law into the local legal systems; (2) national courts tend to interpret international rules so as not to upset their governments' interests, sometimes seeking guidance from the executive for interpreting treaties; (3) that courts use a variety of 'avoidance doctrines', such as the act of State doctrine, in ways that shield both their own and foreign governments from judicial review under international law.)

15. 1987 PHIL. CONST. art. II, § 2 ("The Philippines...adopts the generally accepted principles of international law as part of the law of the land.").

16. *See infra,* Chapter 3 (presenting a critical analysis of significant Supreme Court decisions).

from the domestic perspective) principles such as the separation of powers, and the primary role given to the Executive and to some extent, the Legislature, in matters of foreign relations.

Therefore, the task Philippine courts are continually faced with is to fashion a sensible working relationship between the two systems; accommodating international law effectively within the Constitutional and statutory landscape of the Philippine legal system.

II. THE PREMISES OF THE INQUIRY:

An Introduction to the Monism-Dualism Debate, and to Customary International Law

A. Clash of Theories: Dualism v. Monism in Contemporary Terms

While an extensive theoretical exegesis surrounding the nature of the relation between international and municipal law would be out of place in this work, it cannot be denied that theoretical questions have had a certain, though not decisive, influence on writers dealing with substantive issues, and also upon courts.[17] Thus, a brief exposition on these theories is helpful to ground the discussion better on their philosophical backbone.

There are two basic viewpoints concerning the relationship between international and domestic law — "monism" and "dualism." Although there is much uncertainty surrounding these terms, a survey of related literature[18] suggests the general definitions. The *monist* view is that international and domestic law are part of the same legal order; international law is automatically incorporated into each nation's legal system, and international law is supreme over domestic law. Monists contend that there is but a single system of law, with international law being an element within it alongside all the various branches of domestic law.[19] Monism requires, among other things, that domestic courts "give

17. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 31 (5th ed. 1998).

18. For an extended discussion on the history of the monist and dualist debate, *see* ANTONIO CASSESE, INTERNATIONAL LAW 162-65 (2001) [hereinafter CASSESE, INTERNATIONAL LAW]. The theoretical underpinnings of the debate are also summarized excellently in BROWNLIE, *supra* note 17, at 31-34; 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 3, at 53-56. For a more policy-oriented perspective, *see* Myres S. McDougal, *The Impact of International Law Upon National Law: A Policy-Oriented Perspective,* 4 S. DAK. L. REV. 25 (1959), *reprinted in* MCDOUGAL & ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER 157 (1960).

19. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 205 (1994).

effect to international law, notwithstanding inconsistent domestic law, even domestic law of a constitutional character."[20]

In contrast, the *dualist* view is that international and domestic law are distinct; each nation determines for itself when and to what extent international law is incorporated into its legal system, and the status of international law in the domestic system is determined by domestic law.[21] Under this view, "[w]hen municipal law provides that international law applies in whole or in part within our jurisdiction, this is merely an exercise of the authority of municipal law, an adoption or transformation of the rules of international law."[22]

As these definitions suggest, the debate between monism and dualism is in part a debate about where one should look to determine international law's domestic status: monism looks outward to the structure and content of international law; dualism looks inward to domestic standards and processes.[23]

Most commentators, including Philippine authorities,[24] agree that at least during the latter half of this century, dualism has been the prevailing view.[25] In recent years, however, there has been a definitive revival of monist thought throughout international legal circles. The revival, however, is not one of the traditional monist model, since few today contend that all of international law is automatically incorporated into every domestic legal system, and that international law does (or should) always tower over municipal law when the two conflict. Professor Bradley has thus coined the phrase "internationalist conception" to describe the current trend of thought regarding the relationship between international and domestic law, to distinguish it from pure monism.[26] The underlying theme of the internationalist conception is that the incorporation and status

20. HENKIN, INTERNATIONAL LAW, *supra* note 4, at 64.

21. HIGGINS, *supra* note 19.

22. BROWNLIE, *supra* note 17, at 33.

23. Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception,* 51 STAN. L. REV. 529 (1999).

24. Father Bernas categorically views the Constitution's Incorporation Clause as indicative of the dualist conception of Philippine law. *See* JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 55 (1996) [hereinafter BERNAS COMMENTARY]. *See also* ISAGANI CRUZ, INTERNATIONAL LAW 47 (8th ed. 1998).

25. *See, e.g.,* HENKIN, INTERNATIONAL LAW, *supra* note 4, at 66 (1995) ("The international system today...is essentially dualist in principle...").

26. *See* Curtis Bradley, *The* Charming Betsey *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law,* 86 GEO. L.J. 479, 497-504 (1998).

of international law in the U.S. legal system should be determined, at least to some extent, by international law itself.[27]

The monism-dualism debate has bedeviled international lawyers for a long time, with no visible end in sight. Continuing vagueness as to the meaning of the terms, and of its usefulness as a framework for discussing what actually occurs in domestic governments, have led some to avoid the philosophical discussion completely, believing the debate to be entirely divorced from reality.[28] There are also those who feel that the entire monist-dualist debate is *passé*, and that as a practical matter, it is difficult to convince courts to apply international law, especially given a conflict between the international and the domestic.[29] Judge Higgins, however, points out that the difference among courts in response to a clash of international law and domestic law in various domestic courts is substantially conditioned by whether the country concerned is monist or dualist in its approach.[30] Still, even the thought process of domestic courts is often instinctive, rather than explicitly predicated. Rather than devoting further reflection to abstractions, it is more fruitful to examine the interplay within the particularities of Philippine law and jurisprudence.

B. *The "International law" being incorporated: An Overview of Customary international law*

Before entering into that discussion, a brief re-examination of the nature of customary international law, the principal source of the "international law" incorporated, is in order.

With an overabundance of outstanding scholarship on the subject of customary international law, and repeated syntheses by Philippine textbooks[31] and undergraduate theses,[32] this section will not presume to add more to an already rich body of work. It is helpful, however, to recall by way of overview the basic principles of this often controversial source of law, to aid in understanding the theory and practice of Incorporation law and jurisprudence in the chapters that follow.

27. *See, e.g,* Harold Hongju Koh, *Transnational Public Law Litigation,* 100 YALE L.J. 2347, 2397 (1991).

28. *See* Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law,* 92 RECEUIL DES COURS 70-80 (1957).

29. *See* HIGGINS, *supra* note 19, at 206.

30. *Id.*

31. *See, e.g.,* CRUZ, *supra* note 24, at 22-24.

32. An outstanding summary of the nature of customary international law is found in: Anna Leah Fidelis T. Castañeda, Note, *From Prerogative to Prohibition: Article 2(4) as Customary International Law in* Nicaragua v. U.S., 38 ATENEO L.J. 1, 9-19 (1993).

1. The evolving content of customary international law

Customary international law is one of the two primary sources of international law which, along with treaties, make up the bulk of the rules of international law.[33] Unlike treaties, which are contractual and written in nature, customary international law results from "a general and consistent practice of States followed by them from a sense of legal obligation."[34] The two basic elements of customary law are, therefore, State practice and *opinio juris*, or the sense of legal obligation under which a State acts.[35] Through analysis of these two elements, as well as their duration and character, rules of customary international law eventually develop and gain acceptance by the international community as binding law. Traditionally, customary international law has covered areas of international law such as the laws pertaining to territory, immunities, the law of the sea, and the use of force by one State against another. Customary international law is often later codified by treaty, which may act as an authoritative restatement of the state of customary law regarding a certain area. [36]

In times past, customary international law was primarily concerned with the external conduct of States, with the bulk of rules covering the law of the sea and the laws regulating warfare between States. With the modern development of international law, most notably in the area of human rights, customary international law has come to cover many areas historically regarded as matters left to States themselves, to which international law itself was unconcerned.[37] Human rights principles that

33. *See* BROWNLIE, *supra* note 17, at 4-11; HARRIS, *supra* note 4, at 35.

34. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2) (1987); Statue of the International Court of Justice, June 26, 1945, art. 38(1)(b) (including, as a source of international law for the Court to apply, "international custom, as evidence of a general practice accepted as law").

35. *See generally* Asylum Case, 1948 I.C.J. 24 (Oct. 5); North Sea Continental Shelf Cases, (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 4 (Feb. 20).

36. As, for example, in the case of the Law on Treaties [*See* Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF.39/27, 1155 U.N.T.S. 336 (1969)] and the Law of the Sea (*See* Third United Nations Convention on the Law of the Sea). Certain aspects of these (and other) "codification" treaties, of course, also contain progressive developments in the law not currently reflective of custom.

37. Areas of law that delved into the relation between States and individuals, especially their own nationals, were once considered matters solely within jurisdiction of States. As outlined in the Introduction however, international law is no longer concerned (if it ever was) solely with States. *See* BROWNLIE, *supra* note 17, at 580-94; Muchlinski, *The Status of the Individual under the European Convention on Human Rights and Contemporary International Law,* 34 INT'L COMP. L. Q. 376 (1985). One striking example of this is the right of individuals, under the European Convention on Human Rights, to directly complain and have standing to sue for violation of their rights.

have attained the status of customary international law include prohibitions on slavery and torture.[38] However, due to the evolutionary process of the formation of customary international law and the subjective nature of its recognition, there are other more controversial principles which are argued also to have attained customary international law status. These principles include prohibitions of some uses of the death penalty,[39] of discrimination based on sexual orientation,[40] and of "the advocacy of national, racial or religious hatred."[41] Evident from these examples, modern human rights law, and thus customary international law, seeks to govern not only the relationships between States, but also the relationship between a State and its citizens and the relationships of one citizen with another.[42]

2. The Modern Manner of Customary Law-Making

In the post-World War II era, equally important to recognize is the dramatic transformation of the nature of customary international law-making.[43] The establishment of the United Nations and other international organizations made it easier for nations to meet and express their views about the content of international law. These organizations also facilitated the proliferation of multilateral treaties on a wide range of subjects, including human rights. Unsurprisingly, these changes, have influenced the nature of customary international law.

Perhaps the most important change in the nature of customary law-making, however, is that it is now less tied to state practice. Courts now rely on General Assembly resolutions, multilateral treaties, and other international pronouncements as evidence of customary international law

38. *See* RESTATEMENT (THIRD), *supra* note 34, at 702. *See also* Filartiga v. Pena-Irala, 630 F.2d 876, 882 (2d Cir. 1980) (holding that the proscription of torture had attained the status of customary international law).

39. *See* United Nations Human Rights Committee, General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, General Comment No. 24(52) at 3, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).

40. *See* David A. Catania, The Universal Declaration of Human Rights and Sodomy Laws: A Federal Common Law Right to Privacy for Homosexuals Based on Customary International Law, 31 AM. CRIM. L. REV. 289, 315-18 (1994); James D. Wilets, International Human Rights Law and Sexual Orientation, 18 HASTINGS INT'L & COMP. L. REV. 1, 119 (1994).

41. UN Committee, *supra* note 39, at 3.

42. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position,* 110 HARV. L. REV. 815, 818 (1997).

43. *Id.* at 839.

without rigorous examination of whether these pronouncements reflect the actual practice of States. The *Nicaragua Case*[44] exemplifies this new outlook. In that case, the International Court of Justice relied heavily on General Assembly resolutions and multilateral treaties as evidence of customary rules concerning limitations on the allowable use of force and the principle of non-intervention, [45] and referred only generally to the relevant practice.[46]

Modern customary law-making also departs significantly from the traditional conception in the area of duration. It was once orthodox to require a substantial period of time to elapse before practice would ripen into legal binding custom.[47] Now, however, customary international law can develop very rapidly. The World Court, for instance, has stated that "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law."[48] The accelerated process of customary law-making is due in part to improvements in communication, which have made the practice of States widely and quickly known.[49] It is also due to the fact that discrete events such as pronouncements of international organizations and the promulgation of multilateral treaties are treated as evidence of customary international law.[50]

44. Military and Paramilitary activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

45. *See id.* at 98-107.

46. LOUIS HENKIN, RICHARD PUGH, OSCAR SCHACHTER & HANS SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 85 (3d ed. 1993). The erosion of the State practice requirement is discussed more extensively in Anthony D'Amato, *Trashing Customary International Law,* 81 AM. J. INT'L L. 101 (1987).

47. Professors Bradley and Goldsmith note that "[a]s late as 1963, Professor Briely's famous book on international law observed that '[t]he growth of a new custom is always a slow process.'" Bradley & Goldsmith, *supra* note 42, at 839 n. 154. *See also* The Paquete Habana, 175 U.S. 677, 686 (1900) (referring to "usage among civilized nations...gradually ripening into a rule of international law.").

48. North Sea Continental Shelf Cases (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 4, at 44 (Feb. 20).

49. Bradley & Goldsmith, *supra* note 42, at 840, *citing* RESTATEMENT (THIRD), *supra* note 35, § 102 reporters' note 2.

50. "The essence of the new modes of lawmaking is that they accelerate the process of customary law formation by relying upon the unique form of State practice which occurs in multilateral organizations like the United Nations." Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after* Filartiga v. Peña-Irala, 22 HARV. INT'L L.J. 53, 72 (1981).

III. THE INTERPLAY IN THEORY:

The Constitutional and Statutory tools of Incorporation

"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[51] Justice Gray's famous *dictum* is equally apt in describing the Philippines' fealty to international law within its legal system. Through the Constitution and various statutes, the Philippines exhibits a remarkable textual commitment towards internalizing international law. These statutes, in turn, allow international law to be "self-executing," i.e., international law is to be applied by courts in the Philippines without any need for it to be enacted or implemented by Congress.[52] The rationale for this, according to the Supreme Court, springs from the fact of statehood itself — the principles of international law "are deemed part of the law of the land as a

51. The Paquete Habana, 175 U.S. 667, 700 (1900).

52. In this sense, "international law" pertains to customary international law. Conventional international law, on the other hand, while equally binding as obligations of the Philippines, are not incorporated into domestic law, in the formal sense. The architecture of the Constitution has prescribed a different mode for having treaties made part of Philippine law: "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." PHIL. CONST. art. VII, § 21. *Cf.* Bayan v. Zamora, 342 SCRA 449, 492 (2000) ("In our jurisdiction, the power to ratify [a treaty] 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.").

The manner through which treaties become part of Philippine law is also known as the doctrine of *transformation,* to distinguish itself from the principle of incorporation. *See* MERLIN M. MAGALLONA, A PRIMER IN INTERNATIONAL LAW IN RELATION TO PHILIPPINE LAW 37 (1997) ("[C]onventional International law becomes Philippine law only by virtue of transformation. This means that treaty rules form part of Philippine law only if they comply with the specific constitutional requirement for this method..."). The evident reason for the Constitutional requirement of Senate concurrence before a treaty has any domestic effect is in order to preserve the essence of the Constitution's architecture, which vests the power to make law in Congress. Were it not so, the treaty-making power of the President could, through the 'backdoor,' create binding law without Congressional approval through the device of a treaty.

Of course, in the international arena, treaties concluded by empowered State officials are binding, regardless of whether the internal constitutional processes under municipal law are followed. *See* Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territories, 1932 P.C.I.J. Rep., ser. A/B, no. 44, at 24 ("a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.").

condition and consequence of our admission in the society of nations,"[53] and upon admission into international society, "the State is automatically obligated to comply with these principles."[54] Customary international law, in particular, is not made and developed by Congress or the Courts.[55] In a real sense, Courts *find* international law rather than make it.[56]

The method through which this *finding* occurs, of course, is not unbounded. The Philippine legal system has its own mechanism for incorporating international law within the Philippines. The principal instrument of Incorporation is found in the Constitution, and any attempt at understanding the interplay between Philippine law and international law must begin there.

A. *The Incorporation Clause: Article II, § 2 of the Constitution*

The Philippines joins a surprisingly numerous number of States that explicitly provide for the status of international law within the municipal sphere.[57] Article 2, Section 2 of the 1987 Constitution contains the familiar phrase that adopts "international law as part of the law of the land," a provision that has existed from the inception of the Republic. In totality, it reads: "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." This is of exactly the same

53. Holy See v. Rosario, 238 SCRA 524 (1994); U.S. v. Guinto, 182 SCRA 644 (1990).

54. U.S. v. Guinto, 182 SCRA 644 (1990).

55. *See* Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984). Professor Henkin argues that even with the undoubted power of common law courts to create law, international law should not be considered federal common law. *Id.* at 1561.

56. *Id.* at 1561-62. *See also* MAGALLONA, *supra* note 52, at 39 ("Once the Incorporation Clause is invoked in an appropriate case or proceeding in the Philippines and a norm is qualified as one of "the generally accepted principles of international law," it becomes applicable without the need of proving it as part of Philippine law."). The Supreme Court has explicitly adopted this view recently. *See* Tañada v. Angara, 272 SCRA 18 (1997).

57. *See supra* note 13 and accompanying text. A comprehensive study of the various States that explicitly adopt international law as part of their domestic legal systems was made by Professor Cassese. *See* Cassese, *Modern Constitutions, supra* note 11.

wording as the 1973 Constitution,[58] which in turn, is a near-verbatim retention of the 1935 provision.[59]

Absent the Incorporation Clause, the status and applicability of international law in the Philippines is thought to be less certain,[60] although the Supreme Court has held that the principles of international law would apply in the Philippines *automatically* even without the Clause.[61] Without pausing to consider the debate that has recently echoed in the leading law

58. 1973 PHIL. CONST. art. II, §3.

59. 1935 PHIL. CONST. art. II, § 3 ("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.").

60. Dean Magallona opines that absent the Incorporation Clause, the status and applicability of the "generally accepted principles of international law" as a source of specific legal rights and duties within Philippine jurisdiction becomes a matter of doubt and uncertainty, particularly as to their enforceability in the courts. He further believes that "[t]he Incorporation Clause may imply that general international law only forms part of Philippine law insofar as they are expressly adopted. Accordingly, unless so incorporated, general norms of international law may acquire no enforceability in the Philippine legal system." He then refutes the Court's rulings in *Holy See v. Rosario* and *U.S.A. v. Guinto* (holding that even without the Incorporation Clause, international law is automatically deemed part of Philippine law as a consequence of Statehood), by noting that those *dicta* were influenced by common law principles, which, in his view, adopt international law in its full extent by the common law as part of the law of the land (*citing* Blackstone's Commentaries and *The Paquete Habana*).

Note that by the nature of common law system, 'incorporation' is accomplished by the very judicial decisions which affirm this doctrine. This process of incorporation should contrast with incorporation effected by virtue of an explicit constitutional mandate as is the case of the Philippines. In contrast too with the law-making function of common-law courts, the incorporation doctrine as framed in *U.S.A. v. Guinto* and *Holy See v. Rosario* does not become law by the exclusive force of judicial pronouncement, as against the clear meaning of the Incorporation Clause of the Constitution, with respect to which the role of the courts is only to interpret and apply the law.

MAGALLONA, *supra* note 52, at 43-45.

While correct as a whole, this view is not entirely accurate. International law is not 'incorporated' into United States law in the ordinary common-law sense. "[T]o call international law federal common law is misleading.... Unlike federal common law, customary international law is not made and developed by the federal courts independently and in the exercise of their own law-making judgment. In a real sense federal courts *find* international law rather than make it, as was not true when courts were applying the 'common law'..." Henkin, *supra* note 55, at 1561-62.

61. *See supra* notes 54 & 55, and accompanying text.

reviews of the United States,[62] this thesis will proceed with the confidence that the constitutional underpinnings surrounding the incorporation of customary international law in the Philippines through Judicial action is unquestionable.

But what does the Incorporation Clause really contemplate? From a textual standpoint, its precise scope and content is elusive, as the text of the provision does not provide *what* these "generally accepted principles" are, *who* is to give effect to them, or *how* these "executors" are to be guided in making their determination. Thus, consistent with orthodox constitutional interpretation, an understanding of the historical origins and the intent of the framers is the first step towards ascertaining the scope and meaning of the Incorporation Clause. This is the first task of this thesis.

1. The Original Understanding of the Incorporation Clause: The Intent of the Framers

a. Origins: the 1935 Constitution

The Incorporation Clause was first introduced into Philippine law by the 1935 Constitution. The origins of "Article 2--Declaration of Principles" of that Constitution were based largely upon reports of a number of committees,[63] which were, in turn, inspired by the different constitutional precepts introduced in the Convention by the delegates and by provisions of the Constitutions of Germany, Spain, and other countries of continental Europe.[64] The Incorporation Clause is thus a break from the Philippines' traditional model for Constitutional Law, the United States. No such

62. A recurring debate continues in the United States as to whether U.S. Courts (both Federal and State) have the Constitutional authority to incorporate customary international law into their municipal law. While the intellectual virility of the clash is fascinating, the Incorporation Clause of our own Constitution (the U.S. Constitution does not possess a similar provision) sidesteps the need to enter the debate. *See* Curtis A. Bradley & Jack L. Goldsmith, *supra* note 42, at 818; Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

63. These were the Committee on Declaration of Principles, the Committee on National Defense, the Committee on Labor and Social Welfare, and the Committee on the Conservation of Natural Resources of which were Chairmen, respectively, Delegates Palma, Alejandrino, Delgado, and Locsin, upon the suggestions of President Recto. 2 THE PHILIPPINE CONSTITUTION: ORIGINS, MAKING, MEANING, AND APPLICATION 167 (Jose M. Aruego et al eds., 1970).

64. *Id.* at 168.

explicit statement on incorporation exists in the United States Constitution.[65]

Beyond facially identifying its origins, however, ascertaining the specific intent of the framers in adopting the Incorporation Clause is a far more difficult enterprise. One searches the entire record of the proceedings leading to the adoption of the 1935 Constitution for any light on the matter in vain, for unlike other aspects of the Commonwealth Constitution, the Incorporation Clause was never once directly discussed during the floor deliberations. While there was extensive discussion of Article 2, Section 3, practically all of it was devoted to a fervent debate on the merits and demerits of the political, philosophical, and legal repercussions of the Philippines "renounc[ing] war as an instrument of national policy." The Incorporation Clause was discussed only tangentially, and on the rare occasions wherein it was mentioned, only within the context of the policy renouncing war.

One of these rare instances came with the comments of Delegate Abella on November 12, 1934. He observed that the (then) proposed article was imbued with a progressive spirit, and that the precept renouncing war and adopting the generally accepted principles of international law was the "product of a post-war principle as embraced and sponsored by the agencies of peace."[66] He would later note that one

65. The American Constitution, enacted in 1787 and brought into force in 1789, was the first in the world to acknowledge the existence and binding force of international law. Cassese, *Modern Constitutions*, *supra* note 11, at 352. It provides: "The 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, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. CONST. art. VI, ¶ 2. Also, U.S. CONST. art. I, § 8, ¶ 10 includes, among the powers of Congress, the authority "[t]o define and punish piracies and felonies committed on the high seas, and offences against the law of nations."

Be that as it may, the U.S. Constitution is vague as to the exact status of international law within both State and federal law. *See generally* Bradley & Goldsmith, supra note 42.

66. In full, Delegate Abella's remarks were:

I cannot but mention here the distinguishing features of the brain-child of the sub-committee of seven. They reveal much progressive spirit in them. They show that their authors are awake to the pressing needs of the times and conditions obtaining in their country. *A precept renounces war and adopts the generally accepted principles of international law. This is the product of a post-war principle as embraced and sponsored by the agencies of peace.* The Philippines, a weak nation, has much faith in it. I am sure this is one provision which will be left intact, amidst the scuffle and wranglings that are presently coming over in this Convention.

implication of the invocation of international law in the provision was that the renunciation of war did not mean that the Philippines would lose its right to defend itself. *"Aquí se hace mención del Derecho Internacional. El derecho Internacional sobre este respecto, ha puesto en desuso la declaración de guerra, y yo voy a citar un internacionalista que a este efecto dice lo siguiente: (Sr. Abella leyó página 352, Derecho Internacional por Hurley.).*"[67]

Another relevant comment was found in Delegate Osias' speech, which outlined the underlying rationale for the clause, at least in his view:

> *Nationalism and internationalism.* The Convention is faced with another difficult problem. It is common knowledge that dependent people fight strenuously for nationalism and internationalization. Our people properly have fought and will fight for these ideals because they are an assertion of their personality.
>
> Yet, paradoxical as it may seem, now that the Filipino people are on the eve of entering into full nationhood they must concern themselves more and more with internationalism and internationalization. Our outlook must be broadened. We must shape our life as a nation belonging to a family of nations. We are not to be contented with the thought of independence; it is necessary that we think of interdependence. The interests of individuals and nations are interrelated and interbound.
>
> It behooves this Nation to steer its course between the Scylla of chauvinistic nationalism and the Charybdis of utopic internationalism.[68]

Unfortunately, that glowing rhetoric forms one of the only instances in which the framers discussed the policy and legal implications behind the Incorporation Clause. Thus, there is significant evidence to suggest that the framers of the Commonwealth Constitution understood the Incorporation Clause merely as an adjunct of the general policy renouncing war, and little more. The Incorporation Clause would therefore have to find its scope and meaning in future constitutions and from the Supreme Court, which,

Speech of Monday, Nov. 12, 1934, *reprinted in* 3 PROCEEDINGS OF THE PHILIPPINE CONSTITUTIONAL CONVENTION (1934-35) 240 (Salvador H. Laurel ed. 1966) (emphasis supplied).

67. "Here there is mention of International Law. The International Law in this regard, has placed aside the declaration of war, and I will cite an Internationalist who on this point has said the following: *(Delegate Abella read page 352, International Law by Hurley).*" Remarks on Wednesday, Dec. 12, 1934, *reprinted in id.* at 944 (the informal translation from the Spanish was made by Dr. Teodoro A. Llamzon, Professor of Linguistics at the SEAMEO Regional Language Center, Singapore [ret.]).

68. Speech of Aug. 24, 1934, *in* 1 PROCEEDINGS OF THE PHILIPPINE CONSTITUTIONAL CONVENTION (1934-35) 467 (Salvador H. Laurel ed. 1966).

without any definitive legal parameters, would have the unchecked authority to write into it the widest of readings.[69]

b. Planned amendment: events surrounding the 1973 Constitution

The felt necessity for change that prompted the convening of the 1971 Constitutional Convention also gave academics a chance to take a critical look at the Incorporation Clause. Among the proposed changes was one from the University of the Philippines Law Center, which sought to amend the clause with: "adopts the general (sic) accepted principles of international law as part of ITS MUNICIPAL LAW."[70] The proposal consisted of a substantial retention of the Incorporation Clause, with a modification. The change of the words "the law of the Nation" to "its municipal law" was thought to be a necessary clarification "in order to avoid any conjecture that the generally accepted principles of international law, whether customary or by treaty provisions, will be incorporated into Philippine law with the force of Constitutional provisions."[71] Through the proposed amendment, "it will be beyond question that international law principles and treaty provisions have only the same status as statutes enacted by legislature in this jurisdiction."[72]

Despite the adoption of the substance of the U.P. Law Center Proposal by Resolution,[73] the 1971 Convention's Committee on Declaration of

69. These ideas are discussed with more detail in chapters 3 & 4, *infra* .

70. U.P. LAW CENTER, U.P. LAW CENTER CONSTITUTIONAL REVISION PROJECT 19 (1970). In full, the text of the proposed amendment to Article 2, Section 3, reads: "The Philippines renounces war as an instrument of national policy, REAFFIRMS ITS DEDICATION TO THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY UNDER THE RULE OF LAW and adopts the general [sic] accepted principles of international law as part of [the law of the Nation] ITS MUNICIPAL LAW." *Id.*

71. One visible error with that rationale, of course, is that the Incorporation Clause should not include treaty law within its parameters, as that originates from an entirely different source of law, with its own method of *transformation* under art. VII, § 21 of the Constitution. *See further supra* note 53 and accompanying text. It is an error not without Supreme Court authority, however. *See, e.g.,* Agustin v. Edu, 88 SCRA 196 (1979) (holding that the Vienna Convention on Road Safety is binding by virtue of the Incorporation Clause).

72. U.P. LAW CENTER, *supra* note 70.

73. Resolution No. 413, *A Resolution Proposing to Amend Section 3 Article II of the Present [1935] Constitution,* introduced by Hon. Pedro P. Romualdo, dated June 10, 1971, resolved and recommended a change of the words "the law of the Nation" to "its municipal law"; as "this clarification is necessary in order to avoid any conjecture that the generally accepted principles of international law, whether customary or by treaty provisions, will be incorporated into Philippine law with

Principles and Ideologies,[74] and in the official working draft Constitution,[75] the amendment was not carried on to the final text.[76]

the force of Constitutional provisions...with this proposed amendment, it will be beyond question that international law principles and treaty provisions have only the same status as statutes enacted by legislature in the jurisdiction."

Although unmentioned in the Resolution, the U.P. Law Center's proposed revision was undoubtedly the basis for Delegate Romualdo's proposal, as both the amended section, and the rationale given in the *Whereas* clause, were exact reproductions of the former's. *Cf. supra* note 70.

74 In the Minutes of the Meeting of the Committee on Declaration of Principles & Ideologies (Delegate Raul Roco, Chairman) of Nov. 25, 1971, held at the Manila Hotel, at 4-5, the following took place, which represents possibly the most detailed Conventional discussion on the Incorporation Clause ever: Delegate Verzola pointed out that they have amended the phrase, "...and adopts the generally accepted principles of international law as part of the law of the nation," to read, "The Philippines adopts the generally accepted principles of international law *as part of its municipal law.*" He said the Committee felt that the latter was stronger in tone. *Id.* at 3, ¶ 15. Delegate Lichauco asked whether this phrase would bind us irrevocably to international commitments and agreements, even if they worked against our national interests. He cited the patents agreement which have created havoc on the economy. He queried whether the proposed phrase would render unconstitutional any decision of the country to break these treaties and commitments. *Id.* at 3-4, ¶ 16. The Chair [Delegate Raul Roco] and Delegate Verzola answered that according to the UP Law Center's interpretation, the "part of its municipal law" phrase would place "generally accepted principles of international law..." on the same level as ordinary statutes, which can be revoked or abrogated. *Id.* at 5, ¶ 17. Delegates Ordoñez and Espiritu made it clear that *"principles of international law" were not rigid. They were mere guidelines in conducting international relations.* The countries remain sovereign and they could break away from these commitments any day, with the understanding that they should be ready to face the possible consequences. *Id.* at ¶ 18. The provision was *approved* by the majority. *Id.* at ¶ 19. (emphasis added).

75. STEERING COUNCIL, OFFICIAL WORKING DRAFT OF THE NEW (1973) CONSTITUTION (Carlos Ledesma, Acting Chairman, Oct. 30, 1972): Art. 2, § 3 of the Draft provided: "The Philippines renounces war as an instrument of national policy and adopts the generally accepted principles of international law as part of the municipal law, and adheres to the policy of peace, equality, justice, freedom, cooperation and amity with all nations." At this point in the evolution of the 1973 Constitution, the U.P. Law Center Draft, which included a phrase "reaffirm[ing] its dedication to the maintenance of international peace and security under the rule of law," was proposed to show a positive attitude on the part of the Philippines towards international peace and security under the rule of law, especially in line with the objectives of the United Nations, *see* U.P. LAW CENTER, *supra* note 70, at 19.

76. The final text of the provision read: "The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of

It is unclear from the floor deliberations as to why this occurred. Nevertheless, it should be noted that the proposed revision would not have broken new ground. By the time of the adoption of that Constitution, the Supreme Court had already established the exact status of principles of international law when incorporated into the Philippines, i.e., are merely of statutory effect.[77] Similarly, the Committee on the Declaration of Principles and Ideologies also seemed to adopt the position that Incorporated international law was to be given only statutory efficacy.[78] These could explain why the final text of the 1973 Constitution did not adopt the U.P. Law Center proposal, and instead, adopted the phraseology that survives to this day. Finally, by substituting the semantics of the last part of the clause from "law of the *nation*" to "law of the *land*," one of the greater purposes for convening the 1971 Convention, that of eliminating any lingering vestiges of colonial domination, was textually accomplished.

c. Reaffirmation: The 1987 Constitution

Unlike the 1971 Convention, the 1986 Constitutional Commission did not attempt to tinker with the Incorporation Clause in any substantial way. Both the proposed[79] and final[80] texts made no significant departure from the 1973 formulation. As with its predecessors, the Commissioners devoted scant attention to the provision's scope, meaning, or application.

What little was discussed was hardly elucidating. However, two interesting points do arise from the deliberations. First, Commissioner Serafin Guingona inquired on two occasions as to the nature of Section 2, Article II, and in each instance, implied that the Incorporation Clause covered both Conventional and Customary international law.[81] Nobody

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." 1973 PHIL. CONST. art. II, §3.

77. *See* extended discussion in Chapter 3, *infra*.

78. *See* Committee Deliberations, *supra* notes 53 & 54, and accompanying text.

79. "The Filipino people commit themselves to peace, equality and freedom. They renounce war as an instrument of national policy and adopt the generally accepted principles of international law as part of the laws of the land." *Reprinted in* JOAQUIN G. BERNAS, S.J., THE INTENT OF THE 1986 CONSTITUTIONAL WRITERS 75 (1996) [hereinafter BERNAS INTENT].

80. "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." 1987 PHIL. CONST. art. II, § 2.

81. *See* 4 RECORD OF THE CONSTITUTIONAL COMMISSION 665, 772 (1986) (proceedings of Sept. 16, 1986, and Sept. 18, 1986, respectively).

disabused him of that notion. More importantly, when Commissioner Guingona asked whether "generally accepted principles of international law" were adopted by this provision as part of statutory law or of constitutional law,[82] Commissioner Jose Nolledo mistakenly suggested that the phrase "laws of the land" referred to *both* statutory and Constitutional law.[83] Specifically, he maintained that at least the provisions of the United Nations Charter would form part of Constitutional Law: "It seems to me that all nations, regardless of the provisions of their municipal law, must respect the UN Charter."[84] As Father Bernas was to later observe, nobody adverted to the fact that Commissioner Nolledo's interpretation was a departure from what had hitherto been the accepted meaning of the provision.[85]

Two days later, however, during the period of amendment, Commissioner Adolfo Azcuna stated the correct rule, clarifying that "[w]hen we talk of generally accepted principles of international law as part of the laws of the land, we mean that it is part of the statutory type of laws, not of the Constitution."[86] The Commission unanimously voted for the provision's approval.[87]

2. The meaning of the phrase "Generally Accepted Principles of International Law"

The phrase "generally accepted principles of international law" admits to some ambiguity. The most authoritative enumeration of the sources of international law, Article 38 of the Statute of the International Court of Justice,[88] does not enumerate any of the sources within this rubric, as it is

82. Commissioner Guingona presented a hypothetical case where, despite a clear provision in the Constitution that ownership of corporations operating public utilities should be 60-40 equity in favor of Filipinos, a treaty was entered into later which would give the Filipinos a majority equity that is less than what was provided for in the Constitution. "[T]here will be a conflict now between two Constitutional provisions — the provision of 60-40 as expressly contained in our Constitution and the provision of a majority ownership as provided for in the treaty which is made a part of our Constitution....I was wondering whether it would be safer if we just consider treaties or conventions as part of our municipal law and not part of our Constitutional Law." *Id.* at 665.

83. *Id.*

84. *Id.*

85. BERNAS INTENT, *supra* note 79, at 75.

86. 4 RECORD OF THE CONSTITUTIONAL COMMISSION 772 (1986).

87. 37 voted in favor of Section 2, with no votes against, and no abstentions. *Id.*

88. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

(b) international custom, as evidence of a general practice accepted as law;

(c) general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, art. 38(1).

not quite the same as the "general principles of law" recognized under Article 38(1)(c). Professor Brownlie submits that the term "general principles of international law" could refer to rules of customary law, to general principles of law, or to logical propositions resulting from judicial reasoning on the basis of existing international law and municipal analogies.[89] However, it is also important from the viewpoint of Philippine constitutional law to keep in mind the distinction between conventional rules and customary norms, because of the difference in the methods by which each becomes Philippine law.[90]

Because of the expansive and inclusive implications of the phrase, some Philippine commentators (and indeed, the Supreme Court)[91] seem to maintain that both custom and "general principles of law" fall within the meaning of the Incorporation Clause. Dean Magallona, for example, views the Incorporation Clause as a recognition that both customary international law *and* general principles of law comprise the "generally accepted principles of international law," and unequivocally declares these sources of international law part of Philippine law.[92]

More dangerous perhaps is the fact that the phraseology of the Incorporation Clause appears pliant enough to support a view that the

89. BROWNLIE, *supra* note 17, at 18-19. The eminent publicist continues: "What is clear is the inappropriateness of rigid categorization of the sources. Examples of this type of general principle are the principles of consent, reciprocity, equality of States, finality of awards and settlements, the legal validity of agreements, good faith, domestic jurisdiction, and the freedom of the seas. In many cases these principles are to be traced to State practice. However, they are primarily abstractions from a mass of rules and have been so long and so generally accepted as to be no longer *directly* connected with State practice. In a few cases the principle concerned, though useful, is unlikely to appear in ordinary State practice.." *Id.*

90. *Id.* at 37. As stated previously, Conventional international law, of course, becomes part of Philippine Law through the Treaty Clause, 1987 PHIL. CONST. art. VII, § 21.

91. *See* International School Alliance of Educators v. Hon. Quisumbing, 333 SCRA 18 (2000), discussed in more detail in Chapter 3(B)(6) *infra*.

92. MAGALLONA, *supra* note 52, at 32.

"international law" the Constitution refers to is not limited merely to *public* international law. After all, the generic term "international law" has, in the past, been used to refer to principles of private international law, or to transnational commercial and admiralty principles, areas of law not considered within the ambit of public international law. And as seen above, there is no categorical description on the part of the framers as to the scope and content of the term. Indeed, the Supreme Court has sporadically expanded the term to include principles of transnational commercial law.[93]

3. "as part of the law of the land."

One of the few clear aspects of the framers' intent that arose from the deliberations in 1971 and 1986 was the intention to have "part of the law of the land" meant that incorporated international law would merely have the force of statute, and not constitutional imperative.[94] The phrase "law of the land" refers to the levels of legal rules below the Constitution, especially legislative acts and decisions of the Supreme Court.[95] Thus, it is incorrect to interpret this phrase as including the Constitution itself, because this would mean that the "generally accepted principles of international law" falls in parity with the Constitution.[96] Within the Philippines, therefore, general international law is in parity with statutes; both are "part of the law of the land." But because the Constitution is supreme law, inconsistent principles of international custom will never be given effect, at least under the domestic legal order.

In sum, Father Bernas derives two observations from Section 2, Article II of the Constitution. First, the Philippines, in its relations with other States, considers itself bound by international law. This is a necessary corollary of being a civilized State and member of the family of nations. Second, it makes "the generally accepted principles of international law" part of domestic law binding on the members of the national community in their relations with each other. The provision, like the law of most

93. *See* BPI v. De Reny, 35 SCRA 256 (1970), discussed in Chapter 3(F), *infra*.

94. *See supra* notes 83-88 and accompanying text.

95. CIVIL CODE, art. 8: "Judicial decisions applying or interpreting the laws or the Constitution shall form part of the legal system of the Philippines."

96. MAGALLONA, *supra* note 52, at 47. Notably, there are certain principles of international law, such as sovereign immunity, which have been made part of the Constitution (albeit largely through interpretation by the Supreme Court instead of strict textual inclusion). The principle of sovereign immunity is the most apparent example of this (1987 PHIL. CONST. art. XVI, § 3: "The State cannot be sued without its consent,") as applied in, *inter alia*, Holy See v. Rosario, 238 SCRA 524 (1994), and the principle renouncing was as an instrument of national policy (Art 2, § 2), which is a fundamental norm of international law enshrined in the U.N. Charter.

States and most courts today, adopts "dualism" which views the domestic legal system and international legal systems as discrete entities. At the same time it *bridges* that duality by making international law part of domestic law.[97] Theoretically, therefore, international law can be used by Philippine courts to settle domestic disputes in much the same way that they would use the Civil Code or the Penal Code and other statutes passed by Congress.[98]

B. Judicial notice of the "law of nations"

The current law on evidence in the Philippines, whose progenitors predate even the 1935 Constitution,[99] contains a provision related to international law that has been obscured by inactivity, despite its immense practical implications. Under the Revised Rules on Evidence, *mandatory* judicial notice is given to the "law of nations."[100] Coupled with the Incorporation Clause, the obligation judges have to judicially notice and apply international law "as often as questions of right depending upon it are duly presented for their determination,"[101] seems to take, at least in theory, a decidedly pro-active approach: even in the absence of an explicit invocation of international law by the parties, Philippine magistrates are expected to pass upon cases fully aware of possible international law implications, and to use it as a source of rights and obligations between the parties, should it be applicable. This, in turn, gives judges (depending on how they choose to determine what "generally accepted principles of international law" exist that are applicable to the case) considerable latitude to *find* applicable law from a reservoir of principles that are dynamic, and constantly changing with the times.

97. JOAQUIN G. BERNAS, S.J., FOREIGN RELATIONS IN CONSTITUTIONAL LAW 10-11 (1995) [HEREINAFTER BERNAS, FOREIGN RELATIONS].

98. *Id.* at 16.

99. The Philippines follows the lead of the Anglo-American system of evidence. In the United States, the rules, principles and traditions of international law, or "the law of nations," will be noticed in Federal and State courts. 2 MCCORMICK ON EVIDENCE 420 (4th ed. 1992), *citing* The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law and must be ascertained and administered by the courts of justice."); Skiriotes v. Florida, 313 U.S. 69, 73 (1941) (international law is "a part of our law and as such is the law of all States of the Union").

100. Rules of Court, The 1989 Revised Rules on Evidence, Rule 129 [What need not be Proved], § 1 provides: "Section 1. *Judicial Notice, when mandatory.* — A court shall take judicial notice, without the introduction of evidence, of ... the law of nations ...."

101. The Paquete Habana, 175 U.S. at 700.

But does the mandatory judicial notice of international law make for good policy? The answer first necessitates a brief deconstruction of the nature of the "law of nations," as well as the policy behind judicial notice itself, especially from its Anglo-American origins.

1. The "Law of Nations"

Ascertaining the meaning of the term "law of nations" is an endeavor that brings one through the development of international law itself, at least until the verge of the twentieth century. Almost two hundred years ago, Chief Justice Marshall spoke of "the law of nations" in the landmark case *The Neride,*[102] as did the United States Constitution and early statutes, rather than of "international law." That case dealt with the law of Prize under admiralty, a branch of law not considered part of international law today. Indeed, the law of nations seems to be a broader concept in some ways, and a narrower one, in others. It is broader, because the law of nations seems to have encompassed admiralty and general principles of the *lex mercatoria*, or "law merchant" applicable to transnational commercial transactions.[103] It is also much narrower, because the "law of nations" as then understood did not even begin to include the concept of human rights, or the idea of individuals being given any kind of legal personality.[104] Blackstone's scholarship during that period further enunciate the limited concept of international law as known then. He defined an exclusive list of three principle offenses against the law of nations: violations of safe conduct, infringement of the rights of ambassadors, and piracy.[105]

All told, a fair appraisal of the term "law of nations" reveals that "international law" is not entirely synonymous, and in fact, is a markedly different body of law, reflecting the shift in the world's attitudes themselves. The law on judicial notice concerning international law, then, falls upon an antiquated concept of international law, where the "rules of the game"

102. The Neride, 13 U.S. (9 Cranch) 388, 423 (1815).

103. Louis Henkin, *supra* note 55, at 1555 n. 1, *citing* Dickinson, *The Law of Nations as Part of the National Law of the United States,* 101 U. PA. L. REV. 26, 26-27 (1952).

104. *See* Gabriel M. Wilner, *Filartiga v. Pena-Irala: Comments on Sources of Human Rights Law and Means of Redress for Violations of Human Rights,* 11 GA. J. INT'L & COMP. L. 317, 320 (1981) ("The notion that all individuals have rights independent of what may be granted to them under national law...adds a dimension to international law unknown to it when the sources of the law of nations were set forth in the nineteenth and early twentieth centuries.").

105. Donald J. Kochan, *Constitutional Structure as a Limitation on the Scope of the "Law of Nations" in the Alien Tort Claims Act,* 31 CORNELL INT'L L.J. 153, 169 (1998), *citing* 4 WILLIAM BLACKSTONE, COMMENTARIES *68, *72.

were much arguably simpler and more well-known. Immediately reading in modern international law in full within the concept of "the law of nations" as used in evidence is therefore unwarranted. Neither should it be correct to say, conversely, that admiralty and transnational commercial law are still of mandatory judicial notice today, as those areas have become less universally consistent than they were in centuries past.[106] What then, if any, should be considered a matter of mandatory judicial notice today?

2. The Concept of Judicial Notice and International Law

a. Anglo-American Origins

Professor Wigmore explains the basic concept of judicial notice: "[t]hat a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so."[107] The Court in this case assumes that the matter is so notorious that it will not be disputed.[108]

106. Admiralty and transnational commercial transactions have been fractured greatly, especially after World War II, as different States began to legislate on those areas at the domestic level. Various multilateral treaties, of course, have attempted to harmonize the law anew. For a critique of the differences in the maritime laws of States and of attempts at the international level at harmonizing these laws through treaties, *see generally* ALBERT R. PALACIOS, A COMPARATIVE ANALYSIS OF THE HAGUE, HAGUE-VISBY, AND HAMBURG RULES (1985).

107. 9 J.H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2567 (3d ed. 1940) [hereinafter WIGMORE ON EVIDENCE].

108. It must be noted, however, that the purpose of judicial notice itself is not without controversy. Its primary use, adopted by many, if not most jurisdictions, is "to prevent a party from presenting a moot issue or inducing a false result by disputing what in the existing state of society is demonstrably indisputable among reasonable men." This being so, matters judicially noticed cannot be challenged. Professors Thayer and Wigmore take a contrary view. They argue that courts should use judicial notice primarily as a time-saving device in situations in which facts, although disputable, are unlikely to be disputed. For them, judicial notice is a procedural mechanism for establishing a *prima facie* case for the existence of a particular fact, thereby shifting the burden of going forward (if not the burden of persuasion) to the opposing side. Having this effect, judicial notice operates much like a presumption, which shifts to the opposing side the burden of going forward with evidence to rebut the presumed fact. "Taking judicial notice does not import that the matter is indisputable. It is not necessarily anything more than a *prima-facie* recognition leaving the matter still open to controversy... In very many cases...taking judicial notice of a fact is merely presuming it, *i.e.*, assuming it until there shall be reason to think otherwise." As to matters of law, however, both sides do not differ in opinion. Matters of law are generally conclusive, and courts are not obliged to receive evidence to rebut the taking of judicial notice of

It is important to emphasize, however, that despite the definitive undertone of judicial notice, the *opponent is not prevented from disputing* the matter in evidence, if he believes it disputable.[109] Judicial notice is used cautiously and only when the facts judicially noted cannot reasonably be disputed.[110] In the common law, judicial notice of facts or certain laws is clearly not given a peremptory character, particularly when these facts or principles of law are "near the line of doubt in their feature of notoriety."[111] In addition, embraced within the concept of judicial notice is that a judge may, should the case call for it, actively seek out sources of information to assist him. This is not a search for evidence to establish a fact, nor is it a contribution of personal testimony — it is merely an occasional measure, taken in discretion, to satisfy a judge that he is justified in making the desired ruling for dispensing with the presentation of evidence by a party who claims that judicial notice is warranted. The judge perceives that the fact probably cannot need evidence; he merely seeks to define the precise tenor of the fact about which he will make his ruling. To aid in the endeavor, the judge is entitled to aid himself in reaching a decision, by consulting any source of information that will serve the purpose — official records, encyclopedias, any books or articles, or indeed any source whatever that suffices to satisfy his mind in making a ruling.[112]

In the United States, state and federal courts must judicially notice all treaties to which it is party. Even in the absence of a treaty, the determination of international law has always been seen as a question of law for the court, and one that may properly be judicially noticed.[113]

b. In the Philippines

Philippine authorities essentially mirror the ideas of their Anglo-American progenitors. In Moran's words, judicial notice may be defined as the cognizance that courts may take, without proof, of facts which they are bound or supposed to know.[114] Judicial notice is based upon convenience

legislative facts. *See* PAUL RICE, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE 1121-33 (3d ed. 1996), *comparing* Morgan, *Judicial Notice,* 57 HARV. L. REV. 269, 273 (1944), *with* THAYER, PRELIMINARY TREATISE ON THE LAW OF EVIDENCE AT COMMON LAW 308-09 (1898) *and* 9 WIGMORE ON EVIDENCE, *supra* note 109, §§ 2565-83. *See further* McNaughton, *Judicial Notice-Excerpts Relating to the Morgan-Wigmore Controversy,* 14 VAND. L. REV. 779-795 (1961).

109. WIGMORE ON EVIDENCE, *supra* note 107, § 2567.

110. 29 AM. JUR. 2d., *Evidence,* § 24, 29.

111. WIGMORE ON EVIDENCE, *supra* note 107, § 2568.

112. *Id.* § 2568*a* (citations omitted).

113. 29 AM. JUR. 2d., *Evidence,* § 114.

114. 5 MANUEL V. MORAN, COMMENTS ON THE RULES OF COURT 39 (1970 ed.).

and expediency. It would certainly be superfluous, inconvenient, and expensive both to parties and the court to require proof, in the ordinary way, of facts which are already known to courts,[115] such facts not being susceptible of contradiction.[116] In order for a court to take judicial notice, of course, a request to do so is unnecessary, and such is left to the discretion of the judges.[117] From the language of the provision under consideration, the facts and laws mentioned as matters for mandatory judicial notice "shall be judicially recognized by the court without the introduction of evidence." The use of the word "shall" seems to imply that judicial notice is always compulsory. Courts seem bound to take notice of the law in force in the Philippines — such is not a matter of discretion.[118] Indeed, the codal provision makes these matters of mandatory judicial notice.[119]

The judicial notice of *laws,* however, is a different matter. Because the function of the courts is to administer justice according to law, they are in general bound to know the law. A distinction must be made, however, between domestic and foreign law. According to Moran, courts must take judicial notice of, *inter alia,* the law of nations (which he differentiates from treaties), as a subset of the *laws of the land.* Moran thus considers the law of nations as different from *foreign laws,* to which judicial notice is not accorded.[120] Justice Martin, on his part, explicitly links the corollary principles of this Rule on Evidence and the Incorporation Clause. Because the Constitution provides that the Philippines adopts the generally accepted principles of international law as part of the law of the land, our courts must take judicial notice of them.[121] A marked distinction thus exists under the law of evidence between the treatment of international law and that of foreign law. Norms of international law are treated as *rules of law* (with the benefit of judicial notice, as pointed out above); whereas a

115. *Id.*

116. 5 RUPERTO G. MARTIN, RULES OF COURT OF THE PHILIPPINES 35 (4th ed. 1981). Justice Martin cites the basis for this Rule as the old latin maxim *"Lex non requirit verificari quod apparet curiae"* ("the law does not require that to be verified which is apparent to the court.").

117. *See* 5 OSCAR M. HERRERA, REMEDIAL LAW 73 (1999).

118. *Id.* at 78, *citing* 5 MANUEL V. MORAN, COMMENT ON THE RULES OF COURT 58 (1980 ed.)

119. *See* Rule 129, § 1 ("A court *shall* take judicial notice, without the introduction of evidence...").

120. MORAN, *supra* note 114, at 40-41.

121. MARTIN, *supra* note 116, at 41.

foreign law is treated merely as a *fact*, subject to the requirements of proof under the Rules of Court.[122]

However, is this ordained dichotomy valid? As will be discussed in Chapter four *infra,* serious questions as to the propriety of judicially noticing international law exist.

C. *Other relevant laws*

Philippine statute books are replete with laws that are either inspired by, or in fulfillment of, international law.[123] The purpose of this section, however, is not to catalog each of these laws. Rather, the statutory law that buttresses the Incorporation Clause by giving life to principles of international law within our legal system will be surveyed.[124]

1. Civil Code

The Civil Code provides that "[p]enal laws and those of public security and safety shall be obligatory upon all who live and sojourn in Philippine territory, *subject to the principles of public international law* and to treaty stipulations."[125] Under this provision, in an appropriate penal proceeding, assertion of Philippine jurisdiction based on the territoriality principle[126]

122. MAGALLONA, *supra* note 52, at 43.

123. Examples include the Philippine Extradition Law, Philippine Safeguards Law, laws to protect diplomatic immunity, and the Inter-Country Adoption Act. An old study lists over 150 statutes that "adhere to international law." *See* DIGEST OF PHILIPPINE INTERNATIONAL LAW JURISPRUDENCE 127-55 (Pacifico A. Castro & Myrna S. Feliciano eds., 1982).

124. In addition to the statutes discussed *infra*, both the Code of Commerce and the Civil Code contain general principles that may be considered functionally equivalent to the "general principles of law recognized by civilized nations," found in article 38(1)(c) of the Statute of the International Court of Justice. The author's position, however, is that these principles of law are not properly to be considered sources of incorporated international law. For an extended discussion on "general principles of law,"*see infra* Chapter 4(B)(4)(b).

125. CIVIL CODE, art. 14.

126. Events occurring within a State's territorial boundaries and persons within that territory, even though temporary, are subject to the application of local law. REBECCA M.M. WALLACE, INTERNATIONAL LAW 112 (3d ed., 1997); *See* HIGGINS, *supra* note 19, at 56. After all, sovereignty in the relations between States signifies independence, i.e., in the form of territorial sovereignty, a principle of exclusive competence in regard to a State's own territory in such a way as to make it the point of departure in settling most questions that concern international relations. AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 111 (Peter Malanczuk ed. 7th ed., 1997).

may be opposed or restricted by diplomatic immunity under international law.[127] The provision evidently contemplates the use of both conventional and customary international law in modifying Philippine penal rules, and does not limit itself explicitly to diplomatic relations. Thus, in the same vein as the Incorporation Clause, Article 14 of the Civil Code allows judges to balance Philippine criminal and public safety laws with the demands of international law, allowing the harmonization between domestic statutory policy and the Philippines' international legal obligations.

2. Revised Penal Code

Article 2 of the Revised Penal Code, which provides for the application of the country's penal laws, contains many of the principles of jurisdiction found under international law,[128] and is thus similar to Article 14 of the Civil Code. One major difference between Article 2 and its Civil Code counterpart is that the former seems to allow international law to apply only when applicable treaties exist;[129] whereas the latter allows opens the door for interaction with customary international law.

127. MAGALLONA, *supra* note 52, at 45

128. Beyond the traditional territoriality principle, article 2 asserts Philippine penal jurisdiction over various extra-territorial acts, thus encompassing elements of the generally accepted and often applied principle of *objective territoriality* (sometimes referred to as the 'effects doctrine'), where jurisdiction is conferred when any essential element of a crime is consummated in State territory. *See* Lotus Case (France v. Turkey), 1927 PCIJ (ser. A) No. 10, at 23. The classic illustration is the discharge of a gun near a border between two countries, injuring a person on the other side. Here, jurisdiction is based on the injurious effect, although the act or omission itself never occurred on the territory of the State. The same principle can be, and has been, employed to found jurisdiction in cases of conspiracy, violations of anti-trust and immigration laws by activity abroad, and in many other fields of policy. BROWNLIE, *supra* note 17, at 304.

Other principles of jurisdiction under international law include the *nationality principle* (affording a State the right to prosecute its nationals for crimes committed anywhere in the world), the *passive personality principle* (conferring jurisdiction over an alien for crimes committed abroad affecting a national), the *protective principle* (allowing a State to punish acts prejudicial to its security, i.e., plots to overthrow its government, espionage, and forging its currency), and the *universality principle* (granting upon States the right to exercise jurisdiction over certain acts which threaten the international community as a whole and which are criminal in all countries, such as war crimes, piracy, hijacking, and various forms of international terrorism). AKEHURST, *supra* note 126, at 110-12. *See further* WALLACE, *supra* note 126, at 112-19, BROWNLIE, *supra* note 17, at 304-09, *and* HIGGINS, *supra* note 19, at 56, 65.

The Revised Penal Code also contains a title defining and punishing the "Crimes Against National Security and the Law of Nations,"[130] which include the crimes of treason, espionage, inciting to war or giving motives for reprisals, and flight to the enemy's country. Most significant for purposes of international law, perhaps, is the proscription against piracy, whether committed in Philippine waters or the high seas.[131] Unlike the relatively amorphous character of incorporated principles, crimes against international law as the Revised Penal Code provides for them are well-defined and operate as explicit statutory law, i.e., these penal provisions are neither discovered nor found.[132] Another point to emphasize is the fact that "law of nations," a term significantly different from "international law,"[133] was used by the Code, reflective of its old age. It also explains why other crimes *hostis humani generis* more recently identified, such as genocide and torture, are not similarly proscribed.

Having established the parameters of the discourse, the Constitutional and statutory tools Philippine Courts may employ in incorporating international law will now be explored within the context of Philippine jurisprudence, to decipher the approach and attitude Philippine courts take towards international law.

IV. THE INTERPLAY IN PRACTICE: THE JURISPRUDENCE ON INCORPORATION

A critique of significant Supreme Court decisions relating to general international law

As the last chapter has demonstrated, the deliberations of the framers were far from a source of light, leaving little by way of insight into the meaning and application of the Incorporation Clause.[134] In sharp contrast to other provisions of the Constitution, the Framers have been reticent about its

129. *See* REVISED PENAL CODE, art. 2 ("*Except as provided in the treaties* and laws of preferential application, the provisions of this Code shall be enforced only within the Philippine Archipelago...").

130. *Id.* Bk. 2, Title 1.

131. *Id.* Art. 122.

132. Parenthetically, it should be noted that Title One of Book 2 contains only one Chapter: "Crimes against national security." No chapter on the "law of nations" exists.

133. *See* Chapter 2(B)(1) *supra,* for a discussion on the meaning of the term "law of nations."

134. Generally, in the interpretation of Constitutional provisions, the intent of the framers is given the highest significance. *See* Sarmiento v. Mison, 146 SCRA 549, 552 (1987).

scope, content, and manner of enforcement. One therefore looks to the Supreme Court to tell us what the law is.[135]

Because of the inevitable conclusion that the modern usage of the Incorporation Clause is almost entirely a judicial construct, the objective of this chapter is to survey Philippine case law relating to general principles of international law. While to some degree, this has been done before,[136] this survey will focus on a more phenomenological discussion of the significant

135. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

136. Surveys on Philippine court decisions dealing with international law are rare, but not entirely novel. At least four such studies have been made in varying depth. DIGEST OF PHILIPPINE INTERNATIONAL LAW JURISPRUDENCE (Pacifico A. Castro & Myrna S. Feliciano eds. 1982), identified 214 cases and over 150 statutes with international law inclinations. The study was devoted to a doctrinal digest of the various international law principles that found their way into the Philippine legal system; it did not distinguish, however, between public and private international law, nor the objective of the study to perform more than a broad survey of Court rulings.

Later surveys also exist, the most recent being Adolfo S. Azcuna, *The Supreme Court and Public International Law: 1945-2000*, 46 ATENEO L.J. 24 (2001) (concluding first, that the Supreme Court "adopts a situational approach of developing the law through a changing factual environment," and second, that "primacy is given to the Constitution, with special attention to the provision that 'the Philippines adopts the generally accepted principles of international law as part of the law of the land.'"). *See also* Ranhilio C. Aquino, *International law in Philippine Courts*, 35 SAN BEDA L.J. 46 (1994) (reprinting the author's report on International Law in the Philippine Supreme Court to the Committee for International Law in Municipal Courts, International Law Association). Father Aquino presents a thumbnail discussion of eighteen cases, most of which deal with treaties applied by the Court. Perhaps the most extensive study on the general topic, at least during the colonial period, was made by Professor Fernandez. This was not confined, however, to an analysis of court decisions. *See* ALEJANDRO M. FERNANDEZ, INTERNATIONAL LAW IN PHILIPPINE RELATIONS: 1898-1946 (1971) (examining three major areas of international law relating to the Philippines covering the period from 1898 to 1946, namely: the 1898 Republic and Statehood, the law of State succession as it related to the American Annexation of the Philippines, and the nature and legal consequences of belligerent occupation, as exemplified by the Japanese military occupation of the Philippines during World War II).

Unlike those studies, this chapter will approach Philippine case law from a more phenomenological perspective. The survey will be made topically, rather than chronologically, as this approach is hoped to capture the evolution of the court's thought in a less episodic manner. The scattered nature of the jurisprudence in this area makes it difficult to conclude with certainty that the survey *infra* covers every significant case dealing with general international law. One of the objectives of the work, however, is to re-discover the interplay between international law and Philippine law through an exhaustive sampling of the leading decisions.

cases in Philippine jurisprudence applying general international law to resolve concrete cases, concentrating on the manner through which incorporated customary international law is ascertained and applied — an area largely of first impression. The task is necessary, however, to arrive at a concrete, and comprehensive, picture of the interplay between international law and Philippine law. For purposes of this thesis, it is less significant to know what specific principles the Court deemed part of international law; rather, it is to discover *how* the Justices arrived at those conclusions.

Thus, having recounted the basic tenets of customary international law in Chapter one, the survey to follow will endeavor to gauge the Supreme Court's awareness of customary law-making. How does the Court ascertain principles of customary international law? Does the Supreme Court exhibit a sensitivity to the *State practice-opinio juris* requirements of customary international law? How does it use the Incorporation Clause as a tool towards resolving concrete cases within the Philippines? When international custom conflicts with national policies, where does the Court lean? All these questions lead to an ultimate appreciation of the jurisprudential attitude the Supreme Court has towards international law as Philippine Law.

Thus, through a process of induction, this chapter will critically engage the leading cases dealing with the interplay between international and municipal law, paving the way for a more general engagement of the Court's attitudes in the succeeding chapter.

A. The Law on War

The most quantitatively significant use of international law in Philippine Supreme Court decisions lies in the law of war and international humanitarian law. In over fifty decisions, the Supreme Court repeatedly invoked principles of international law to adjudicate the rights and duties of parties, especially in the aftermath of the Second World War.[137] Today,

137. These include, *inter alia*, Raquiza v. Bradford, 75 Phil. 50 (1945), Tubb & Tedrow v. Griess, 78 Phil. 249 (1947), Dizon v. Phil. Ryukus Command, 81 Phil. 286 (1948) ("A foreign army allowed to march through a friendly country or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place."); Co Kim Cham v. Tan Keh, 75 Phil. 113 (1945), Montebon v. Director of Prisons, 78 Phil. 427 (1947), Alcantara v. Director of Prisons, 75 Phil. 494 (1945), Etorma v. Ravelo, 78 Phil. 145 (1947) (Judicial acts not of a political complexion of a de facto government established by the military occupant in an enemy territory, is valid under international law); Heirs of Tugadi and Pajimola v. MRR, 65 SCRA 593(1975), Noceda v. Escobar, 87 Phil. 204 (1950) (Private property seized and used by the enemy in times of war under circumstances constituting valid requisition does not become enemy

those principles are largely irrelevant. Their enduring legacy, however, lies in the underlying judicial reasoning through which those principles were recognized and applied in our national setting.

1. Maritime Deviation during War

The first case to deal at length with the international law on war was *Compagnie De Commerce et de Navigation D'Extreme Orient v. The Hamburg Amerika Packetfacht Actien Gesellschaft.*[138] Its primacy is not in chronology alone; the author lauds Justice Carson's *ponencia* as an excellent example of the scholarship that should be exhibited before a purported principle is pronounced customary international law, and made to resolve municipal cases.

The facts of the case can be reduced to a sentence. At the outbreak of the First World War, the master of a German vessel, the *Sambia,* which had just completed loading a cargo of rice meal in the French port of Saigon for delivery to Dunkirk or Hamburg under a contract of affreightment with a French shipper, fled with his vessel and her cargo and took refuge in Manila Bay. The vital issue raised was whether the master of the *Sambia*, when he fled to the port of Manila, had reasonable grounds to apprehend that his vessel was in danger of seizure or capture by the public enemies of the flag under which he sailed. If the master had reasonable ground to believe that by remaining in the port of Saigon he would expose the vessel to the real, and not merely imagined, danger of seizure by the French authorities, his flight to Manila could be held to be justified by the circumstances.[139]

Under these circumstances, the Supreme Court held that her master had no assurance, under any settled rule of public international law, as to the immunity of his vessel from seizure by the French authorities in Saigon as would justify holding that it was his duty to remain in that port, in the hope that he would be allowed to sail for the port of destination designated in the charter party with a *laissez-passer* or safe-conduct, which would secure the safety of his vessels and cargo *en route.* Thus, international law, together with the general principles of maritime law and the express provisions of the charter party, were employed in ruling that the shipowner was relieved from liability for the deviation of the *Sambia* from the route prescribed in the charter party, and the resultant damages to the cargo.

property and its private ownership is retained, the enemy having acquired only its temporary use.).

138. 36 Phil. 590 (1917).

139. *Id.* at 613.

International law was engaged when the cargo owner insisted that, having in mind accepted principles of international law, the established practice of nations, and the express terms of the Sixth Hague Convention (1907), the master should have confidently relied upon the French authorities at Saigon to permit him to sail to his port of destination under a *laissez-passer* or safe-conduct, which would have secured both the vessel and her cargo from all danger of capture by any of the belligerents. The shipowner argued, understandably, that the master was fully justified in deviating, declining to leave the vessel in a situation in which it would be exposed to danger of seizure by the French authorities, should they refuse to be bound by the *alleged* rule of international invoked.[140]

The *ratio* to follow can be considered one of the most impressive displays by the Supreme Court of the manner through which the court ascertains alleged customary principles of international law. The Court candidly acknowledged the practical and legal difficulties entailed in attempting to ascertain whether an alleged customary principle of international law is indeed so.

> When the case was submitted we did not have at hand an authoritative report of the proceedings at the Hague Conference touching the adoption of the sixth convention, and we were not fully advised as to the final action taken by the world powers by way of ratification of, or adherence to its provisions. In the discussion of this branch of the case in the consultation chamber, our lack of definite and authoritative information as to these matters resulted in such division of opinion as to the respective rights of the parties, that it was at first impossible to secure a majority vote for the final disposition of this [case].... *Recently, however, our library was furnished with a copy of Stockton's "Outlines of International Law" which briefly and as we think authoritatively sets forth what we now are all agreed would appear to be the present status of public international law on the subject of "days of grace" and "safe conducts," which may be granted merchant vessels of an enemy, lying in the ports of a belligerent at the commencement of hostilities. Admiral Stockton, a retired officer of the United States Navy, was the first delegate from the United States to the London Naval Conference in 1909, and his text-book, which went to press soon after the outbreak of the war in Europe, contains the most recent statement of the doctrine by a recognized authority to which our attention has been invited.*"[141]

The Court then proceeded to use Admiral Stockton's book as authority for establishing that the rule of *laissez-passer* was not a generally accepted principle of international law.[142] The Court also cited extensively

140. *Id.* at 614.

141. *Id.* at 614-15 (emphasis supplied).

142. Discussing the question of the allowance of days of grace at the outbreak of war, the Court quoted Stockton as writing: "The [allowance of grace] is an extremely liberal one and it is doubtful whether it would be generally accepted, especially in the case of States of Europe where quick mobilization maintains as a rule." *Compagnie de Commerce,* 36 Phil. at 616.

from an "interesting article" in the *American Journal of International Law*[143] which, after reviewing at some length the history of the practice of granting days of grace and safe-conducts, which the author contended *should* form part of the law of nations, admitted as a "source of regret" that the Second Peace Conference refused to recognize it as a right but simply a privilege, which could be accorded or refused at the opinion of the belligerent.[144]

Finally (and most admirably), the Court went into its own survey of the relevant state practice, canvassing for consideration the Order in Council of the British Government of the 6th of August, 1914,[145] the decree of the President of France relating to German vessels in French Ports at the outbreak of war,[146] President McKinley's proclamation of April 26, 1898,[147] the U.S. Supreme Court's decision in the case of *the Buena Ventura,*[148] the opinions of English authorities,[149] and then summarized the state of the law, thus:

> That the practice has been by no means uniform, and that the tendency in recent years has been to limit, restrict and in some cases, apparently, to disregard it altogether will appear from a very summary review of its historical development. In the Crimean War (1854), England and France gave Russian vessels six weeks for loading and departure. In the Prussian-Austrian War of 1866, six weeks were allowed. In the war of 1870 France granted a leave of thirty days. In the Spanish-American War (1898), Spain allowed American ships five days, and the United States allowed Spanish ships one month. In the Russo-Japanese War (1904), the Japanese allowed the Russians one week, but the Russians allowed the Japanese only two days. As to the present European War our sources of information are not absolutely authoritative, but it would appear that the English and Germans detained and seized each other's merchant vessels, and in some instances confiscated their cargoes, under circumstances which would seem to indicate that one belligerent or the other, or both, had wholly disregarded the pious wish of the sixth Hague Convention. With reference to other belligerents it is said that England and Austria-Hungary

143. Written by Professor James Brown Scott, *in* 2 AM. J. INT'L L. 266 (1908) (the Court did not mention the title of the article).

144. *Compagnie de Commerce,* 36 Phil at 616-17.

145. *Id.* at 617.

146. *Id.* at 621.

147. *Id.* at 623.

148. 175 U.S. 384 (1899).

149. *Compagnie de Commerce,* 36 Phil. at 624 (citing the opinions of Professors Laurence and Higgins).

> mutually granted ten days of grace; Germany and France, seven days; France and Austria, seven days; but that Great Britain and Turkey, and Great Britain and Bulgaria made no mutual allowance of time, and that Italy without granting days of grace *captured* all enemy vessels of war, and *sequestered* the rest--a distinction without any very substantial difference.[150]

With the relevant State practice established, the Court's conclusion was almost perfunctory. "We conclude that under the circumstances surrounding the flight of the *Sambia* from the port of Saigon, her master had no such assurances, under any well-settled and universally accepted rule of public international law, as to the immunity of his vessel from seizure from the French authorities..."[151]

The most fascinating aspect of the case, however, was its *dictum* on page 623. Despite recognizing that our own highest authority under Municipal law then, the U.S. Supreme Court[152] indicated that President McKinley's proclamation of 1898 providing for immunity of Spanish vessels at the outbreak of the Spanish-American War "was but a formal recognition of an established practice of nations, which had been recognized as early as the Crimean War by England, France, and Russia,"[153] it nevertheless refused to follow the ruling of *The Buena Ventura*.

> But the very fact that there was so substantial a divergence of views among the conferees representing their respective governments at the second Hague Conference in 1907, with regard to the existence and binding character of such a duty under accepted rules of international law, as to make it impossible for the conferees to agree upon a convention setting forth anything beyond *"a pious wish"* in the premises, quite conclusively demonstrates that, thereafter at least, adherence to the practice by any belligerent could not be demanded by virtue of any convention, *tacit or express*, *universally recognized* by the members of the society of nations; and it may be expected only when the belligerent is convinced that the demand for adherence to the practice inspired by his own commercial and political interests outweighs any advantage he can hope to gain by a refusal to recognize the practice as binding upon him.[154]

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150. *Id.* at 624-25.

151. *Id.* at 625.

152. At that time, of course, the Philippines was under American Sovereignty, and the Supreme Court, in particular, under the appellate jurisdiction of the U.S. Supreme Court. A number of cases of the Philippine Supreme Court were in fact subjected to review from the U.S. High Court. *See, e.g.,* Chuoco Tiaco v. Forbes, 228 U.S. 549 (1913) (Holmes, J.), *affirming* 16 Phil. 534.

153. *Compagnie de Commerce,* 36 Phil. at 623.

154. *Id.* at 623-24.

This is an outstanding example of how customary international law incorporated into Philippine law is not to be subject to any formal *stare decisis* rule, as the foundation of the rule in this instance, international law, is dynamic and constantly changing. To bind international law under rules of precedent would, indeed, result in anachronistic, dead-letter rules disrespectful of that dynamic. Another important realization garnered from a scrutiny of the case is that despite its pointing out, early on, that the U.S. did not sign the Hague Conference of 1907,[155] and thus did not bind the Court under treaty law, it did not immediately write *finis* to the issue. Instead, it extensively discussed relevant State practice, in a serious attempt to ascertain the State of the law as *custom*. The decision did all this even without the mandate of the Incorporation Clause, as its first manifestation in the Commonwealth Constitution was to come a full 18 years later. Even with the passage of 85 years, one would indeed be hard-pressed to find a comparable example of judicial insight and forbearance in 'discovering' customary international law as *Compagnie de Commerce*. For reasons not readily apparent, the Court simply discontinued such rigorous analysis in future cases.

2. Legal Implications of the wartime "Philippine Republic" as a *de facto* Government

Immediately after World War II, cases delving into international law started filling the Court's docket. These expectedly focused on issues surrounding the legal effects of the Japanese occupation, and of transactions perfected at that troubled time. The first of those was *Co Kim Cham v. Eusebio Valdez Tan*.[156]

The case concerned a simple petition for *mandamus*, to compel (then) Judge Arsenio P. Dizon of the Court of First Instance of Manila to proceed with a Civil Case. Judge Dizon refused to take cognizance and continue the proceedings on the ground that the proclamation issued on October 23, 1944 by General Douglas MacArthur had the effect of invalidating and nullifying all judicial proceedings and judgments of courts of the

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155. *Id.* at 615.

156. 75 Phil. 113 (1945). The case filled over 100 pages of the Philippine Reports, and was far from unanimous. Feria, J., was *ponente*, with Moran, C.J., Ozaeta, Paras, Jaranilla, and De Joya, and Pablo, JJ., concurring. Perfecto and Hilado, JJ., entered scathing dissents, which refuted the majority's invocation of international law extensively.

The controversial nature of the case was amplified by the fact that two months later, the Court issued a second decision on motion for reconsideration, which raised and refuted substantially the same issues as the majority opinion. *See* Co Kim Cham v. Eusebio Valdez Tan Keh, 75 Phil. 371 (1945).

Philippines under the Japanese-instituted Republic of the Philippines.[157] In resolving the case, however, the issues to be decided upon were to have lasting implications on the newly liberated nation: the most important of these was whether the judicial acts and proceedings of the courts existing in the Philippines under Japanese rule were good and valid, and remained so even after the liberation of the Philippines. The Court, through Justice Felicisimo R. Feria, turned to international law for guidance.

"It is a legal truism in political and international law that all acts and proceedings of the legislative, executive, and judicial departments of a *de facto* government are good and valid."[158] The question to be determined, however, was whether the government established during Japanese military occupation was indeed a *de facto* government. After discussing the various kinds of *de facto* governments,[159] and extensive invocation of international law in virtually every paragraph of its *ratio*,[160] the Court held that a *de facto* government of paramount force was established by the Japanese forces.[161] The fact that the Japanese-held Philippine Executive Commission was a civil and not a military government and was run by Filipinos was held to be of no moment, the Court referring to the practice of belligerents such as that of Napoleon in 1806 and the German invasion of Alsace and Lorraine in 1870 (citing the treatises of Messrs. Calvo and Hall). Thus, because the government established was *de facto*, the "well-known principle of postliminy (postliminium) in international law"[162] operated to validate all acts of that government not of a political nature. Those acts were, in other

157. The Proclamation, made a few days after his historic Leyte Landing, declared:

> (1) [t]hat the Government of the Commonwealth of the Philippines is...the sole and only government having legal and valid jurisdiction over the people in areas of the Philippines free of enemy occupation and control; (2) that the laws now existing on the statute books of the Commonwealth of the Philippines and the regulations promulgated pursuant thereto are in full force and effect and legally binding upon the people in areas of the Philipines free of enemy occupation and control; and (3) that all laws, regulations, and processes of any other government in the Philippines than that of the said Commonwealth are null and void and without legal effect in areas of the Philippines free of enemy occupation and control.

Reprinted in 75 Phil. at 120.

158. *Id.* at 122.

159. *Id.* at 122-23.

160. Apart from a bevy of publicists (e.g., Messrs. Halleck, Hall, Taylor) and Court decisions (overwhelmingly of U.S. origin), the Hague Conventions were also repeatedly invoked throughout the decision.

161. *Co Kim Cham,* 75 Phil. at 127.

162. *Id.* at 130 (no mention of authority).

words, held to be binding in Philippine law by virtue of principles of international law.

Having established the validity of the judicial acts of the Japanese-influenced Republic, the next issue for determination was whether General MacArthur's Proclamation, which declared "[t]hat all laws, regulations, and *processes* of any other government in the Philippines than that of the said Commonwealth are null and void and without legal effect"[163] should be interpreted to mean that it was the General's intention to annul and avoid all judgments and judicial proceedings in the Philippines during the occupation. In what appears to be an instance of the Court's bending backwards to achieve a desired end, it was held that the General *must have known* that all judgments and judicial proceedings not of a political complexion of *de facto* governments during the Japanese military occupation were good and valid under international law, and that therefore, the phrase "processes of any other government" in the proclamation could not have meant such an invalidation. "The only reasonable construction of the said phrase is that it refers to governmental processes other than judicial processes or court proceedings, for according to a well-known rule of statutory construction "a statute ought never to be construed to violate the law of nations if any other possible construction remains."[164] Further on, the Court explicitly invoked the Incorporation Clause itself, *for probably the first time in the Court's history,* to bolster the argument.

> It is not to be presumed that General Douglas MacArthur, who enjoined in the same proclamation of October 23, 1944, "upon the loyal citizens of the Philippines full respect and obedience to the Constitution of the Commonwealth of the Philippines," should not only reverse the international policy and practice of its own government, but also disregard in the same breath the provisions of section 3, Article II, of our Constitution, which provides 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.*"[165]

This is a novel recasting of the Incorporation Clause — the Court here seems to imply that the construction of statutes must be judicially determined in consistency with international law, because by virtue of the Incorporation Clause, these principles are part of Philippine Law, and therefore, public officials could not have intended for legislation to perform illegal acts. This is a useful legal fiction, as it stretches credulity to maintain that principles of international law are readily in the mind of the legislature when enacting laws. The judge, therefore, is given the authority and duty to exert every effort to make Philippine law consistent with

163. *See supra* note 157 for the full text of the proclamation.

164. *Co Kim Cham,* 75 Phil. at 132.

165. *Id.* at 133 (emphasis supplied).

international law, even if that means adopting a construction that the municipal actor, such as General MacArthur in this instance, did not originally intend.

The last issue tackled was whether courts of the Philippine commonwealth, which existed prior to and continued during the Japanese occupation, had jurisdiction to continue the proceedings in actions pending in said courts at the time the Philippine Islands were reoccupied or liberated by the American and Filipino forces, and the Commonwealth Government was restored.[166] Again, the decision employed international law to resolve the issue. Although the Court acknowledged that in theory, the authority of the local judicial authorities was suspended as a matter of course as soon as military occupation took place, "*in practice* the invader does not usually take the administration of justice into his own hands, but continues the ordinary courts or tribunals to administer the laws of the country which he is enjoined, unless absolutely prevented, to respect."[167] The Court then cited specific instances of state practice[168] to buttress its argument. It concluded: "Following these *practices and precepts of the law of nations*, the Commander in Chief of the Japanese Forces ... ordered that 'all ... judicial institutions, shall continue to be effective for the time being as in the past...'"[169] The Court ultimately ruled that the courts had jurisdiction to continue cases pending during occupation.

As to how the Court viewed sources of "incorporatable" international law, *Co Kim Cham* also some offers insight into the degree of the Court's sensitivity to, and expertise in international law at that time. At one point in the decision, the Court made unmistakable reference to customary international law: "Not only the Hague Resolutions, but also the principles of international law, as they result from the usages established between civilized nations, the laws of humanity and the requirements of the public conscience, constitute or form the law of nations."[170] The Court continued

166. *Id.* at 138-39.

167. *Id.* at 139 (emphasis supplied).

168. The decision cited the Executive Order of President McKinley to the Secretary of War on May 19, 1898 ("in practice, they [the municipal laws] are not usually abrogated but are allowed to remain in force and to be administered by the ordinary tribunals substantially as they were before the occupation"), and TAYLOR, PUBLIC INTERNATIONAL LAW 596 ("From the stand-point of actual practice such arbitrary will is restrained by the provision of the law of nations which compels the conqueror to constitute local laws and institutions so far as military necessity will permit."). *Id.* at 139. Later, the Court cited Germany's occupation of Alsace and Lorraine in 1870. *Id.* at 142.

169. *Id.* at 139-40.

170. *Id.* at 136, *citing* "Preamble of the Hague Conventions" (Westlake, International Law, 2d ed., Part II, p. 61).

rather fuzzily to refer repeatedly to the Hague Regulations as its primarily authority under international law. The Hague Resolutions, however, would in later cases be recognized by the Court as binding not under treaty, but customary international law.[171]

The more interesting discussions on the interplay between international law and Philippine law occurred, however, in the separate opinions. Justice De Joya's concurring opinion, for example, merits significant discussion, as it dealt with the case almost entirely from an international law perspective.

With notable clarity, Justice De Joya's concurrence followed the logical progression of an incorporation issue. He began by observing that the case "requires the application of principles of international law, in connection with the municipal law in force in this country, before and during Japanese occupation."[172] He continued:

> Questions of International Law must be decided as matters of general law; and that International Law is no alien in this Tribunal, as, *under the Constitution of the Commonwealth of the Philippines, it is part of the fundamental law of the land (Article II, section 3).* As international law is an integral part of our laws, it must be ascertained and administered by this Court, whenever questions of right depending upon it are presented for our determination, sitting as an international as well as a domestic Tribunal.[173]

The opinion then discussed the methodology through which genuine principles of international law are sifted: "[s]ince International Law is a body of rules actually accepted by nations as regulating their mutual relations, the proof of the existence of a given rule is to be found in the consent of nations to abide by that rule; and this consent is evidenced chiefly by the usages and customs of nations, and to ascertain what these usages and customs are, the universal practice is to turn to the writings of publicists and to the decisions of the highest courts of the different countries of the world."[174] Undoubtedly, that *dictum* was made in reference

171. *See* Kuroda v. Jalandoni, 83 Phil. 171 (1949) (holding that the Hague Resolutions were part of Philippine law not as a binding treaty, as the Philippines was not party, but as customary international law). It is possible, however, that the Court was acting as if it was still a United States court. If such were so, the United States' adherence to the Hague Resolutions would account for its ready acceptance within Philippine law as treaty obligation.

172. *Co Kim Cham,* 75 Phil. at 146 (De Joya, J., concurring).

173. *Id.* (De Joya, J., concurring) (citations omitted) (emphasis supplied).

174. *Id.* at 147 (De Joya, J., concurring). The opinion cited The Paquete Habana, 175 U.S. 677 (1900), as authority for the statement. That case is considered leading on the matter of international law as part of United States law, and is perpetually cited as authority in U.S. Court decisions.

to Customary international law; the general consent of States is not required for treaties to take effect.

The opinion then distinguished between custom and treaty as sources of incorporatable international law. "But while usage is the older and original source of International Law, great international treaties are a later source of increasing importance, such as the Hague Conventions of 1899 and 1907."[175] As a commonwealth court of the United States, the "Hague Convention (has) been adopted by the nations giving adherence to them, among which is the United States of America."[176] The opinion then echoed the principles cited in the main opinion faithfully.[177]

It is unclear whether Justice De Joya considered the international principles invoked binding under custom or treaty law through the Incorporation Clause. An analysis of the entire opinion, and indeed, of the *ponencia* itself, seems to argue in favor of the interchangeability of these sources to the Court, or more accurately perhaps, of the overlapping use of both treaty and custom to justify its conclusions. As with most decisions before and after its time, *Co Kim Cham* relied in inordinately high measure upon the commentaries and opinions of publicists.

An even more engaging discussion of the interplay (albeit derisive in its outlook) is Justice Gregorio Perfecto's dissenting opinion. In a rebuke of the interpretation afforded to General MacArthur's Proclamation by the majority, the dissent attacked the neutralization of the effect of the proclamation through international law.

> ... [A] way is being sought to neutralize the effect of the proclamation. The way found is international law. The big and resounding word is considered as a shibboleth powerful enough to shield the affected persons from the annulling impact.
>
> Even then, *international law is not invoked to challenge the legality or authority of the proclamation, but only to construe it in a convenient way* so that judicial processes during the Japanese occupation, through an *exceptional effort of the imagination*, might be segregated from the processes mentioned in the proclamation.[178]

175. *Id.* (De Joya, J., concurring). That statement foreshadows the leading role multilateral treaties now take in both codifying and progressively advancing *de lege ferenda* international law.

176. *Id.* (De Joya, J., concurring).

177. One interesting elaboration of the main opinion is Justice De Joya's discussion on why General McArthur's Proclamation must be made part of Philippine law. "It is to be presumed that General Douglas McArthur is familiar with said rules and principles, as International Law is an integral part of the fundamental law of the land, in accordance with the provisions of the Constitution of the United States...the nullification of all judicial proceedings conducted before our courts, during the Japanese occupation, would lead to injustice and absurd results, and would be highly detrimental to public interests." 75 Phil. at 152 (De Joya, J., concurring).

Justice Perfecto then pointed rather patronizingly to the fact that international law "is not a fixed or immutable science. On the contrary, it is developing incessantly, it is perpetually changing in forms. In each turn it advances or recedes, according to the vicissitudes of history, and following the monotonous rhythm of the ebb and rise of the ride of the sea... The characteristic plasticity of law is very noticeable, much more than in any other department, in international law."[179]

An enlightening discussion then ensued on Incorporation. After stating that "we should be cautioned not to allow ourselves to be deluded by generalities and vagueness which are likely to lead us easily to error, in view of the absence of codification and statutory provisions,"[180] Justice Perfecto cited the Incorporation Clause of the Constitution. He then noted: "*There being no codified principles of international law, or enactments of its rules, we cannot rely on merely legal precepts.*"[181] He was referring, undoubtedly, to international custom not reduced into a binding treaty. He noted, in fact: "With the exception of international conventions and treaties and, just recently, the Charter of the United Nations...we have to rely on unsystematized judicial pronouncements and reasonings and on theories, theses, and propositions that we may find in the works of authors and publicists."[182]

Justice Perfecto then discussed the implication of Incorporation with remarkable insight:

> Due to that characteristic pliability and imprecision of international law, the drafters of our Constitution had to content themselves with "generally accepted principles."
>
> *We must insist, therefore, that the principles should be specific and unmistakably defined, and that there is definite and conclusive evidence to the effect that they are generally accepted among the civilized nations of the world and that they belong to the current era and no other epochs of history.*
>
> *The temptation of assuming the role of a legislator is greater in international law* than any other department of law, since there are no parliaments, congresses, legislative assemblies which can enact laws and specific statutes on the subject. It must be our concern to avoid falling in so great a

178. 75 Phil. at 171-72 (Perfecto, J., dissenting) (emphasis supplied).

179. *Id.* at 172-73 (Perfecto, J., dissenting).

180. *Id.* at 173 (Perfecto, J., dissenting).

181. *Id.* (Perfecto, J., dissenting) (emphasis supplied).

182. *Id.* (Perfecto, J., dissenting).

temptation, as its dangers are incalculable. It would be like building castles in the thin air, or trying to find an exit in the thick dark forest where we are irretrievably lost. We must also be very careful in our logic. In so vast a field as international law, the fanciful wanderings of the imagination often impair the course of dialectics.[183]

This warning probably marked the first significant instance in the entire history of the Philippine Supreme Court of the grave repercussions that unbridled use of the Incorporation Clause could wreak upon Philippine Law,[184] a warning that surprisingly has not been reiterated in future decisions. While one may disagree with some of Justice Perfecto's vivid language, his critical attitude is nonetheless nothing less of admirable — unlike virtually every other decision of the Court before or since, the Incorporation Clause here was not taken as a license for incorporation without thought of the underlying policy repercussions. The dissent clearly implies that prior to incorporation, the international law sought to be incorporated should be clearly defined and analyzed strictly as to whether it forms part of general practice, or if already recognized in the past as a principle, whether the content of such has changed from the time of its first recognition under international law. If not, the Judge then takes the role of legislator — the "plasticity" of international law lends to flights of imaginative judicial thought, and is license to make advocacies law.

Expectedly, and consistent with his palpable skepticism, Justice Perfecto found no principle of international law that could affect the clear meaning of MacArthur's October Proclamation:[185]

But we waited in vain for the specific principle of international law, only one of those alluded to, to be pointed out to us. If the law exists, it can be pointed out....The imagined principles are so shrouded in a thick maze of strained analogies and reasoning, that we confess our inability even to have a fleeting glimpse at them through their thick and invulnerable wrappers. At every turn international law, the blatant words, are haunting us with the deafening bray of a trumpet, but after the transient sound has fled away, absorbed by the resiliency of the vast atmosphere, the announced principles, which are the very soul of

183. *Id.* at 173-74 (Perfecto, J., dissenting) (emphasis supplied).

184. One may say, in fact, that these cautionary remarks by Justice Perfecto prefigured the more famous judicial pronouncements by the U.S. Federal Courts in Tel-Oren v. Libyan Arab Republic, 517 F. 2d. 774 (D.C. Cir. 1984). *See further infra* notes 430-31 and accompanying text.

185. "We tried in vain to find out in the majority opinion anything as to the existence of any principle of international law under which the authority of General MacArthur to issue the proclamation can effectively be challenged. No principle of international law has been, or could be, invoked as a basis for denying the author of the document legal authority to issue the same or any part thereof." *Co Kim Cham,* 75 Phil. at 174.

international law, would disappear too with the lightning speed of a vanishing dream.[186]

3. War Crimes

Kuroda v. Jalandoni[187] ranks among the first acknowledgments that customary international law indeed forms part of Philippine law through the Incorporation Clause. Shigenori Kuroda, the Commanding General of the Japanese Imperial Forces in the Philippines from 1943-44, was charged before a Military Commission convened by the Armed Forces Chief of Staff with having unlawfully disregarded and failed "to discharge his duties as such commander to control the operations of members of his command, permitting them to commit brutal atrocities and other high crimes against noncombatant civilians and prisoners of the Imperial Japanese Forces, in violation of the laws and customs of war." In defense, General Kuroda argued, *inter alia,* that Executive Order No. 68, through which President Roxas established the National War Crimes Office, was illegal because it violated both law and Constitution, "to say nothing of the fact [that] the Philippines is not a signatory nor an adherent to the Hague Convention on Rules and Regulations covering Land Warfare and, therefore, petitioner is charged of 'crimes' not based on law, national and international."[188]

Chief Justice Moran's dictum is a powerful example of the effectiveness and importance of the Incorporation Clause. Through its invocation, principles of customary international law that were never embodied in Philippine statutory law may be employed with full force of law. The decision evidently used the clause as a judicial tool in order to arrive at particular desired ends.

This Court holds that this order [Executive Order No. 68] is valid and constitutional. Article 2 of our [1935] 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

186. *Id.* at 175.

187. 83 Phil. 171 (1949).

188. *Id.*

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.[189]

Addressing the argument that the non-accession of the Philippines to the Hague Convention on Rules and Regulations covering Land Warfare rendered it impotent in the Philippines, Chief Justice Moran held that "[s]uch rules and principles...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.*"[190]

Kuroda displayed the Supreme Court's ability (albeit implicit) to distinguish between the different sources of international law and the manner through which they become part of Philippine law. Professor Magallona indeed considers *Kuroda* a recognition by the Supreme Court of the two principal sources of international law, treaty and custom, and its ability to distinguish between the two,[191] which therefore allowed the Court, through the Incorporation Clause, to transplant principles from the Hague and Geneva Conventions, despite the Philippines' non-accession to these instruments. At the same time, the Court was able to recognize the concept of a "'codification'" treaty, when it referred to a "recognition of rules and principles of international law as contained in treaties to which our government may have been or shall be a signatory."[192] Thus, the Court recognized that principles of customary international law do not

189. *Id.*

190. *Id.* (emphasis supplied). In full, the Court held:

> Petitioner argues that respondent Military Commission has no jurisdiction 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.*

191. *See* MAGALLONA, *supra* note 52, at 32-33.

192. Kuroda v. Jalandoni, 83 Phil.; *see* MAGALLONA, *supra* note 52, at 33.

cease to be so, and indeed, are sometimes better found, in multilateral treaties that purport to declare the current State of international law on a particular matter.

More important to note, however, is the clear policy implication the *Kuroda* Court made of the Incorporation Clause. Judged by this case, the Executive is empowered to create substantial administrative machinery in adherence to the demands of incorporated customary international law, even in the absence of an enabling statute by Congress, international law effectively supplanting the need for domestic legislation. Interestingly enough, it was this treatment of the Incorporation Clause that was taken to task by the sole dissenting opinion of Justice Perfecto as violative of the separation of powers.[193]

Not all of the Court's *dicta* were laudable, however. First, from a methodological perspective, one clear observation that arises was that the Court cited no authority in concluding that the rules on land warfare enunciated in the Hague and Geneva Conventions indeed constituted customary international law — one can only speculate as to why.[194] Second, the Court observed that "the generally accepted principles and policies of international law...are part of our Constitution,"[195] as if to imply that incorporated customary law is not merely part of the law of the land, but forms part of the constitution. The author posits that such *obiter dictum* should not be accorded serious merit.[196]

193. The President's power to create, through Executive Order, the War Crimes Office was assailed, arguing that the power to establish government offices is essentially legislative, the E.O. thus being violative of the Separation of Powers. No mention was made of the Incorporation Clause, nor any derivative powers the President may have arising from it, which given the Justice's scathing dissent in *Co Kim Cham,* is surprising.

194. Speculative as it is, perhaps principles of International Humanitarian Law were, at that time, of of such common knowledge that reference to State practice or to secondary sources of law such as "judicial decisions and the opinions of the most highly qualified publicists" [Statute of the International Court of Justice, art. 38(1)(d)] were felt unnecessary. In any case, Judicial Notice of the "Law of Nations" is sanctioned by the current Rules on Evidence. *See* discussion *supra,* Chapter III(B).

195. *Kuroda,* 83 Phil. at 113.

196. This runs counter to both the Framers' intent, *see supra* note 61-66 and accompanying text, and the Court's own pronouncements. *See infra,* especially analysis of *Ichong v. Hernandez* and *Reyes v. Bagatsing.*

B. Human Rights

The Philippines was remarkable prescient as an early champion of international human rights law, embracing the concept many years before it was recognized as having customary status.[197] *Mejoff v. Director of Prisons*,[198] for example, both recognized and gave effect to the Universal Declaration of Human Rights (UDHR)[199] in 1951, barely three years after the birth of the Declaration. It was not till many years later that a consensus among publicists was drawn as to the customary nature of the Declaration.

Those early cases were understandably a source of pride for the Supreme Court in later years. In *Reyes v. Bagatsing*,[200] a tangibly pleased Court, through Chief Justice Enrique Fernando, proclaimed: "The Philippines can rightly take credit for the acceptance, as early as 1951, of the binding force of the Universal Declaration of Human Rights even if the rights and freedoms therein declared are considered by other jurisdictions as merely a statement of aspirations and not law until translated into the appropriate covenants."[201] Indeed, principles of international human rights law have been used many times in the Court's jurisprudential history to further the dignity of the human person in areas of human activity and action that have not been specifically contemplated in any municipal law. The Incorporation Clause has been a convenient catch-all provision allowing the Court to *find* principles it deems, from a policy perspective, as in furtherance of justice and human dignity. The following survey will substantiate this conclusion. It will also show, however, that despite general respect for international human rights law, the Court has also shown less than admirable perspective in a few cases. On some occasions, it either disregarded international human rights principles

197. The UDHR is now recognized, of course, as the foundation of modern human rights law; this was not to happen, however, until many years after *Mejoff* and companion cases. *See* THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 98 (1995) ("As a mere resolution, [the UDHR] did not claim binding force, yet it was passed with such overwhelming support, and such prestige has accrued to it in surrounding years, that it may be said to have become a customary rule of State obligation.").

198. 90 Phil. 70 (1951) *See further* discussion *infra*.

199. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess. U.N. Doc. A/810 (1948) [hereinafter UDHR].

200. 125 SCRA 553 (1983).

201. *Id.* at 566. He would continue: "In the following cases decided in 1951, Mejoff v. Director of Prisons, 90 Phil. 70; Borovsky v. Commissioner of Immigration, 90 Phil. 107; Chirskoff v. Commissioner of Immigration, 90 Phil. 256; Andreu v. Commissioner of Immigration, 90 Phil. 347, *the Supreme Court applied the Universal Declaration of Human Rights.*"

despite awareness of them,[202] or even used them as justification for the abridgment of individual rights.[203]

1. Early Incantations: Mejoff, Borovsky, Chriskoff, and Andreu

Mejoff v. Director of Prisons[204] is the first case that deals with international human rights principles, not long after the promulgation of the Universal Declaration of Human Rights itself.[205] The Court reversed the effect of a previous decision,[206] granting Boris Mejoff, an alien of Russian descent, release on bail, pending an order of deportation which could not be executed because no country would take him. He had at that point been detained for two years already. The Court adopted the UDHR though the Incorporation Clause:

> [B]y its Constitution (Art. II, Sec. 3) the Philippines "adopts the generally accepted principles of international law as part of the law of Nation." And in a resolution entitled "Universal Declaration of Human Rights" and approved by the General Assembly of the United Nations of which the Philippines is a member, at its plenary meeting on December 10, 1948, the right to life and liberty and all other fundamental rights as applied to all human beings were proclaimed. It was there resolved that "All human beings are born free and equal in degree and rights" (Art. 1); that "Everyone is entitled to all the rights and freedom set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, nationality or social origin, property, birth, or other status" (Art. 2); that "Every one has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law" (Art. 8); that "No one shall be subjected to arbitrary arrest, detention or exile" (Art. 9); etc."[207]

Borovsky v. Commissioner of Immigration[208] followed *Mejoff* almost immediately. In that case, Victor A. Borovsky was a stateless citizen residing in the Philippines since 1936, and was arrested by the Commissioner of Immigration and ordered deported, having been found to be an undesirable alien, a vagrant and habitual drunkard. He was put on board a ship which took him to Shanghai, but was not allowed to land

202. *See Ichong v. Hernandez*, discussed further *infra*.

203. *See Marcos v. Manglapus*, discussed further *infra*.

204. 90 Phil. 70 (1951) (*per* Tuason, J.).

205. *See supra* notes 197 & 199 and accompanying text.

206. *See* Boris Mejoff v. Director of Prisons, 84 Phil. 218 (1949).

207. Mejoff v. Director of Prisons, 90 Phil. at 73-74.

208. Victor Borovsky v. The Commissioner of Immigration and The Director of Prisons, 90 Phil. 107 (1951).

there because he was not a Chinese national, and did not possess an entry visa. He was thus brought back to Manila and confined in prison. Mejoff petitioned for *habeas corpus*; however, in the return, the Solicitor General alleged that the government had attempted through every reasonable means to deport the Stateless alien, but was as of that time unsuccessful.

The Court granted the writ. In so doing, Justice Pedro Tuason (who was also the *ponente* of *Mejoff*), employed the UDHR in exactly the same way as the prior case. In fact, in an example of curious consistency, almost the entirety of the *dicta* in *Borovsky* was a verbatim reproduction of *Mejoff's*.[209] In the same vein, indeed, in the same volume of the Philippine Reports, were the rulings in *Chriskoff v. Commissioner*[210] and *Ardreu v. Commissioner*.[211]

In all these cases, the UDHR was directly employed as legal basis for the release of the detained aliens and the grant of bail. The clear implication of the Court, therefore, was that the Incorporation Clause allowed for the UDHR to act as a repository of human rights principles that could be directly invoked before Philippine Courts *per se*, as the Court made no attempt to detect whether these principles were, indeed, "generally accepted principles of international law." Certainly, in 1951, the UDHR was simply not considered customary international human rights law, but a mere aspirational document.[212] Perhaps the only way to reconcile the decision with an orthodox understanding of the workings of the Incorporation Clause is that the decision was a 'foretelling' of the future: decades later, the provisions of the UDHR invoked by the Court are now almost universally considered part of the body of customary international human rights law.[213]

2. Recant : *Ichong v. Hernandez*

The stirring affirmations of the UDHR's place in the Philippines through the Incorporation Clause made in the cases above were remarkable. Just

209. Indeed, as to facts, ratio, and dispositive, the two cases are almost photocopies of one another. *Compare Mejoff*, 90 Phil. at 72-79, *with Borovsky*, 90 Phil. at 110-16.

210. Vadim N. Chirskoff v. Commissioner of Immigration and Director of Prisons, 90 Phil. 256 (1951) (an alien who had been detained for an extended period of time after the authorities had failed to deport him has the right to be released, consistent with the Universal Declaration of Human Rights, and the rulings in *Mejoff* and *Borovsky*)

211. Charles K. Andeu v. Commissioner of Immigration and Director of Prisons, 90 Phil. 347 (1951) (granting the release of the detained alien consistent with the Court's rulings in *Mejoff, Bovorovsky,* and *Chriskoff*).

212. *See* WALLACE, *supra* note 126, at 207-08.

213. *Id.*

seven years later, however, the Court made a dramatic retraction from its initial embrace of the UDHR. That infamous case was *Ichong v. Hernandez*.[214]

Republic Act No. 1180, the Retail Trade Nationalization Law, prohibited aliens from engaging directly in retail trade within the Philippines. The ostensible purpose of the law was to "translate national aspirations for economic independence and national security, rooted in the drive and urge for national survival and welfare, into a concrete and tangible measures designed to free the national retailer from the competing dominance of the alien, so that the country and the nation may be free from a supposed economic dependence and bondage."[215] Many, especially the Filipino-Chinese Community, disagreed, however, considering the law discriminatory, and a denial to alien residents of the equal protection of the law and of due process.

The Court upheld the law. While the due process and equal protection issues were given primary importance, the Court, through Justice Labrador,[216] also tackled the alleged violation of the Charter of the United Nations, the Universal Declaration of Human Rights, and the Treaty of Amity between the Republic of the Philippines and the Republic of China. The Court found no merit in the contention. Respecting the Charter invocation, the Court held: "The United Nations Charter imposes no strict or legal obligations regarding the rights and freedom of their subjects."[217]

More importantly, with respect to the UDHR, the Court held that the Declaration "contains nothing more than a mere recommendation, or a common standard of achievement for all peoples and all nations."[218] The Court then cited incidents of State practice to bolster its contention that the UDHR was non-binding: "That such is the import of the United Nations Charter and (sic) of the Declaration of Human Rights can be inferred from the fact that members of the United Nations Organization,

214. Lao H. Ichong (in his own behalf and in behalf of other alien residents, corporations, and partnerships adversely affected by Republic Act No. 1180) v. Jaime Hernandez et. al., 101 Phil. 1155 (1957).

215. *Id.* at 1160-61.

216. Perhaps surprising to the contemporary reader, considering the severity of the law and its decidedly undeceptive manner of class legislation against Resident Chinese in the Philippines, is the near-unanimity of the decision. Paras, C.J., Bengzon, Reyes, A., Bautista Angelo, Concepcion, Reyes, J.B.L., Endencia, and Felix, JJ., concurred in Justice Labrador's *ponencia*. Only Justice Padilla was of a different mindset. *See Id.* at 1192-95 (Padilla, J., concurring and dissenting).

217. *Id.* at 1190, *citing* HANS KELSEN, THE LAW OF THE UNITED NATIONS 29-32 (1951).

218. *Id.*, *citing* KELSEN, *supra* note 217, at 39.

such as Norway and Denmark, prohibit foreigners from engaging in retail trade, and in most nations of the world laws against foreigners engaged in domestic trade are adopted."[219] The Court also dismissed the argument that the law violated the Treaty of Amity between the Philippines and China.[220]

At the risk of overstating the obvious, one cannot help but be taken aback at the cavalier manner through which the UDHR and the Charter itself were disposed with. Armed with the opinion of Kelsen, the Court disregarded its prior embrace of the UDHR and International Human Rights Law manifested in *Mejoff* and companion cases, making light of any binding character the UDHR had under international law, and consequently, under Philippine law, too. One may take the effect of the Court's ruling to its illogical conclusion, and opine that the decision is authority for upholding the views of Publicists over that of the Court's own precedent. A more reasoned approach, however, especially in light of the undeniable status of the UDHR as normative under contemporary customary international law, is to regard this decision as a legal aberration unworthy of precedential value. Indeed, the human rights and fundamental fairness criticisms this case has received over the decades has been scathing, and its ill-advised roots were finally recognized and uprooted by Congress through the repeal of R.A. 1180.[221]

3. A Mixed Return: *Reyes v. Bagatsing*

Reyes v. Bagatsing[222] was a suit initiated by retired Justice J.B.L. Reyes, on behalf of the Anti-Bases Coalition, against Manila Mayor Ramon Bagatsing,

219. *Id.*

220. *Id.* at 1190-91. After explaining that the Treaty only required the Philippines to treat Chinese nationals "upon the same terms as the nationals of any other country," and that the law was not invalid for this reason because Chinese nationals are not being discriminated vis-à-vis other foreign nationals, the Court made another important, and controversial, observation. "But even supposing that the law infringes upon the said treaty, the treaty is always subject to qualification or amendment by a subsequent law, and the same may never curtail or restrict the scope of the police power of the State." *Id.* at 1191. That line of reasoning, of course, would tend to make every treaty obligation invalid in the Philippines, as the scope of police power encompasses virtually every area of governmental action.

221. Retail Trade Liberalization Act of 2000, R.A. No. 8762 (2000). For an insightful discussion on Retail Trade within the greater context of the Philippines' legal philosophy concerning commercial laws, *see* Cesar L. Villanueva, *Revisiting the Philosophical Underpinnings of Philippine Commercial Laws,* 46 ATENEO L.J. 707, 744-51(2001).

222. 125 SCRA 553 (1983).

who denied the Coalition a permit to rally in an open space within the vicinity of the U.S. Embassy, in order to compel him to issue the necessary permit. After discussing the cognate rights of free speech and peaceful assembly, the Court discussed the "novel aspect to this case"[223] — the interplay between the rights to free speech and assembly under the Constitution, and the obligations of the Philippines under international law to protect the integrity and safety of diplomatic missions and premises.

The Court noted that the Philippines had, in 1965, ratified the 1961 Vienna Convention on Diplomatic Relations, and that, as a binding treaty, the Philippines was obligated "to take appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity."[224] Oddly, the Court then cited the Incorporation Clause of the Constitution, and ruled: "To the extent that the Vienna Convention is a restatement of the generally accepted principles of international law, it should be part of the law of the land."[225] Using the language of constitutional law, Justice Fernando then commingled the tests under the law on free speech with the Vienna Convention's terminology: "[I]f there were a clear and present danger of any intrusion or damage, or disturbance of the peace of the mission, or impairment of its dignity, there would be a justification for the denial of the permit insofar as the terminal point would be the Embassy."[226] Viewed in this light, the City Ordinance prohibiting the holding of rallies within a 500 meter radius from any foreign mission,[227] an implementation of the Convention's mandate,[228] was therefore valid, "[u]nless the ordinance is nullified, or declared *ultra vires*," as primacy is always accorded to the constitutional rights of free speech and peaceable assembly.[229] Lastly, an *obiter* in the case invoked the Universal Declaration

223. *Id.* at 565.

224. *Id.* at 566, *citing* Vienna Convention on Diplomatic Relations, art. 22 (1961).

225. *Id.* To further confound things, the quoted phrase was footnoted in the decision with the enumeration of Court decisions that have employed the Universal Declaration of Human Rights, something clearly not in point there.

226. *Id.* at 566.

227. Ordinance No. 7295 of the City of Manila, *cited in Id.*

228. *Id.* at 570 ("It is to be admitted that [Ordinance No. 7295] finds support in the previously quoted Article 22 of the Vienna Convention on Diplomatic Relations.")

229. *Id.* at 566-67.

of Human Rights, along with the Constitution, as basis for the rights to free speech and peaceable assembly.[230]

Through *Reyes*, Justice Fernando recreated the mistake he earlier made in *Agustin v. Edu*, wherein treaty obligations were 'incorporated' into the Philippines as "generally accepted principles of international law," despite the fact that they originated from an entirely different source of law, and have different constitutional mechanisms for absorption into the Philippine legal system. Another important observation was the scenario Justice Fernando's *ponencia* pointed out as possible — what would happen if a treaty or general principle of law is found to be in irreconcilable conflict with Constitutional mandates, such as free speech? In such a case, the decision seems to indicate, understandably, that the Court would uphold the Constitution every time, even to the detriment of its obligations under international law.[231]

This view is reinforced by the separate opinions. In signing the decision, Justice Makasiar included a short comment, noting that his concurrence was "with the justification that in case of conflict, the Philippine Constitution — particularly the Bill of Rights — should prevail over the Vienna Convention."[232] And in Justice Plana's separate opinion, he added a qualification to his concurrence:

> The main opinion yields the impression that a rally or demonstration made within 500 feet from the chancery of a foreign embassy would be banned for coming within the terms of the prohibition of the cited Ordinance which was adopted, so it is said, precisely to implement a treaty obligation of the Philippines under the 1961 Vienna Convention on Diplomatic Relations.
>
> In my view, without saying that the Ordinance is obnoxious *per se* to the constitution, it cannot be validly invoked whenever its application would collide with a constitutionally guaranteed right such as freedom of assembly and/or expression, as in the case at bar, regardless of whether the chancery of any foreign embassy is beyond or within 500 feet from the situs of the rally or demonstration.[233]

Both Justices' comments exhibit a clear disdain towards international obligations — clearly, for those two Justices, the Constitution should be construed independently of the Convention, instead of harmonized. If the Constitution allows unfettered exercise of the fundamental freedoms, the

230. *Id.* at 567 ("[The rights to free speech and peaceable assembly] are assured by our Constitution and the Universal Declaration of Human Rights."), *citing* arts. 19-20 of the UDHR.

231. *See Reyes,* 125 SCRA at 570.

232. *Id.* at 571.

233. *Id.* at 575-76.

Constitution should be followed strictly, without attempting to balance those freedoms with the need to uphold international obligation to ensure the safety of a diplomatic mission.

4. The right to return to one's country: *Marcos v. Manglapus*

Marcos v. Manglapus[234] represents a new watermark in the area of incorporated international law. A sharply divided Court[235] raised principles of international human rights law to deny former President Ferdinand Marcos the right to return to the Philippines three years after the EDSA revolution.

The case arose from a petition for *mandamus* and prohibition, asking the Court to compel Secretary of Foreign Affairs Raul Manglapus to issue travel documents to Mr. Marcos and the immediate members of his family, and to enjoin the implementation of President Aquino's decision to bar their return to the Philippines on grounds of national security.[236] Apart from the constitutional issues being asserted,[237] Mr. Marcos also contended that international law, specifically international human rights instruments, guaranteed him the right to return to the Philippines.[238]

The majority of the Court viewed the right to travel from the Philippines to other countries, and within the Philippines, as completely distinct from the right to return to one's country, a separate (although related) right under international law. The Court took note of the fact that both the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights (ICCPR)[239] treated the right to

234. 177 SCRA 668 (1989).

235. The decision was 8-7. Cortés, J., was *ponente* of the majority opinion, with Narvasa, Melencio-Herrera, Gancayco, Griño-Aquino, Medialdea, and Regalado, JJ., concurring. Fernan, C.J., concurred in a separate opinion. Gutierrez, Jr., Cruz, Paras, Padilla, Sarmiento, Feliciano, and Bidin, JJ., dissented. Among the dissenters, Justices Gutierrez, Jr., Cruz, Paras, Padilla, and Sarmiento registered separate dissenting opinions.

236. *Marcos,* 177 SCRA at 682-83. Specifically, the Aquino government feared that the return of the former President would have dire consequences to the peace, security, and economy of the nation. *Id.*

237. The Marcoses were claiming their right to return to the Philippines principally under the Bill of Rights [Art. 3, §§ 1, 6]. The Court also discussed the extent and limits of the powers of the President in the decision.

238. *Marcos,* 177 SCRA at 64-85.

239. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368 (1967) (entered into force Mar. 23, 1976) [hereinafter ICCPR]. The Philippines signed and ratified the ICCPR on December 19, 1966 and October 23, 1986, respectively. *See* Echegaray v.

return as a separate concept, and allowed restriction of the right on grounds of national security and public order, and merely disallowed the arbitrary deprivation of the right.[240] "It would therefore be inappropriate to construe the limitations to the right to return to one's country in the same context as those pertaining to the liberty of abode and the right to travel."[241]

Arguing textually, the Court then explicitly ruled that the right to return to one's country was not among the specific rights guaranteed in the Bill of Rights;[242] however, "it is our well-considered view that the right to return may be considered as a generally accepted principle of international law and, under our Constitution, is part of the law of the land [Art. II, Sec. 2 of the Constitution.] However, it is distinct and separate from the right to travel and enjoys a different protection under the [ICCPR], i.e., against being arbitrarily deprived thereof [Art. 12(4)]." Effectively, therefore, principles of international human rights law supplement the Philippine Bill of Rights within our jurisdiction through the operation of the Incorporation Clause, granting citizens human rights that do not explicitly exist under the Constitution.

Again, however, one observes that the source of the human right incorporated was not considered by the Court as existing from the standpoint of Customary international law.[243] Apparently, the Court

Secretary of Justice, 297 SCRA 754, 780, 807 (1998), *citing* Human Rights Instruments Chart of Ratification, ST/HR/4/Rev. 15, United Nations Publication (Sales No. E.87.XIV.2) (1997).

240. Specifically, the Court invoked the UDHR (art. 13(2):"Everyone has the right to leave any country, including his own, and to return to his country.") and the ICCPR (art. 12(4):"No one shall be arbitrarily deprived of the right to enter his own country.").

241. *Marcos,* 177 SCRA at 687.

242. From a strictly textual standpoint, of course, the Court was right: the Constitution provides only for "[t]he liberty of abode and of changing the same" and "the right to travel." *See* PHIL. CONST. art. 3, §6.

243. The Court did make mention of Secretary Manglapus' disclosure that the decision to ban Mr. Marcos from returning to the Philippines for reasons of national security and public safety had international precedents. "Rafael Trujillo of the Dominican Republic, Anastacio Somoza, Jr. of Nicaragua, Jorge Ubico of Guatemala, Fulgencio Batista of Cuba, King Farouk of Egypt, Maximiliano Hernandez Martinex of El Salvador, and Marcos Perez Jimenex of Venezuela were among the deposed dictators whose return to their homelands was prevented by their governments." *Marcos,* 177 SCRA at 686, *citing* Statement of Foreign Affairs Secretary Raul S. Manglapus, *in* Memorandum of Respondents, at 26-32.

incorporated Article 12(4) of the ICCPR, a treaty which the Court itself noted that the Philippines had ratified,[244] and should therefore, at least theoretically, already create rights and obligations in the Philippine legal system through the process of transformation.

Another interesting aspect of the case was the Court's use of international law not merely to incorporate 'new' human rights in the Philippines, but also to *interpret* the Constitution. The Court resolved the issue regarding Mr. Marcos' right to travel, as guaranteed in Section 6, Article III of the Constitution, by stating that the right to travel was completely distinct from the right to return to one's country *under international law.* Thus, not only were the U.S. Supreme Court cases invoked concerning the content of the right to travel irrelevant;[245] the scope of the right to travel under our Constitution did not include the right to return to one's country because international law treated those rights separately. Consequently, the right to travel was immaterial to Mr. Marcos' case.[246]

Having "clarified the substance of the legal issue,"[247] the Court proceeded with other constitutional issues, and ultimately ruled that "the President did not act arbitrarily ... in determining that the return of former President Marcos and his family at the present time and under present circumstances poses a serious threat to national interest and welfare..." and dismissed the petition of the former dictator.

Justice Cortés' opinion expectedly drew a firestorm of criticism from her dissenting brethren, especially regarding her use of international law to

It would be interesting, if not more legally tenable, for the Court to discuss these instances of State practice as indicative of the rule of international law it sought to establish. The Court, however, did not seem to consider this aspect of the case.

244. The case specifically mentions that the ICCPR "had been ratified by the Philippines." *Id.* at 684.

245. "[W]e must State that it would not do to view the case within the confines of the right to travel and the import of the decisions of the U.S. Supreme Court in the leading cases of *Kent v. Dulles* [357 U.S. 116] and *Haig v. Agee* [453 U.S. 280]...the rulings in the cases of *Kent* and *Haig,* which refer to the issuance of passports for the purpose of effectively exercising the right to travel are not determinative of this case and are only tangentially material insofar as they relate to a conflict between executive action and the exercise of a protected right." *Id.* at 687, 688.

246. The Court thus ruled that the case is novel and without precedent in both Philippine and American jurisprudence. "Consequently, resolution by the Court of the well-debated issue of whether or not there can be limitations on the right to travel in the absence of legislation to that effect is rendered unnecessary. An appropriate case for its resolution will have to be awaited." *Id.* at 688.

247. *Id.*

separate the right to travel guaranteed under the Constitution from the right to return to one's country. Justice Gutierrez's dissent[248] appears to have brushed aside the *ponencia's* distinction between the right to travel and the right to return to one's country — he anchored his opinion that Mr. Marcos had a constitutional right to return to the Philippines squarely on Article 3, Section 6 of the Constitution.[249] "Section 6 provides that the right to travel, *and this obviously includes the right to travel out of or back into the Philippines,* cannot be impaired except in the interest of national security, public safety, or public health, *as may be provided by law.*"[250] Justice Cruz was also of the same mindset.[251]

Justice Paras' dissent invoked the Universal Declaration of Human Rights, along with the Constitution, as basis for opining that Mr. Marcos had a right to return to his own country except only if prevented by the demands of national safety and national security.[252] "If we [allow Marocs' return], our country shall have maintained its regard for *fundamental human rights,* national discipline, and for human compassion."[253]

Justices Padilla and Sarmiento directly challenged the validity of the *ponencia*'s invocation of international law. In fact, Justice Padilla's dissent displays an attempt to ascertain the scope of the international human right involved in the case better than the *ponencia* itself. He began by noting that Mr. Marcos invoked not only a constitutional right to return to one's country; he invoked the right as a basic *human right* recognized by the Universal Declaration of Human Rights.[254] "The Court ... should not accept respondents' general apprehensions, concerns and perceptions at face value, in the light of a countervailing and even irresistible, specific, clear,

248. Bidin, J., joined Justice Gutierrez's dissenting opinion.

249. *See Marcos,* 177 SCRA at 703 (Gutierrez, J., dissenting). Later, he opined: "Section 6 of the Bill of Rights states categorically that the liberty of abode and of changing the same within the limits prescribed by law may be impaired only upon a lawful order of a court. Not by an executive officer." *Id.* at 706.

250. *Id.* at 706-07 (some italics supplied).

251. "It is my belief that the petitioner, as a citizen of the Philippines, is entitled to return and live--and die--in his own country." *Id.* at 714. "Like the martyred Ninoy Aquino who also wanted to come back to the Philippines against the prohibitions of the government then, *Marcos is entitled to the same right to travel and the liberty of abode* that his adversary invoked." *Id.* at 716 (Cruz, J., dissenting) (emphasis supplied). Surprisingly, despite Justice Cruz's undoubted knowledge in International Law, having authored a textbook on the subject, he made no attempt, or perhaps felt no need, to address those issues.

252. *Id.* at 717 (Paras, J., dissenting). Exactly what provision of the UDHR he was referring to was not mentioned.

253. *Id.* (Paras, J., dissenting).

254. *Id.* at 719 (Padilla, J., dissenting) (emphasis in the original).

demandable, and enforceable right asserted by a Filipino. Deteriorating political, social, economic, or exceptional conditions, if any, are not to be used as a pretext to justify derogation of human rights."[255] His dissent thus clearly elevates the human rights recognized under the UDHR to the status of enforceable right akin to the constitutional rights protected under the Bill of Rights.

The Padilla dissent then continues by deconstructing the *ponencia*'s invocation of international law.

> As a member of the United Nations, the Philippines has obligations under its charter. By adopting the generally accepted principles of international law as part of the law of the land, (Art. II, Sec. 2 of the Constitution), the Philippine government cannot just pay lip service to Art. 13, par. 2 of the Universal Declaration of Human Rights which provides that everyone has the right to leave any country, including his own, and *to return to his country*. This guarantee is reiterated in Art. XII, par. 2 of the International Covenant on Civil and Political Rights which States that "*no one shall be arbitrarily deprived of the right to enter his own country.*" (italics supplied) "Arbitrary" or "arbitrarily" was specifically chosen by the drafters of the Covenant [*citing* P. Hassan, *The Word "Arbitrary" as used in the Universal Declaration of Human Rights: "Illegal or Unjust"*, 10 HARV. INT'L L.J. 225 (1969)] hoping to protect an individual against unexpected, irresponsible or excessive encroachment on his rights by the State based on national traditions or a particular sense of justice which falls short of international law or standards [*citing* F.C. Newman and K. Vasak, Civil and Political Rights, The International Dimensions of Human Rights, pp. 135-66].[256]

Justice Padilla thus forcefully advocated allowing Mr. Marcos' return on the basis of UN Charter obligations found in the UDHR, and in the ICCPR's tenets. Mistaken, however, was the use of the Incorporation Clause to make those obligations binding in the municipal setting — again, transformation through Senate concurrence must be regarded as the proper manner through which treaty obligations become valid and binding in the municipal sphere. In one sense, however, Justice Padilla was correct, unlike the majority opinion — the UDHR was correctly observed as operational within the Philippine setting through the Incorporation Clause, as the Declaration's provisions are largely representative of customary international law, not treaty obligations.

255. *Id.* at 719-20, *citing* S.P. Marks, *Principles and Notms of Human Rights Applicable in Emergency Situations: Underdevelopment, Catastrophies and Armed Conflicts, in* 1 THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 175-204 (UNESCO, 1982). Whether this source accurately represented customary international law at that time, and not mere advocacy, is uncertain. Yet again, no attempt at systematically asserting its customary validity was made.

256. *Id.* at 720.

Justice Sarmiento's dissent was even more piquant.

> I also find quite strained what the majority would have as the "real issues" facing the Court: "The right to return to one's country," pitted against "the right of travel and freedom of abode", and their supposed distinctions under international law, as if such distinctions, under international law, in truth and in fact exist. There is only one right involved here, whether under municipal or international law: the right of travel, whether within one's country, or to another, and the right to return thereto. The Constitution itself makes no distinctions; let, then, no one make a distinction. *Ubi lex non distinguit, nec nos distinguere debemus.*[257]

Evidently, Justice Sarmiento's viewed the distinction of the majority as little more than strained semantics. Whether he meant that international law and the Constitution are substantially identical regarding the right to travel out of, and back into, the country, is itself unclear, however.

Overall, what is encouraging about the decision is the Court's evident acceptance of the role International Human Rights Law (as codified in the UDHR and the ICCPR in this case) has in supplementing the Philippine Bill of Rights. Both the *ponencia* and the dissenting opinions freely discussed issues of international human rights law without seeing the need to pause and consider whether principles of international human rights law can or should be part of Philippine law. The Court took the matter almost as a fact. And unlike previous decisions, which could have been interpreted to mean that Human Rights instruments applied only to aliens,[258] *Marcos* employed the ICCPR and the UDHR to a Filipino.

One must take exception, however, in the doctrinal hair-splitting the majority made to sidestep the human rights issue that was at the center of the case. As succinctly pointed out by Justice Padilla, both the UDHR and ICCPR validated the position of the former President, rather than hindered it.

The charged nature of *Marcos*, and the tenuous extent to which the decision used international law to justify its desired result, exemplifies the truth of Holmes' familiar aphorism that "[g]reat cases like hard cases make bad law."[259] The case itself seems to apologize for its conclusions, reminding all at the outset that what was then at stake were not solely legal issues, but the political and economic well-being of the nation,[260] and that

257. *Id.* at 722 (Sarmiento, J., dissenting).

258. *See e.g., Mejoff, Borovsky,* discussed *supra.* In those cases, the persons seeking redress were foreign nationals or Stateless individuals.

259. Northern Securities Co. v. U.S., 193 U.S. 197, 400 (1904).

260. *Id.* at 681. The case began with this somewhat cryptic paragraph: "Before the Court is a controversy of grave national importance. While ostensibly only legal

the case was not meant to create precedent.[261] Its use of international law betrays this nervousness well. Thus, the supreme irony of the decision has to be the fact that international human rights was invoked not to uphold the primacy of individual rights against the State, but to uphold the right of the State to abridge them.

5. The Status of the Death Penalty under International Law: *Echegaray v. Secretary of Justice*

The famous (or infamous, depending on one's moral and ethical underpinnings) case of *Echegaray v. Secretary of Justice*[262] sealed the fate of Leo Echegaray, previously convicted and sentenced to death[263] for raping the ten-year old daughter of his common-law spouse, and cleared the way for the first execution in the Philippines after the effectivity of the 1987 Constitution. The case centered on whether the impending execution violated the constitutional proscription against cruel, degrading, and inhuman punishment[264] *per se*, and, relatedly, whether that execution was a violation of the Philippines' obligations under certain international

issues are involved, the Court's decision in this case would undeniably have a profound effect on the political, economic and other aspects of national life."

261. "This case is unique. It should not create a precedent, for the case of a dictator forced out of office and into exile after causing twenty years of political, economic and social havoc in the country and who within the short space of three years seeks to return, is in a class by itself." *Id.* at 682.

Justice Gutierrez chastised the majority for this. "I am...disturbed by the majority ruling which declares that it should not be a precedent. We are interpreting the Constitution for only one person and constituting him into a class by himself. The Constitution is a law for all classes of men at all times. To have a person as one class by himself smacks of unequal protection of the laws." *Id.* at 703 (Gutierrez, J., dissenting).

262. 297 SCRA 754 (1998). Although the decision was *Per Curiam*, two separate (which were really dissenting) opinions were registered. Unofficially, one of those decisions was penned by Justice Artemio Panganiban, a staunch Catholic lay leader and adherent to the abolition of the Death Penalty. Mr. Justice Panganiban categorically claims authorship of one of the dissents in Artemio V. Panganiban, *My Ponencia Writing-Style,* 2 PHILJA JUDICIAL J. 60 (2000).

263. *See* People v. Echegaray, 257 SCRA 561 (1996). Echegaray's subsequent Motion for Reconsideration was also denied in People v. Echegaray, 267 SCRA 682 (1997).

264. PHIL. CONST. art. III, §19(1). One should note that 1987 Constitution's version of the "cruel and unusual punishment" clause, as found in the 1935 and 1973 Constitutions, is casted differently — undoubtedly influenced by the International Law, specifically the ICCPR, the phrase is now worded as "cruel, degrading, or inhuman punishment inflicted." *Cf.* ICCPR, art. 7 (" No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.").

covenants, i.e., that the death penalty "violates the *International Covenant on Civil and Political Rights* considering that the Philippines participated in the deliberations of and voted for the *Second Optional Protocol*,"[265] without, however, ratifying it.

In an interesting twist, the Commission on Human Rights agreed with Echegaray, and filed an *amicus* petition contending *inter alia*[266] that the death penalty violated the UNHR[267] and the ICCPR.[268] The Commission also cited statistics from Amnesty International showing that as of October 1996, a total of 99 States were death penalty abolitionists in law or practice, while 95 States were "retentionists.[269] These statistics could have been used as evidence of State practice for purposes of establishing a customary norm against the death penalty; from the tenor of the opinion, however, it does not seem that it was argued.

The Court disagreed with both petitioner and Commission, and held that when carried through means of lethal injection, the death penalty did not violate the proscription against cruel, degrading, and inhuman treatment. As to the invocation of international law, the Court was correct in observing that the death penalty law does not violate international *treaty* obligations,[270] as the ICCPR itself explicitly recognizes that capital punishment is an allowable limitation to the right to life, subject to the limitation that it be imposed for the "*most serious crimes*."[271] The Court also noted that the Human Rights Committee established by the ICCPR and the UN Economic and Social Council both recognized the right to employ the death penalty, albeit only for the most serious intentional crimes, with lethal or other extremely grave consequences.[272] Most importantly, the Court tersely disposed of Echegaray's plea under the Second Optional Protocol of the ICCPR, as "*[t]he Philippines neither signed nor ratified said*

265. *Echegaray*, 297 SCRA at 768.

266. *Id.* at 767-68.

267. UDHR, art. 3 ("Everyone has a right to life, liberty and security of person") & art 5 ("No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.").

268. ICCPR, art. 6, and the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty.

269. *Echegaray*, 297 SCRA at 768.

270. *Id.* at 780.

271. *Id.* at 781. Indeed, the very same provision that recognizes the right to life also makes provision for the taking of it by the State: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be *arbitrarily* deprived of his life." ICCPR, art. 6(1).

272. *Id.* at 781-83.

document. Evidently, petitioner's assertion of our obligations under the *Second Optional Protocol* is misplaced."[273]

The Court was, of course, correct in asserting that the Second Optional Protocol could not bind the Philippines in any way, at least from the standpoint of treaty law. As the Philippines is effectively a third party to that Protocol, such does not create any binding rights or duties with respect to us.[274] The fact that the Philippines participated in its deliberation is of no legal consequence. Thus, while one may commend the spirited nature underlying the assertion that international law proscribes the death penalty, from a strict treaty law standpoint, both petitioner and the Commissioner on Human Rights had no legal leg to stand on. But what of customary international law?

The dissenting opinion explored the idea that the Death Penalty was proscribed under Customary international law, and concluded that it did. In fact, argument III of the dissent was headed *viz:* "R.A. No. 8177 Implementing The Death Penalty Violates International Norm."[275] The dissenter defined the core issue surrounding the death penalty to be the "*inherent and inalienable right to life* of every human being," one of the "self-evident principles" that inspired the adoption of the International Bill of Rights, i.e., the UDHR, ICCPR, ICESCR, and the ICCPR's two Optional Protocols.[276]

The dissent then devoted much of the decision to the particular provisions of the ICCPR, its two Optional Protocols, U.N. General Assembly, Economic and Social Council, and Commission on Human Resolutions,[277] and the Practice of Regional Organizations,[278] the sum of which was supposed to "indisputably" show the emergence of an

273. *Id.* at 783 (emphasis in original).

274. This principle of international law is commonly known as *pacta tertiis nec nocent nec prosunt,* which simply means that a treaty is not binding upon a person who is not party to it. *See generally* CHRISTINE CHINKIN, THIRD PARTIES IN INTERNATIONAL LAW 3 (1994).

275. *Id.* at 805.

276. *Id.* It must be stressed, however, that one would be hard-pressed to find authority supporting the view that the Two Optional Protocols also constitute part of such a peremptory group — these two protocols, precisely, were not considered of such universal agreement as the three formal instruments.

277. *Id.* at 808-10, *citing* U.N. G.A. Res. 2857 (XXVI) and 32/61 of Dec. 6, 1977, and a number of Economic and Social Council, and Commission on Human Rights Resolutions.

278. *Id.*, *citing* Sixth Protocol to the European Convention on Human Rights, which the dissent noted was the "first binding international agreement for the abolition of the death penalty."

international norm abolishing the death penalty. As authority for such a monumental statement, the dissenter pointed to William Schabas, who observed that the adoption of the International Bill of Rights "has firmed up this international norm."[279] The dissenter concluded: "*I respectfully submit that we should respect this international* norm consistent with the *spirit* of section 2, Article II, of our Constitution, which mandates that the Philippines "adopts the generally accepted principles of international law as part of the law of the land ..."[280]

It is difficult to reconcile the dissent with the orthodox rules of customary international law. Indeed, the case is evidence yet again of the same unfamiliarity the Supreme Court has displayed on many other occasions — the inability to distinguish *de lege ferenda* or aspirational principles of international law from true custom. Is there a uniform and consistent practice among States, accepted as a matter of *opinio juris*, that international law requires for custom to crystallize?[281] The dissent's own evidence seems to suggest otherwise. Its invocation of the ICCPR and the Second Optional Protocol is largely self-defeating for as previously mentioned, the ICCPR explicitly recognizes the right of States to exercise capital punishment, merely prescribing minimum standards for the exercise of such. The Second Optional Protocol does not bind the Philippines, a non-signatory, unless that Protocol can be shown either to have crystallized[282] or codified customary international law. While the dissent

279. *Id.* at 811, *citing* WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW (2d ed. 1997).

280. *Id.* (emphasis in the original). One other argument worth mention is the dissent's rather brazen argument that "[a]t the very least, execution of our death convicts should be suspended pending decision of our government to reject or ratify the Second Optional Protocol." *Id.* at 811-12. The fact that the Philippine government has not decided for or against the Second Optional Protocol since its adoption in 1989 certainly does not create any *de facto* rights — if at all, Executive inaction in this matter should precisely be respected as tacit rejection of the Protocol.

281. *See* North Sea Continental Shelf Cases, (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 4 (Feb. 20).

282. "Crystallization" is a term under international law used to describe the process through which a multilateral treaty, while in itself not expressive of prevailing custom, so influences the practice of States that the treaty's provisions may be said to guide future conduct almost instantaneously. It is also employed in the more progressive sense, i.e., the treaty's provisions present the State of the law as it should be and as practiced by a number of States, and so universally influences subsequent practice as to "crystallize" custom. The Exclusive Economic Zone provisions of the Third United Nations Convention on the Law of the Sea (1982) is one example of this phenomenon. *See generally* BROWNLIE, *supra* note 17, at 11-15.

does cite the practice of Europe, and Amnesty International Statistics, it conveniently fails to account for the practice of the rest of the world, especially from developing countries, whose practice is essential in fulfilling the uniformity criterion of customary international law. Neither does the dissenter show, or perhaps realize, that General Assembly Resolutions form evidence of the *opinio juris* of States. Indeed, for every William Schabas, who the dissenter cites as authority, many other authorities, including the ICCPR itself, can be cited to propose that no such customary principle exists.[283]

Thus, in attempting to advocate the abolition of the death penalty, a familiar tactic was used: the Incorporation Clause was employed as a tool for advocacy. The dissent, in fact, resorted to the "spirit" of the Incorporation Clause, tacitly admitting the fact that the purported custom against the death penalty is less-than settled, at best. As one can always find some evidence to support a view that a proposition is now customary, the limitations of custom as a source of law becomes, yet again, apparent with this case. The law should not be so susceptible to manipulation.

One final point may be made. While probably not constitutive of customary international law at present, the dissent did succeed in showing the trend of international law towards the eventual abolition of the death penalty. Should a case along the lines of *Echegaray* be presented in the future, customary international law at that time could very well dictate the overturning of the death penalty. If that happens, it would be interesting to speculate on the ruling of the case — would the Supreme Court, employing the Incorporation Clause, invalidate explicit statutory and legislative policy, and abolish the death penalty? Or would it uphold specific domestic policy, as opposed to the general constitutional mandate provided by the Incorporation Clause? Would the Court also adhere to *stare decisis*, despite that shift in customary international law? The last chapter of *Echegaray's* legacy remains unwritten.

6. "Equal pay for equal work": *International School Alliance of Educators v. Hon. Quisumbing*

International School Alliance of Educators v. Hon. Quisumbing and International School Inc.[284] was a recent case that exhibited just how expansively the Court is willing to construe the Incorporation Clause. The International School Manila, a domestic educational institution established primarily for dependents of foreign diplomatic personnel and other temporary residents, had a standing policy of hiring both foreign and local teachers as members

283. *See, e.g.,* ICCPR, art. 6(2); European Convention on Human Rights, art. 2(1); Soering Case, 161 Eur. Ct. H.R. (Ser. A), at 31, *reprinted in* 28 I.L.M. 1063.

284. 333 SCRA 13 (2000).

of the faculty, in order to cater to the educational needs of its mostly-foreign students better. The School classified its faculty into two groups: (1) foreign-hires and (2) local hires. Should the teacher hired be either domiciled in the Philippines, have his home economy in the Philippines, owe economic allegiance to the Philippines, or if the school was responsible for bringing the individual to the Philippines, that faculty member was considered a local-hire, regardless of nationality.[285] Because they received salaries 25% less than the "foreign-hires," the locally-hired teachers of the International School sued, crying racial discrimination. The School disputed this, pointing to the fact that at least 38 local-hires were not Filipinos.

The Supreme Court agreed with the 'local-hires.' "That public policy abhors inequality and discrimination is beyond contention. Our Constitution and laws reflect the policy against these evils."[286] The Court proceeded to establish the School's legal obligation to pay its locally hired teachers the same as its international hires, based on lofty, but mostly hortatory, principles derived from the Constitution,[287] "the very broad" Article 19 of the Civil Code,[288] and the Labor Code,[289] the sum of which "impregnably institutionalize in this jurisdiction the long honored legal truism of 'equal pay for equal work.'"[290]

The Court could very well have confined its *ratio* to these principles. But perhaps because of the foreign dimension of the case, and the lacuna in

285. *Id.* at 16, *citing* Rollo, at 328.

286. *Id.* at 19.

287. *Id.* at 19-20, *citing* PHIL. CONST. art. XIII, § 1 (exhorting Congress to "give highest priority to the enactment of measures that protect and enhance the right of all people to human dignity, reduce social, economic, and political inequalities.") The case later cited art. XIII, § 3 (entitling labor to "humane conditions of work" and "equality of employment opportunities for all.").

288. Requiring every person, "in the exercise of his rights and in the performance of his duties, [to] act with justice, give everyone his due, and observe honesty and good faith." CIVIL CODE, art. 19.

289. *Id.* at 21, *citing* LABOR CODE, art. 3, (the State shall "ensure equal work opportunities regardless of sex, race, or creed"); art. 135 (prohibiting the payment of lesser compensation to a female employee for work of equal value); art. 248 (declaring it an unfair labor practice for an employer to discriminate in regard to wages in order to discourage membership in any labor organization).

290. *Id.* at 22.

Philippine law,[291] Justice Kapunan saw it fit to base the idea of "equal pay for equal work" also on international law.

> International law, which springs from *general principles of law*, (Statue of the International Court of Justice, Art. 38) likewise proscribes discrimination. General principles of law include principles of equity (M. Defensor-Santiago, International Law 75 (1999), citing Judge Hudson in *River Meuse Case*, (1937) Ser.A/B No. 70.), *i.e.*, the general principles of fairness and justice, based on the test of what is reasonable (*Ibid.*, citing *Rann of Kutch Arbitration (India vs. Pakistan)*, 50 ILR 2 [1963]). The Universal Declaration of Human 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. The Philippines, through its Constitution, has incorporated this principle as part of its national laws.*[292]
>
> ...Notably, the International Covenant on Economic, Social, and Cultural Rights, *supra*, in Article 7 thereof, provides: "The States Parties to the present Convention recognize the right of everyone to...*fair wages and equal remuneration for work of equal value without distinction of any kind*, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;..."[293]

While the Court should be lauded for bridging a municipal labor rights dispute with international human rights law, the decision must be considered in other ways one of the Court's more spectacular failures, at least from the perspective of Incorporation. Initially, the Court invoked general principles of law, as the term is understood under Article 38 of the Statute of the Court,[294] which could only mean "the general principles of law recognised by civilised nations."[295] The general principle sought to be incorporated "include principles of equity, i.e., the general principles of fairness and justice, based on the test of what is right and reasonable."[296] Certainly, it is self-evident to say that equity, fairness, and justice are

291. Indeed, the long string of Constitutional provisions and statutes invoked only seem to amplify the fact that none of them squarely contemplated the situation found in the present case.

292. *International School*, 333 SCRA at 20-21 (emphasis supplied).

293. *Id.* at 22 (some citations omitted) (emphasis supplied).

294. It is doubtful that such a source of law was ever meant, nor should it be, susceptible to incorporation. A more comprehensive discussion on the issue is made in Chapter 4, *infra*.

295. Statute of the International Court of Justice, art. 38(1)(c).

296. *International School*, 333 SCRA at 20.

already part of the Philippine legal system; its origins are not to be traced to international law. More will be said on this point in the next chapter.

Equally disturbing was the Court's apparent lack of sensitivity (or knowledge) of the different sources of international law and the manner through which they form part of Philippine law. In one paragraph, the Court bundled together general principles of law (presumably part of Philippine law through incorporation), alongside a number of treaties (without identifying whether the Philippines was party to the treaty, or whether such are codifications of customary international law — if so, the Court does not give the slightest indication that it had investigated those principles and had found them to have the State practice and *opinio juris* necessary for custom to exist), and then claimed that they "all embody the general principle against discrimination, the very antithesis of fairness of justice. The Philippines, *through its Constitution, has incorporated* this principle as part of its national laws."[297] Thus, both treaties and "general principles of law" were once again treated as interchangeable sources of international law that may directly be invoked as Philippine law to resolve disputes through the Incorporation Clause, notwithstanding the great difference in the manner in which they become, and remain, part of Philippine law.

C. Deportation

In re Patterson,[298] one of the first reported cases ever decided by the Supreme Court, is proof that even from the inception of the Insular Government in the Philippines, international law was already made part of Philippine Law, and a judicial tool used in the adjudication of controversies. In 1901, a British subject, Thomas Toye Patterson, arrived at the port of Manila from abroad, and was arrested within twenty-four hours after landing, the Insular Collector of Customs claiming that he had reasonable grounds to believe that Patterson was guilty of violating the law. The foreigner sued for *habeas corpus,* invoking, *inter alia,* the international treaty between England and the United States, governing commerce and intercourse between the subjects of both nations.

The Court, however, affirmed the Collector's detention of Patterson. The treaty referred to could not dilute the right to existence and the integrity of its territory: "it is a doctrine generally professed...that under no aspect of this case does this right of intercourse give rise to any obligation

297. *Id.* at 21 (emphasis supplied).

298. 1 Phil. 93 (1902).

on the part of the State to admit foreigners under all circumstances into its territory."[299] The authority for this statement was international law.

> The international community, as Martens says, leaves States at liberty to fix the conditions under which foreigners should be allowed to enter their territory. These conditions may be more or less convenient to foreigners, but they are a legitimate manifestation of territorial power and not contrary to law. In the same way *a State possesses the right to expel from its territory any foreigner who does not conform to the provisions of the local law.* (Marten's Treatise on International Law, vol.1, p. 381) *Superior to the law which protects personal liberty, and the agreements which exist between nations for their own interest and for the benefit of their respective subjects is the supreme and fundamental right of each State to self-preservation and the integrity of its dominion and its sovereignty.*[300]

A more extensive use of the international law on deportation as manifested in the Philippines, however, came eight years later. In *Forbes v. Chuoco Tiaco,*[301] a case of great political and legal repercussions at the time of the colonial period,[302] defendant Chuoco Tiaco, a Chinese national, had filed suit to enjoin Governor-General Forbes from carrying out his order to deport the defendant from the country. Among the issues presented was the source and extent of the power of the Philippine (Insular) government to deport or expel objectionable aliens.

After establishing that the government of the United States in the Philippine Islands is a "government with all the necessary powers of a government,"[303] "we are of the opinion, and so hold, that it has impliedly or inherently all such powers as are necessary to preserve itself in conformity with the will of the Congress of the United States and the President thereof, and to this end it may prevent the entrance into or eliminate from its borders all such aliens whose presence is found to be detrimental or injurious to its public interest, peace, and domestic tranquility."[304] The right to deport or expel unwanted aliens springs, according to the Court, from the fact in itself that the government exists, as recognized by international law. The Court boldly stated that "every author who has written upon the subject of international law and who has

299. *Id.* at 96.

300. *Id.* at 96-97 (emphasis supplied).

301. 16 Phil. 534 (1910). On *certiorari,* the U.S. Supreme Court affirmed. Chuoco Tiaco v. Forbes, 228 U.S. 549 (1913) (Holmes, J.).

302. *See generally* Anna Leah Fidelis T. Castañeda, *The Origins of Philippine Judicial Review, 1900-1935,* 46 ATENEO L.J. 107 (2001).

303. *Forbes,* 16 Phil. at 559.

304. *Id.* at 559-60.

discussed this question has reached the same conclusion."[305] Apart from "noted authors," the Court cited extensively from its prior ruling in *In re Patterson*,[306] the U.S. Supreme Court's decision in *Chao Chan Ping*;[307] *Ekiu v. United States*,[308] *Fong Yue Ting v. U.S.*;[309] the English House of Lords[310] and a slew of other cases.

Of course, there is nothing inherently wrong in abiding by precedent. However, that when principles of incorporated international law are concerned, strict adherence to the doctrine of *stare decisis* must be proscribed, as the source of the principle, customary international law, is dynamic and constantly changing.[311] This bears emphasis because the Court's *dictum* in *In Re Patterson* could lead some to the conclusion that the principles on deportation were taken primarily from U.S. Supreme Court precedent. Automatic resort to precedent should be antedated by a preliminary inquiry as to whether international law on the matter has changed first. In that way, even if the court ultimately rejects international law in favor of domestic policies and established principles, it does so with its 'eyes open,' and not under the guise of fealty to the international legal order.

Parenthetically, one notes that the international law on deportation has indeed changed from that time: the right to deport is no longer as absolute as *Forbes* and subsequent cases would have it.[312]

305. *Id.* at 564-68. The Court named these "noted men and Statesmen" — Vattel, Blackstone, Marshall, Phillimore, Story, Oppenheim, and twenty others, as examples. The Court later reprinted their thoughts on the matter. *Id.*

306. *Id.* at 560-61.

307. 130 U.S. 581 (1888) (holding that the power to exclude foreigners is an incident of sovereignty). Parenthetically, it should be said that these cases are not without controversy. *See generally* Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and its Progeny,* 100 HARV. L. REV. 853 (1987).

308. 142 U.S. 651 (1891) ("It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions or to admit them only in such cases and upon such conditions as it may see fit to prescribe.").

309. 149 U.S. 698 (1892) ("The power to exclude or expel aliens being a power affecting international relations is vested in the political department of the Government.").

310. The Attorney-General of Canada v. Cain, House of Lords Reports, Appeal Case (1906). The Court noted that Lord Atkinson "cit[es] Vattel's Law of Nations in support of his proposition [that every State has the right to expel or deport an alien]").

311. *See* further discussion in chapter IV, *infra.*

312. *See, e.g.,* AKEHURST, *supra* note 126, at 260-62.

D. *Sovereign Immunity*

If one goes strictly by the number of cases that have been decided by the Supreme Court, Sovereign Immunity is easily the most virile single principle of customary international law incorporated in the Philippines.[313] From 1945 to the present, sovereign immunity has repeatedly been invoked and applied by the Court, although not necessarily in conformity with the standards set under international law. Recently, *The Holy See v. Rosario*[314] summarized many of the Court's decisions on the matter, and discussed international law extensively in arriving at its decision. It thus constitutes the primary focal point of this section.

The Holy See, who exercises sovereignty over the Vatican City in Rome, Italy, and is represented in the Philippines by the Papal Nuncio, sold a parcel of land it owned in Parañaque to a Philippine national, who in turn, assigned his rights to a Philippine Corporation. Due to the refusal of the squatters on the land to vacate the area, a dispute arose as to which of the parties had the responsibility of clearing the land. Complicating matters further was the Holy See's sale of a portion of the land to another party.

Two issues discussed bear relevance to this work.[315] The first was a preliminary matter — whether the Holy See was, in fact, a sovereign State.

313. Cases which discuss sovereign immunity, many of them related to the former U.S. Military Bases, abound. *See, e.g.,* Raquiza v. Bradford, 75 Phil. 50 (1945); Miquiabas v. Philippine-Ryukus Command, 80 Phil. 262 (1948) World Health Organization v. Aquino, 48 SCRA 242 (1972); Baer v. Tizon, 57 SCRA 1 (1974); Sanders v. Veridiano, 162 SCRA 88 (1988); United States v. Guinto, 182 SCRA 644 (1990); International Catholic Migration Commission v. Calleja, 190 SCRA 130 (1990); Shauf v. Court of Appeals, 191 SCRA 713 (1990); Minucher v. Court of Appeals, 214 SCRA 242 (1992); The Holy See v. Rosario, 238 SCRA 524 (1994).

When one includes diplomatic immunity, an intimately related area of law, the list increases further. *See, inter alia,* Lasco v. UNRFNRE, 241 SCRA 681 (1995); Jeffrey Liang v. People of the Philippines, 323 SCRA 692 (2000), *reaffirmed* G.R. No. 125865, Mar. 26, 2001 (Resolution).

314. 238 SCRA 524 (1994).

315. The Court also discussed the personality or legal interest of the Department of Foreign Affairs to intervene in the case in behalf of the Holy See. The Court disposed of the issue using international law. "In Public International Law, when a State or international agency wishes to plead sovereign or diplomatic immunity in a foreign court, it requests the Foreign Office of the State where it is sued to convey to the court that said defendant is entitled to immunity. " *Id.* at 531-32. The Court then discussed the U.S. and English procedures, before discussing the Philippine practice, which was found to be either through (1) securing an executive endorsement of its claim of sovereign or diplomatic immunity, or (2) to

Citing no less than seven separate publicists,[316] the Court came to the conclusion that it was, as "[t]his appears to be the universal practice in international relations.[317]

Having established its sovereignty, the Court proceeded to inquire whether the Holy See deserved the benefit of sovereign immunity in this case. The Court began by summarizing the current state of the law, invoking the Incorporation Clause at the outset.

> As expressed in Section 2 of Article II of the 1987 Constitution, we have adopted the generally accepted principles of International Law. Even without this affirmation, such 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.[318]

The Court then proceeded to discuss the two conflicting concepts of sovereignty, "each widely held and firmly established" — the "classical, or absolute theory," under which a sovereign cannot be made a respondent in the courts of another sovereign without its consent; and the "newer or restrictive theory," which recognizes the immunity of the sovereign only with regard to public acts (acts *jure imperii*), but not with regard to private acts (acts *jure gestionis*).[319] After further discussion, which included foreign sovereign immunity statutes[320] and its own jurisprudence,[321] the Court, without explicitly stating so, clearly sought to apply the restrictive theory in the Philippines.

submit the defense of sovereign immunity directly to the local courts. *Id.* at 532-33.

Apparently, the procedural practices of foreign States are considered relevant State practice by the Court, although it is unclear why, even as to internal procedural matters, the Court needs to make such an analysis.

316. These ranged from local authors (Jovito Salonga and Pedro Yap; Isagani Cruz), to foreign publicists (*e.g.*, Professors Kelsen and O'Connell). No primary source, however, was cited directly as authority.

317. *Holy See,* 238 SCRA at 534.

318. *Id.* at 534-35, *citing* U.S.A. v. Guinto, 182 SCRA 644 (1990).

319. *Id.* at 535, *citing* U.S.A. v. Ruiz, 136 SCRA 487 (1987); COQUIA & DEFENSOR-SANTIAGO, PUBLIC INTERNATIONAL LAW 194 (1984).

320. *Id.* (citing the U.S. Foreign Sovereign Immunities Act; Act to Provide for State Immunity in Canadian Courts). The Court cites these statutes as examples of the practice of some States in considering when acts are to be deemed *acta jure gestionis*.

321. *Id.* at 536. The Court classified past cases as either *jure imperii* [Syquia v. Lopez, 84 Phil. 312 (1949); U.S. v.Ruiz, 136 SCRA 487 (1987); and Sanders v. Veridiano, 162 SCRA 88 (1988)] or *jure gestionis* [U.S. v. Rodrigo, 182 SCRA 644 (1990); U.S. v. Guinto, 182 SCRA 644 (1990)] pronouncements.

To do so, it recognized that due to the absence of legislation on the matter, it would have to improvise. "In the absence of legislation defining what activities and transactions shall be considered "commercial" and as constituting acts *jure gestionis*, we have to come out with our own guidelines, tentative they may be."[322] The clear implication from the rest of the case is that the Court tried to absorb State practice and perceived customary principles into the matrix of its "tentative rules."[323]

After noting that the Holy See was not (obviously) engaged in the business of buying and selling land "in the ordinary course of a real estate business," [324] and delving into corollary principles under the Vienna Convention on Diplomatic Relations,[325] the Court held that the Holy See was entitled to sovereign immunity, as its decision to transfer property and the subsequent disposal thereof was clothed with governmental character, not being sold for profit or gain, but merely to dispose of land because living thereon was made almost impossible to use as an official residence.[326] Thus, the complaint was dismissed. Justice Quiason's *ponencia,* however, offered Respondent a quaint bit of consolation: it could seek a remedy offered under international law — ask the Philippine Government to espouse its claim against the Holy See.[327]

322. *Id.* at 536.

323. "Certainly, the mere entering into a contract by a foreign State with a private party cannot be the ultimate test. Such an act can only be the start of the inquiry. The logical question is whether the foreign State is engaged in the activity in the regular course of business. If the foreign State is not regularly engaged in a business or trade, the particular act or transaction must then be tested by its *nature*. If the act is in pursuit of a sovereign activity, or an incident thereof, then it is an act *jure imperii*, especially when it is not undertaken for gain or profit." *Id.* (emphasis supplied).

324. *Id.* at 537.

325. "In Article 31(a) of the Convention, a diplomatic envoy is granted immunity from civil and administrative jurisdiction of the receiving State over any real action relating to private immovable property situated in the territory of the receiving State which the envoy holds on behalf of the sending State for the purposes of the mission. If this immunity is provided for a diplomatic envoy, with all the more reason should immunity be recognized as regards the sovereign itself, which in this case is the Holy See." *Id.*

326. *Id.*

327. Private Respondent is not left without any legal remedy for the redress of its grievances. Under both Public international law and Transnational law, a person who feels aggrieved by the acts of a foreign sovereign can ask his own government to espouse his cause through diplomatic channels.

Private Respondent can ask the Philippine government, through the Foreign office, to espouse its claims against the Holy See. Its first task is to persuade the Philippine government to take up with the Holy See the validity of its claims. Of

Many aspects of the *ratio* in *Holy See* are unsettling. In the first place, the Court chose to employ the restrictive theory of sovereign immunity despite its admission that both the classical and restrictive theories of sovereignty are "each widely held and firmly established."[328] That ruling is facially questionable, as the Incorporation Clause provides in the clearest terms that only the "generally accepted principles of international law" are capable of incorporation. Serendipity, however, has worked well for the Court here — there is growing recognition that the restrictive theory has crystallized into customary international law.[329] Nevertheless, it only reinforces the perception that the Court is lackadaisical in rigorous analysis when it comes to incorporating principles of international law.

Second, the Court's reasoning itself, purportedly in fealty to the restrictive theory, is unconvincing. A quick consultation into any basic public international law text reveals that because it is the *nature*, not the *purpose*, of the transaction that is the *vinculum* attracting application of the restrictive theory, sales transactions such as these, which are *by nature* commercial and not an exercise of sovereign powers, are *not acta jure imperii*.[330] By paying lip service to the restrictive theory, but resolving the case according to whether the act was "in the regular course of business," thereby rendering its application to virtually inutile, the Court's practice is more akin to the absolute theory.

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course, the Foreign Office shall first make a determination of the impact of its espousal on the relations between the Philippine government and the Holy See (Yong, *Remedies of Private Claimants Against Foreign States,* Selected Readings on Protection by Law of Private Foreign Investments 905, 919[1984]). Once the Philippine government decides to espouse the claim, the latter ceases to be a private cause.

According to the Permanent Court of International Justice, the forerunner of the International Court of Justice:

By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights — its right to ensure, in the person of its subjects, respect for the rules of international law (The Mavrommatis Palestine Concessions, 1 Hudson, World Court Reports 293, 302 [1924]).

Id. at 538-39. As to how this remedy can effectively and realistically be employed to redress the Respondent's grievances, the Court gives no clue.

328. *Id.* at 535.

329. *See* WALLACE, *supra* note 126, at 122-24.

330. *See* BROWNLIE, *supra* note 17, at 329-39.

E. Pacta Sunt Servanda

Pacta Sunt Servanda, the rule requiring that States perform and fulfill their treaty obligations in good faith, is a principle of customary international law,[331] even a general principle of law,[332] codified by the Vienna Convention on the Law of Treaties.[333] It is the foundation of all conventional international law, for without it, the superstructure of treaties, both bilateral and multilateral, which comprise a great part of all international law, would collapse. It is unsurprising, then, that parties to cases involving international agreements assiduously invoke *pacta sunt servanda* to validate international agreements, and that the Supreme Court has almost always responded to validate treaty obligations. Indeed, this line of jurisprudence exemplifies a fidelity to international law that is decidedly lacking in other areas.

In *Agustin v. Edu,*[334] the Court was faced with a constitutional challenge to the validity of a Letter of Instruction requiring all motor vehicles to obtain Early Warning Devices. In the process of affirming the validity of the regulation as a valid exercise of police power, one of the issues discussed by (then) Justice Fernando to "reinforce" the Court's opinion was fact that the assailed Letter of Instruction was implementing legislation to the 1968 Vienna Convention on Road Signs and Signals, which the Philippines had ratified under P.D. 207.[335]

> It cannot be disputed then that this Declaration of Principle found in the Constitution possesses relevance: "The Philippines...adopts the generally accepted principles of international law as part of the law of the land..." *The 1968 Vienna Convention on Road Signs and Signals is impressed with such a character.* It is not for this country to repudiate a commitment to which it had pledged its word. The concept of *Pacta sunt servanda* stands in the way of such an attitude, which is, moreover, at war with the principle of international morality.[336]

As pointed out by a number of commentators,[337] the Court was mistaken in stating that the Vienna Convention was part of Philippine law

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331. *Id.* at 620.

332. *See* LORD MCNAIR, THE LAW OF TREATIES ch. 30-35 (1961).

333. Vienna Convention on the Law of Treaties, art.26, U.N. Doc. A/CONF. 39/27, 8 I.L.M. 679 (1969), *reprinted in* 63 AM. J. INT'L. L. 875 (1969) ("Every Treaty in force is binding upon the parties to it and must be performed by them in good faith.").

334. 88 SCRA 195 (1979)

335. *Id.* at 212-13.

336. *Id.* at 213 (emphasis supplied).

337. *See, e.g.,* Azcuna, *supra* note 136, at 28 ("[T]he Court probably erred in saying that the 1968 Vienna Convention...is impressed with the character of generally

by virtue of incorporation. One construction of the Court's ruling that does not run afoul of the Constitution is that it was the principle of *pacta sunt servanda,* not the Convention itself, that was among the generally accepted principles of international law binding upon the Philippines.

1. The Constitutionality of the WTO: *Tañada v. Angara*

Recently, three politically charged cases have arisen before the Supreme Court concerning *pacta* which reveal considerable insight into the various attitudes the current members of the Supreme Court have towards international law. The first of these was the case of *Tañada v. Angara.*[338]

The case was initiated by various lawmakers and 'progressive' organizations, assailing the WTO Agreement, and the Senate's concurrence therein, as a violation of the Constitution's economic provisions, *inter alia.* One of the issues advanced was that the WTO Agreement violated Philippine sovereignty. While the Court appreciated the "ferocity and passion by which petitioners stressed their arguments on this issue,"[339] the Court held that the concept of sovereignty itself is not absolute. One of the valid limitations to this is *pacta sunt servanda,* a principle of public international law binding upon the Supreme Court by virtue of the Incorporation Clause:

> [W]hile sovereignty has traditionally been deemed absolute and all-encompassing on the domestic level, 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. Unquestionably, the Constitution did not envision a hermit-type isolation of the country from the rest of the world. In its Declarations of Principles and State Policies, the Constitution "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." By *the doctrine of incorporation,* the country is bound by generally accepted principles of international law, which are considered to be *automatically* part of our laws. One of the oldest and most fundamental rules in international law is *pacta sunt servanda*--international agreements must be performed in good faith. "A treaty engagement is not a mere moral obligation but creates a legally binding obligation on the parties x x x. A State which has contracted valid international obligations is bound to

accepted principles of international law adopted by our Constitution as part of the law of the land. It is the principle of *pacta sunt servanda,* perhaps...that is the general principle invoked...").

338. 272 SCRA 18 (1997).

339. *Id.* at 66.

> make in its legislations such modifications as may be necessary to ensure the fulfillment of the obligations undertaken."[340]

The Court then entered into an extensive discussion on the concept of sovereignty under both Philippine and International Law, ruling that treaties are a valid form of auto-limitation, and not a violation of Philippine sovereignty.[341] "The point is that... a portion of sovereignty may be waived without violating the Constitution, based on the rationale that the Philippines "adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of x x x cooperation and amity with all nations."[342] In the end, a unanimous Court found nothing Constitutionally impermissible about the WTO Agreement, and dismissed the case.

Clearly discernable from *Tañada* was the attempt by the Supreme Court to distance itself from any serious study into the relative merits and demerits of joining the World Trade Organization, beyond a facial examination of whether the Treaty was constitutionally infirm. Matters of policy were judiciously left to the political branches of government. In fact, it was the policy of the Political branches of government, together with its own finding of constitutional permissibility, that seems to have compelled the Court to invoke the principle of *pacta sunt servanda* — one certainly cannot picture the Court invoking *pacta* to validate an otherwise unconstitutional treaty.[343] The Court referred time and again to the fact that the WTO was a manifestation of the government's determination to embrace the global market economy, and that such was in line with both the principle adopting the generally accepted principles of international laws *and* the policy of cooperation and amity with all nations. Thus, the third phrase of the Article II, Section 2, expressing that the Philippines "adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations," which facially at least seems hortatory, is actually an integral part of the Incorporation Clause.

The effect of the Court's decision, therefore, was to emphasize once again the context in which the Incorporation Clause finds itself in — the incorporation of international law is but a component of a greater foreign relations policy that renounces war as an instrument of national policy, and

340. *Id* (citations omitted) (emphasis supplied).

341. *Id.* at 66-70.

342. *Id.* at 70.

343. Of course, under international law, the fact that a treaty is unconstitutional is immaterial — international obligations remain valid, and States cannot present their municipal laws or constitution as an excuse to violate their conventional and customary obligations. *See* Case of Certain German Interests in Polish Upper Silesia, 1929 P.C.I.J. Ser. A. No. 7.

commits itself to furthering cooperation and amity with all nations. In some ways, this means that the Incorporation Clause had gone full circle, and returned to the original intent of the framers.[344]

Another important *ratio* the Court made was to formalize what was textually apparent about the Incorporation Clause — Justice Panganiban's *ponencia* specifically mentioned that the Incorporation Clause works *automatically*,[345] i.e., generally accepted principles of international law automatically form part of our own laws, without further need of recognition each time new custom crystallizes into law.

2. Recent Twists: *Bayan v. Zamora* and *Secretary of Justice v. Lantion*

Another politically charged case was *Bayan v. Zamora*,[346] where the Court settled the heated debate surrounding the Visiting Forces Agreement. Through *Bayan*, the Court had the occasion, among the "smorgasbord of issues"[347] for resolution, to delineate the scope of the treaty clause of the Constitution,[348] as opposed to the particular Constitutional mandate applicable should the treaty concluded concern a military basing agreement.[349] After establishing that the VFA was made within the

344. As discussed in Chapter 2 *supra*, the framers of the Commonwealth Constitution appeared to consider the Incorporation Clause as integrated with the policy renouncing aggressive war.

345. *Tañada*, 272 SCRA at 66.

346. BAYAN (Bagong Alyansang Makabayan) et. al. v. Executive Secretary Ronaldo Zamora et. al., 342 SCRA 449 (2000).

347. *Id.* at 497 (Puno, J., dissenting).

348. PHIL. CONST. art VII, § 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."). Both the main opinion of Buena, J., and the dissent of Puno, J., make interesting claims about the nature of treaties under Philippine law, and their purported meaning under international law, which are worthy of scholarly engagement. Such forays into treaty law and its interplay with Philippine law is, however, beyond the scope of this study.

349. After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases, foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State.

PHIL. CONST. art. XVIII, § 25.

Constitutional architecture for foreign basing and military agreements,[350] the majority[351] proceeded to another reason for validating the agreement: *pacta sunt servanda*.

After noting the acceptance of the Senate and ratification by the President of the VFA (an act which the Court termed is equivalent to "final acceptance" of the VFA), and the corresponding exchange of notes between the Philippines and the United States of America, the Court ruled that "*it now becomes obligatory and incumbent on our part, under the principles of international law, to be bound by the terms of the agreement. Thus, no less than Section 2, Article II of the Constitution, declares that the Philippines 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."[352]

The Court continued in *dicta* that may not-too dramatically be labeled revolutionary:

> As a member of the family of nations, the Philippines agrees to be bound by generally accepted rules for the conduct of its international relations. While the international obligation devolves upon the State and not upon any particular branch, institution, or individual member of its government, the Philippines is nonetheless responsible for violations committed by any branch or subdivision of its government or any official thereof. 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. (Louis Henkin, Richard C. Pugh, Oscar Schachter, Hans Smit, Cases and Materials, 2ND Ed American Casebook Series, p. 136) *Hence, we cannot readily plead the Constitution as a convenient excuse for non-compliance with our obligations, duties and responsibilities under international law."*
>
> Beyond this, Article 13 of the Declaration of Rights and Duties of States adopted by the International Law Commission in 1949 provides: "Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty."(Gerhard von Glahn, [Law Among Nations, An Introduction to Public International Law, 4TH Ed.], p. 487)

350. *See Bayan*, 342 SCRA at 481-92 (explaining that U.S. Senate Concurrence under its Constitution is unnecessary, as the VFA is binding under both international law and U.S. law).

351. Buena, J., *ponente*, with Davide, C.J., and eight other Associate Justices concurring. Mendoza, J., concurred in the result. Puno, J., dissented, joined by Melo and Vitug, JJ. Panganiban, J., took no part.

352. *Bayan*, 342 SCRA at 492 (emphasis supplied).

> Equally important is Article 26 of the [Vienna Convention on the Law of Treaties] which provides that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." This is known as the principle of *pacta sunt servanda* which preserves the sanctity of treaties and have [sic] been one of the most fundamental principles of positive international law, supported by the jurisprudence of international tribunals (Harris, p. 634 cited in Coquia, International Law, p. 512). [353]

Bayan is revolutionary for at least two reasons. First, the Court upheld the validity of the VFA under Philippine Constitutional law based, *inter alia,* upon the need to uphold the principle of *pacta sunt servanda.* By stating, rather forcefully, that "[a]s an integral part of the community of nations, we are responsible to assure that our government, *Constitution* and laws will carry out our international obligations," and that "[h]ence, we cannot readily plead the Constitution as a convenient excuse for non-compliance with our obligations, duties and responsibilities under international law" — the Court exhibits, in a very rare instance, and in the strongest of language, a very respectful, almost differential, attitude towards international law. This kind of fealty by the Court towards international law exhibits an integrative attitude towards international law that is startlingly *monist* in outlook.

Second, and more important, is *Bayan's* clear implication that even constitutional provisions should be understood as being subject to the Philippines' obligations under International law. If the Court meant what it said, *Bayan* would then represent the logical conclusion of a shift in paradigm begun by the Court in *Tañada,* i.e., that through the Incorporation Clause, international law now possesses absolute primacy under Philippine law. Whether that shift will continue to hold true in future decisions, or with respect to International law principles outside *pacta sunt servanda,* would be interesting to watch.

On a more minor note, the case again falls into the trap of *Agustin*: the Court once more erroneously ruled that the VFA has binding force upon us by virtue of the Incorporation Clause.[354] It may be said, however, that the Court was perhaps referring to the *customary* principle of *Pacta sunt servanda*; that would be valid reason for summoning the Incorporation Clause at that point in the Court's decision.[355]

353. *Id.* at 493 (some emphasis supplied).

354. *Id.* at 492 ("With the ratification of the VFA...it now becomes obligatory...under principles of international law, to be bound by the terms of the agreement. Thus, *no less that Section 2, Article II of the Constitution, declares that the Philippines adopts the generally accepted principles of International law as part of the law of the land...*").

355. One final observation bears mention. *Bayan v. Zamora* brings the fundamental issues of sovereignty and the permissibility of laws that seek to have extraterritorial effects sharply into focus, areas rarely delved into by Philippine scholars. These areas are fertile ground for inquiring into the attitude the Supreme Court has towards international law. Unfortunately, as these issues are often only tangentially (if at all) related to the Incorporation Clause, such are beyond the scope of this study.

The most recent upholding of a treaty over challenges based upon domestic law came only seven days after *Bayan,* with the similarly controversial *Secretary of Justice v. Hon. Lantion and Mark Jimenez.*[356] In that case, the Court set aside its earlier January 18, 2000 ruling,[357] and Justice Reynato S. Puno's dissent in the original case was vindicated upon reconsideration by the majority. The "jugular issue" was whether Mark Jimenez was entitled to the due process right to notice and hearing during the evaluation stage of the extradition process. The Court held that "private respondent is bereft of the right to notice and hearing during the *evaluation stage* of the extradition process."[358]

Justice Puno's *ponencia* dedicated much of its argument to the nature of extradition, and the need to uphold the intent behind the treaty. After noting that the Vienna Convention on the Law of Treaties required the Philippines to interpret the treaty in light of its intent, i.e., its object and purpose,[359] the Court recognized that "countries like the Philippines forge extradition treaties to arrest the dramatic rise of international and transnational crimes like terrorism and drug trafficking. Extradition treaties provide the assurance that the punishment of these crimes will not be frustrated by the frontiers of territorial sovereignty."[360] The Court then considered the understanding of the executive department of both the U.S. and Philippine governments of the terms of the treaty binding. "It will be presumptuous for the Court to assume that both governments did not understand the terms of the treaty they concluded."[361] It also noted that other countries with similar extradition treaties (the Court explicitly mentioned the note verbales of Canada and Hongkong on the matter)

356. 343 SCRA 377 (2000).

357. The decision was made upon urgent motion for reconsideration by the Department of Justice, and overturned the Court's prior decision in 322 SCRA 160 (2000). The reconsidered decision was promulgated just shy of nine months later, on Oct. 17, 2000.

The January decision was decided upon a 9-6 vote. In the October reconsidered decision, the new majority was 9-6 again, this time in favor of the Secretary of Justice.

358. *Lantion,* 343 SCRA at 382.

359. *Id.* at 383, *citing* VCLT, art. 31(1) ("A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.").

360. *Id.* at 383-84.

361. *Id.* at 385-86

"Stated in unequivocal language that it is not an international practice to afford a potential extraditee with a copy of the extradition papers during the evaluation stage."[362] Thus, "[w]e cannot disregard such a convergence of views unless it is manifestly erroneous."[363]

But the most important *dictum* of the case was the Court's attitude towards Jimenez's invocation of the right to due process, and that the Bill of rights should always override mere treaty obligations. "To be sure," the Court held, "[Jimenez's] plea for due process deserves serious consideration involving as it does his primordial right to liberty. *His plea to due process, however, collides with important State interests which cannot also be ignored for they serve the interest of the greater majority.*"[364] Because the clash of rights "demands a delicate balancing of interests approach,"[365] a "balancing pole" between an individual's right to due process of law, and the government's policy of extradition and the need to respect the Executive's judgment on matters of foreign policy, in line with the principle of separation of powers. The Court ruled directly and forcefully on the matter: "*Considering that in the case at bar, the extradition proceeding is only at its evaluation stage, the nature of the right being claimed by the private respondent is nebulous and the degree of prejudice he will allegedly suffer is weak, we accord greater weight to the interests espoused by the government thru the petitioner Secretary of Justice.*"[366] In the Court's analysis, only through this result could the Executive's competence and authority to act in all matters in foreign relations be upheld.[367] Also, in tilting the balance of the interests of the State, the Court stressed that the hold on Jimenez's right to notice and hearing at the administrative stage of the extradition process was merely a "*temporary hold...a soft restraint* on his right to due process which will not deprive him of *fundamental fairness* should he decide to resist the [judicial] request for his extradition to the United States."[368]

Apart from respect for Separation of Powers, however, the Court also tilted the balance in favor of the State based upon a recognition of the increasingly globalized nature of the world.

> The Philippines also has a national interest to help in suppressing crimes and one way to do it is to facilitate the extradition of persons covered by treaties duly entered by our government. More and more, crimes are becoming the concern of one world. Laws involving crimes and crime prevention are undergoing universalization. The manifest purpose of this trend towards globalization is to deny easy refuge to a criminal whose activities threaten the peace and progress of civilized countries. It is to the great interest of the Philippines to be part of this irreversible movement in light of its vulnerability to crimes, especially transnational crimes.[369]

362. *Id.* at 386.

363. *Id.*

364. *Id.* (emphasis in the original).

365. *Id.*

366. *Id.* at 391 (emphasis supplied).

367. *Id.* at 391-92 ("The executive department is aptly accorded deference on matters of foreign relations...").

368. *Id.* at 393.

The Court ended with again with strong support for internationalization. "A myopic interpretation of the due process clause would not suffice to resolve the conflicting rights in the case at bar. With the global village shrinking at a rapid pace...we need to push further back our horizons and work with the rest of civilized nations and move closer to the universal goals of 'peace, equality, justice, freedom, cooperation, and amity with all nations (Section 2, Article II, 1987 Constitution)."[370]

While the intrinsic logic of the *ponencia* had much to do with *pacta sunt servanda*, as the Court upheld an interpretation of the R.P.-U.S. Extradition Treaty that undoubtedly amounted to a performance of the treaty in good faith, the decision brings far more compelling issues to the fore. Two points become immediately apparent. To reiterate a prior observation, *Secretary of Justice v. Lantion*, taken together with *Bayan v. Zamora*, seem to usher in a new period in the Court's appreciation of international law in general, and the Incorporation Clause, in particular — a movement that began with *Tañada v. Angara's* embrace of a more international, *monistic* outlook.[371] The Court is increasingly willing to reconcile international law to the domestic legal system, even if that means the limited curtailment of fundamental rights, as was in fact the practical effect of *Secretary of Justice v. Lantion*. Whether this philosophical and legal movement amounts to more than just passing fancy or unmeasured rhetoric in future decisions remains to be seen.

The point becomes even more engaging when one considers that Justice Puno, the *ponente* in *Lantion*, was the principal dissenter in *Bayan v. Zamora*, promulgated just seven days before, in which he extolled the sovereignty and dignity of the Philippines over the *Pacta* demands of the VFA, to which the Philippines was party.[372] While certainly not on all fours, Justice Puno's current *ponencia* and immediately preceding dissent seem at least philosophically opposed to one another. While more a point of observation and curiosity rather than legal, it reveals that individual

369. *Id.* at 392.

370. *Id.*

371. For an extended discussion, *see* Chapter 4(A) *infra*.

372. *See* Bayan v. Zamora, 342 SCRA 449, 497-521 (2000) (Puno, J., dissenting). Less surprising is the fact that, Melo & Vitug, JJ., who joined in dissent, also dissented in *Lantion*.

Justices are less susceptible to doctrinal absolutes as, say, their American counterparts, and are more willing to adapt their legal philosophies to suit desired results.

Second, what is unseen in the decision, but no less worthy of mention for precisely that reason, is that the Court limited the discussion of the extradition treaty to principles of International Treaty Law, such as the Vienna Convention on the Law of Treaties, and did not bleed the Incorporation Clause into *Lantion's* ratio as the Court had the tendency to do before. In fact, when Article II, Section 2 was invoked, the Incorporation Clause seems to have been deliberately left unused, as only the flowery (and hortatory, one might add) third clause in the provision, which calls for "peace, justice, freedom, cooperation, and amity with all nations," was employed by the Court. Undoubtedly, that clause States a general policy that cannot support concrete cases. Overall, therefore, the last paragraph of the decision is important in determining the Court's mindset and attitude towards international issues and international law, but not as a source of rights in future cases.

The dissent of Justice Melo, who was *ponente* in the original decision, also made specific mention of the Incorporation Clause. Melo disagreed sharply with the way the majority tilted the balance in favor of the State. "[T]he power of one — the single individual" being the "very bond of democratic society,"[373] he would have had due process override the Philippines' treaty obligations, should such a fundamental inconsistency exist. He did so in classic dualist language: "If the case was before international tribunals, international obligations would undoubtedly reign supreme over national law. However, in the municipal sphere, the relationship between international law and municipal law is determined by the constitutional law of individual States."[374]

Justice Melo then made a correct, and rarely explicitated, delineation of the Incorporation Clause. "In the Philippines, the doctrine of incorporation is observed with respect to *customary international law* in accordance with Article II, Section 2 of the 1987 Constitution which in essence provides that the Philippines 'adopts the generally accepted principles of international law as part of the law of the land.'"[375] This is one of the few Judicial pronouncements that recognize that the scope of the Incorporation Clause is limited to customary international law. Unfortunately, Justice Melo then makes a worrisome statement. "The Extradition Treaty on the other hand is not customary international law. It

373. *Lantion,* 343 SCRA at 395 (Melo, J., dissenting).

374. *Id.* at 402 (Melo, J., dissenting), *citing* SALONGA & YAP, PUBLIC INTERNATIONAL LAW 11-12 (1992 ed.).

375. *Id.* (Melo, J., dissenting).

is a treaty which may be invalidated if it is in conflict with the Constitution. And any conflict therein is resolved by this Court, which is the guardian of the fundamental law of the land. No foreign power can dictate our course of action..."[376]

The dissent thus could be interpreted to imply that if the extradition was of customary international law origin, instead of a treaty obligation, the Court could validate the 'violation' (in his eyes) of constitutional rights, perhaps under the theory that custom is incorporated through constitutional mandate under Art. II, § 2. Such should not be the case, of course. As previously discussed, although undoubtedly of constitutional origin, the content of customary international law is not derived from the constitution, and is not a constitutional imperative.

The dissent also seemed to forget that it was not the "dictate" of foreign powers that led to the present controversy — the Philippines freely, and in fact, precisely as a sovereign equal, entered into the Extradition Treaty with the United States. That line of reasoning, therefore, has no place in a discussion of a treaty's validity in the Philippines.

F. *Transnational*[377] *Commercial "Laws"*

The field of public international law as it relates to international trade and economic law is almost entirely based upon treaties.[378] This is not to say, however, that there are no established rules regulating international commerce. Most of them, however, are not properly be classified as public international law — they are considered transnational trade law, or a law *tertium genus,* between public international law on the one hand and national systems of law on the other. One example of this is the *lex mercatoria*.[379] Nevertheless, the Supreme Court has shown, once more, its

376. *Id.* (Melo, J., dissenting).

377. National and international laws and processes relating to the international economy may be usefully styled "transnational," a term employed in 1956 by the American Jurist Philip Jessup to encompass "all laws which regulates actions or events that transcend national frontiers." The term has been most often and helpfully been used to describe the laws that have to do with international business transactions. *See* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 274 (2d ed. 1993), *citing* PHILIP C. JESSUP, TRANSNATIONAL LAW 2 (1956).

378. The WTO agreement and the New York Convention on the Enforcement of Arbitral Awards are but the most obvious examples of these.

379. *See generally* Michael Mustill, *The New Lex Mercatoria: The First Twenty-Five Years,* 4 ARB. INT'L 86 (1988); ALAN REDFERN & MARTIN HUNTER, INTERNATIONAL COMMERCIAL ARBITRATION 105-20 (2d ed. 1991). Notably, these areas of law are not universally accepted as valid. Professor Mustill notes: "The *lex mercatoria* has sufficient intellectual credentials to merit serious study, and yet is not so generally accepted as to escape the skeptical eye."

ingenuity in incorporating commercial laws from extra-Philippine sources through the Incorporation Clause.

In *Bank of the Philippine Islands (BPI) v. De Reny Fabric Industries,*[380] the defendant, a Philippine corporation, applied to BPI for four letters of credit to cover the purchase of dyestuffs from its American supplier. The Bank approved the application, and the goods were sent to the Philippines. Upon arrival in the Philippines, the goods were discovered to actually be colored chalk, not dyestuffs. By this time, however, the Bank had already paid the supplier as per the letter of credit. The corporation refused to take possession of the false goods, or to pay the remainder of its obligation under the Letter of Credit, forcing the bank to sue.

While the Supreme Court appreciated the "sweep of [De Reny's'] argument" that it should not be made to pay the bank despite the clear defectiveness of the goods delivered, it nevertheless ruled against the Company, as their case was "nestled hopelessly inside a salient where the valid contract between the parties and the internationally accepted customs of the banking trade must prevail."[381]

"[T]he internationally accepted customs of the banking trade" referred to was contained in the "Uniform Customs and Practices for Commercial Documentary Credits Fixed for the Thirtieth Congress of the International Chamber of Commerce,"[382] Article 10 of which provided in substance that banks are not guarantors of the goods, and must be paid according to the terms of the letter of credit, as they do not concern themselves with the performance of the sales contract between the supplier and the buyer.

> The existence of a *custom in international banking and financing circles* negating any duty on the part of a bank to verify whether what has been described in letters of credits or drafts or shipping documents actually tallies with what was loaded aboard ship, *having been positively proven as a fact, the appellants are bound by this established usage.* They were, after all, the ones who tapped the facilities afforded by the bank in order to engage in international business.[383]

As a matter of municipal law, the *ratio* of the case can arguably be upheld purely on the basis of the Civil Code[384] and the Code of Commerce,[385] both of which allow the custom or usage as a source of law in the absence of any other applicable rules. The Court does, in fact, point to these provisions as justification for applying the ICC document to the case.[386] The Court's primary basis for incorporating those banking principles in the Philippines, however, was the Incorporation Clause of the Constitution: "The power of our courts to accept in evidence, international custom as evidence of a general practice accepted as law, may be said to be derived from both Constitutional as well as statutory sources. Section 3, Article II of the Constitution provides that "The Philippines...adopts the generally accepted principles of international law as part of the law of the Nation."[387] Evidently, customary international law cognizable under the Constitution and merchant custom cognizable by statute are interchangeable, or worse, the same. The Court would adopt *BPI* in later decisions.[388]

Another notable aspect of the decision was that the Court took pains to point out that the customary nature of the UCP 500 was positively proven by the bank.[389] While 'custom' in the Civil Code sense needs, indeed, to be "proved as a fact, according to the rules of evidence,"[390] the same Rules of Evidence provide that the law of nations is a matter for Judicial Notice,[391] and therefore, need not be proven in evidence.[392]

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380. 35 SCRA 256 (1970).

381. *Id.* at 259.

382. The case cites the fact that "the Philippines is a signatory nation" to the document (more popularly known in commercial and banking circles as the UCP 500). *Id.* at 261. The International Chamber of Commerce is, of course, not an International Organization in the Public International Law sense of the word. Rather, it is a private organization based in Geneva, and composed of business persons from around the world, representing their respective countries business interests, at best, in an unofficial manner. *See generally* the ICC website at www.icc.org. It is unclear from the decision whether the Court knew of this fact, or whether the Court considered the act of signing the document a quasi-treaty, binding upon the Philippines through the doctrine of transformation. If so considered, of course, the Court would be in manifest error.

383. *Id* (emphasis supplied).

384. CIVIL CODE, art. 9 ("No judge shall decline to render judgment by reason of the silence, obscurity, or insufficiency of the law."); art. 12 ("A custom shall be proven as a fact, according to the rules of evidence.").

385. CODE OF COMMERCE, art. 2 ("Acts of commerce, whether those who execute them be merchants or not, and whether specified in this Code or not, should be governed y the provisions contained in it, in their absence, by the usages of commerce generally observed in each place; and in the absence of both rules, by those of the civil law.")

386. *See BPI*, 35 SCRA at 259 n. 1.

387. 35 SCRA 256, 259 n.1.

388. See FEATI Bank and Trust Co. v. Court of Appeals, 196 SCRA 576 (1991).

389. "*It was uncontrovertibly proven by the Bank during the trial below* that banks, in providing financing in international business transactions such as those entered into by the appellants, do not deal with the property to be exported or sipped to the importer, but deal only with documents." BPI at 260 (emphasis supplied).

390. CIVIL CODE, art. 12.

391. Rules of Court, The 1989 revised Rules on Evidence, Rule 129, § 1.

G. Environmental Law

Taking its cue from the groundbreaking *Oposa v. Factoran*,[393] one area in which the Supreme Court has been unafraid to explore *de lege ferenda* principles of international law is in Environmental Law.

The clash between the responsibility of the City Government of Caloocan to dispose of the 350 tons of garbage it collects daily and the growing concern and sensitivity to a pollution-free environment of the residents of an area in Caloocan City, was the essence of the controversy in *Laguna Lake Development Authority v. Court of Appeals*.[394] Because of the harmful effects of an open garbage dumpsite in Barangay Camarin, Caloocan City, upon the health of its residents, and the possibility of pollution of the water content of the surrounding area, a letter-complaint was filed with the Laguna Lake Development Authority (LLDA). After investigation, the LLDA found that the City Government of Caloocan was maintaining an open dumpsite without first securing an Environmental Compliance Certificate from the Environmental Management Bureau of the Department of Environment and Natural Resources, as required by law. The LLDA then issued a cease-and-desist order against the City, which was questioned before the Trial Court.

Among the issues decided upon,[395] the Court affirmed the power of the LLDA to issue cease and desist orders, in response to the demands of "the necessities of protecting vital public interests," giving vitality to the statement on ecology embodied in the Constitution,[396] and its declared policy "to protect the right to health of the people and instill health consciousness among them."[397] To buttress the argument, the Court continued: *"It is to be borne in mind that the Philippines is party to the Universal*

392. An extended discussion on this point was made in Chapter 2, *supra,* and a refutation, in Chapter 4, *infra.*

393. 224 SCRA 792 (1993). The reverberations of that case was significant, at least to academics in the area of International Environmental Law. a number of books have cited *Minors Oposa* as authority for the emergence of a concept of standing for environmental degradation. *See infra* note 529 and accompanying text.

394. 231 SCRA 292, 295 (1994).

395. The issue given most attention by the Court was its Administrative Law aspect — whether the LLDA, under its charter and amendatory laws, has the authority over the case, and if so, whether it had the authority to issue the cease-and-desist order. On both counts, the Court held that the LLDA does. *Id.* at 303-05.

396. 1987 PHIL CONST. art. II, § 16: "The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."

397. *Id.* art. II, § 15.

Declaration of Human Rights and the Alma Conference Declaration of 1978 which recognize health as a fundamental human right."[398]

It is reasonable to infer that the Court must have been aware that both the Universal Declaration of Human Rights and the Alma Conference Declaration are not in themselves binding treaty instruments. Did the Court mean to use them, therefore, as an indication of incorporated customary international law? The brevity in which the instruments were mentioned, without further explanation, makes it difficult to say that their mention was more than mere *obiter*. The Court could have meant for these instruments, to which "[i]t has to be borne in mind that the Philippines is party," to merely illustrate the environmental policy of the Philippines, with no further incantations of customary environmental law, at that time (and until the present) in a State of flux.[399] Conversely, the Court's decision could easily be read as a validation that indeed, as discussed by the framers of the Constitution, the human right to a balanced and healthy environment is valid and enforceable in the Philippines due to Philippine policy, culled to a large extent from international sources.

V. THE IMPLICATIONS OF THE JURISPRUDENCE:

Towards a Reasonable Reconciliation of Incorporated International law in the Philippines

The preceding two chapters discussed the tools available under Philippine law for the incorporation of international law and their use in theory, and juxtaposed them against the jurisprudence of the Supreme Court, spanning the entirety of the Court's one hundred-odd year existence.[400] This part of the work is integrative in nature: it seeks to reconcile theory with practice, and arrive at general observations on the manner through which international law is appreciated in the Philippines, and the author's observations on how it should be. The fruition and ultimate goal of these ruminations is to arrive at a practical framework for a more sensible

398. *Laguna Lake*, 231 SCRA at 308, *citing* 3 RECORD OF THE CONSTITUTIONAL COMMISSION 119 (1986).

399. While the International Court of Justice has already recognized the emergency of a definite body of 'international environmental law,' *see* Legality of the Use of Nuclear Weapons, 1996 I.C.J., 35 I.L.M. 809 (1996), the scope of the right, especially in the sense that the Supreme Court seems to use it — as a human right — is still a subject of intense debate among scholars and politicians. *See generally* PATRICIA BIRNIE & ALAN BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT (1992); PHILIPPE SANDS, INTERNATIONAL ENVIRONMENTAL LAW (2d ed. 1996).

400. As seen in Chapter 3, international law was a source of law in the Philippines from the outset. One of the first decisions of the Court, in fact, employed international law directly. *See* In Re Patterson, 1 Phil. 93 (1902).

incorporation of international law by Philippine courts, which will follow in the next chapter.

A. Synthesis: The Jurisprudential Attitude of Philippine Courts towards International Law[401]

Ascertaining the Philippine Supreme Court's jurisprudential attitude towards international law with anything more than the most general observations is indeed a slippery affair. In its first fifty years, the Court seemed to display a much higher degree of sensitivity towards international law, and customary principles were ascertained and incorporated only after painstaking analysis — cases such as *Compagnie de Commerce* exemplified this exactitude. In the last fifty years, however, the picture was not as easily decipherable. Some decisions, such as *Ichong v. Hernandez* and *Reyes v. Bagatsing*, seemed to reflect the more isolationist, protectionist side of those times, with the Court declaring its unqualified commitment to domestic laws and policy, regardless of whether international law should come in conflict. Perhaps more disturbing were the cases that paid lip service to

401. As discussed previously in Chapter 1, the attempt to discuss the particular attitude of the Philippines within the dualist-monist debate is of little practical significance, as the terminology itself has come to contain significantly disparate content. However, so as not to sacrifice comprehensiveness, a brief foray into the debate may be made at this stage of the work.

The explicit mandate of the Constitution's Incorporation Clause, together with the Rule making international law a matter of mandatory judicial notice, confirm the characterization of the Philippines as a dualist state. For indeed, as far as any form of dualism exists, an ordinance, whether through general provision of the Constitution or through statute, is indispensable. Christoph Schreuer, *International Law and Municipal Law, in* 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 253 (1987).

If one is to view the entire monist-dualist debate as a question of attitudes, however, the case law of the Philippines reveals an increasingly monistic, internationalist conception. [*See* Chapter 1 *supra*, for a more extensive discussion on the dualist-monist debate, and on the "internationalist conception."] In fact, isolated instances of the case law suggests a completely *monistic* view of the interplay. Justice Cruz's *ponencia* in U.S.A v. Guinto, 182 SCRA 644 (1990) ("[e]ven without [the Incorporation Clause], we would still be bound by the generally accepted principles of international law under the doctrine of incorporation." This is so, because "such principles are deemed incorporated in the law of every civilized state as a condition and consequence of its membership in the society of nations. Upon its admission to such society, the state is automatically obligated to comply with these principles in its relations with other states."), is indicative of monistic thought. One clear characteristic of the monist doctrine is that no special ordinance for the application of customary law in the domestic sphere is necessary. Christoph Schreuer, *International Law and Municipal Law, in* 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 253 (1987).

international law, but exhibited neither perseverance nor aptitude in discovering the content and actual practice of those principles, or worse, misrepresented the true state of international law on certain issues.[402]

With the onset of the late-1990s, however, the mood of the Court towards international law has become decidedly more cooperative.[403] The Court has, especially regarding the principle of *pacta sunt servanda,* exhibited a conscious shift towards a more internationalist attitude with the recent decisions in *Tañada v. Angara, Bayan v. Zamora,* and *Secretary of Justice v. Lantion.* In fact, if one were to take at face value some of the bolder pronouncements in *Bayan,* one could even say that international obligations now have greater import than even constitutional dictates,[404] although this author does not share that view.[405] As globalization continues to take root and become evermore pervasive, one can expect the Philippines to continue exhibiting a receptive stance towards international

402. *See* especially the cases of *Marcos v. Manglapus* and *Holy See v. Rosario,* discussed in Chapter 3, *supra.*

403. *See* especially the cases of *Tañada v. Angara, Bayan v. Zamora,* and *Secretary of Justice v. Lantion,* discussed in Chapter 3, *supra.*

404. Bayan v. Zamora, 342 SCRA 449, 493 (2000) ("[A]s an integral part of the community of nations, we are responsible to assure that our government, *Constitution* and laws will carry out our international obligations, ...we cannot readily plead the Constitution as a convenient excuse for non-compliance with our obligations, duties and responsibilities under international law.").

405. The implications of such a "blank check" towards international law would lead to conclusions on the abdication of sovereignty wholly impossible, coming from a national court. The efficacy of some of the sweeping statements in those cases should thus be limited only to the principle of *pacta sunt servanda,* and even then, only with circumspect. The reason for this is that *pacta* only operates when the Philippines has signed and ratified a treaty, giving its explicit consent to be bound by international obligations (as opposed to custom, where the possibility that a principle might go against our specific statutory, even Constitutional, precepts is more plausible).

In fact, notwithstanding the glowing words found, for example, in the Court's famous centerpiece of international sensitivity, *Tañada v. Angara,* this author posits that the Philippines remains firmly, and understandably, self-interested. Despite the rhetoric, the basic theme of the *ponencia* was that the Philippines had something to gain out of the treaty, and so therefore, it was in its best interests to bind itself.

One may also argue proceeding from those cases that the use of the Incorporation Clause may be used as a value judgment on the part of the Philippine Republic, to follow treaties we are party to not only because we have concurred therein, but because it is consistent with a *policy* of peace and amity with all nations. This would mean, then, that principles of international law that do not affect state actors, such as, for example, transnational commercial law (as held in BPI), should not be treated with such fealty.

law. Indeed, overall, it is valid to conclude that Philippine case law supports the growth in scope of international law susceptible to incorporation, through an expansive interpretation of the scope of the Incorporation Clause.

This descriptive summary of the Court's *dicta* is hardly systematic. One simply cannot arrive at a completely coherent legal and policy explanation for the divergence in the Supreme Court's opinions. Many factors, including the prevailing exigencies of the times, and the industry skill, and awareness of the individual *ponente* towards international law, undoubtedly affected the variances in each of those cases.

Given the oscillations in the Supreme Court's attitudes towards international law over its hundred year history, attempting to divine a uniform theory explaining these variances, in an attempt to discern a pattern, is an endeavor that borders almost upon folly, for indeed, no intellectually consistent explanation can be maintained for the Court's often-conflicting *dicta*. It is too early to tell whether the internationalism of the Court of late is more than mere justification, representing a clear policy towards international law, even beyond *pacta sunt servanda*.

B. *Reconciling Incorporation in the Philippines*

1. General Observations on the Modern Understanding of the Incorporation Clause

The contemporary understanding of the Incorporation Clause is almost entirely a judicial construct. Beginning with its first *explicit* employment of the Incorporation Clause in the immediate aftermath of the Second World War,[406] the Supreme Court has, with increasing frequency, found purported principles of customary international law applicable in cases before it, with the Clause as the principal tool that authorizes the Court to do so. Since 1945, the Clause has been used to embrace principles of international law as diverse as human rights, diplomatic and sovereign immunity, *pacta sunt servanda*, humanitarian law, environmental law, and even transnational commercial practices. Indeed, the Court has adopted this expansive view of the Clause with such frequency and "matter-of-course-ness" that one can safely deem this the *orthodox position* on Incorporation — for as long as Judges find that purported principles comprise "generally accepted principles of international law," such become

406. The first of these is Co Kim Cham v. Valdez Tan, 75 Phil. 113 (1945). For an extended analysis of the case, *see* discussion in Chapter 3, *supra*.

automatically a source of rights and duties between parties, which the judge may, and indeed is obliged by Judicial Notice,[407] to effectuate.

For such an important and open-ended constitutional mandate (if one unequivocally accepts the orthodox position), the framers would be expected to have established definite parameters to prevent the unbridled exercise of judicial discretion in what is undoubtedly a law-creating function (although ostensibly, a mere declaratory or confirmatory function).

As established previously, however, the Framers of the Commonwealth Constitution simply did not discuss the Incorporation Clause in any significant manner; while their successors in the 1971 Convention and 1986 Commission were similarly silent (excepting Commissioner Azcuna's statements that principles adopted by virtue of the Incorporation Clause only had the force of statute, and not, Constitutional policy). If at all, the original intent appears to have been merely to add the clause to strengthen the country's commitment to the policy renouncing war, and affirming our solidarity with the family of nations.[408] In fact, even during the early years of the Supreme Court, when international law was invoked and applied at all in the Philippines, it was usually to cull principles on the law of war.[409] Thus, if any intent is to be ascribed to the Framers, it is that the Incorporation Clause was regarded merely as another amorphous recognition of the peace-loving policy of the Commonwealth, only to be used to facilitate peace in times of inter-nation strife.

It is therefore sound to conclude that the Supreme Court has employed the Incorporation Clause in a manner radically different from the original intent of the framers of the 1935 Constitution. Consequently, the modern conception of the Incorporation Clause is a product of Judicial ingenuity, a response to the challenges that modern society faces, but without any credible underpinnings of Constitutional intent, albeit justified by the judicial power to interpret the Constitution.

But while the Incorporation Clause has irrefutably taken on a life never originally intended for it, the growth in the scope and meaning attached to the Incorporation Clause does not necessarily mean that the Court has acted *ultra vires*. In face of changes in time and circumstance, Judges should not be bound by interpretations that are simply anachronistic; they must be allowed leeway to make appropriate responses as the times demand of them. This is particularly true when interpreting the Constitution itself, whose

407. Rules of Court, The 1989 Rules on Evidence, Rule 129, § 1 (Courts take mandatory judicial notice of the "law of nations"). For an extended discussion, *see* Chapter II *supra*.

408. *See* discussion in Chapter II(A)(1)(a), *supra* (comments of Delegate Osias).

409. *See, e.g.*, *Compagnie de Commerce*, discussed in Chapter 3(A), *supra*.

great ordinances are rarely clear-cut.[410] As Justice Holmes admonished: "[W]hen we are dealing with words that are a constituent act, like the Constitution ..., we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters."[411] Indeed, a sanctimonious reverence to the Constitution is as recalcitrant as it is unjust, and something no one should countenance.[412]

In this case, none of the framers in 1935 could have foreseen the dramatic transformations that international law itself has undergone from the way it was in 1935. Its rise in breadth and prominence, as it increasingly regulates intra-state actors, has undoubtedly influenced the modern position on the Incorporation Clause, and solidified its orthodoxy. The growth of the Incorporation Clause was therefore organic, as the Supreme Court initially recognized, and then embraced the changes

410. In Springer v. Government of the Philippine Islands, 277 U.S. 197 (1927), Mr. Justice Holmes expressed, in classic *dicta*, the inherent vagarity that characterizes much of Constitutional letter: "The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to another." *Id.* at 209. That observation could easily describe the Incorporation Clause.

411. Missouri v. Holland, 252 U.S. 416, 433 (1920).

412. Thomas Jefferson articulated this sentiment well.

> Some people look at constitutions with sanctimonious reverence, and deem them like the ark of the Covenant, too sacred to be touched. They ascribe to the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading; and this they would say themselves, were they to rise from the dead...I know...that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors...Let us follow no such examples, nor weakly believe that one generation is not as capable as another of taking care of itself, and of ordering its own affairs. Let us, as our sister States have done, avail ourselves of our reason and experience, to correct the crude essays of our first and unexperienced, although wise, virtuous, and well-meaning councils. And lastly, let us provide in our Constitution for its revision at stated periods.

Letter to Samuel Kercheval, July 12, 1816, *in* 15 THE WRITINGS OF THOMAS JEFFERSON 40-42 (Memorial ed. 1904), *cited in* Furman v. Georgia, 408 U.S. 238, 409 n. 7 (1972) (Blackmun, J., dissenting).

international law itself was undergoing, far beyond its constitutional origins.[413]

2. Constitutional Challenges to the Contemporary Understanding of the Incorporation Clause

a. Legislation through the Backdoor? Separation of Powers and the Modern Conception of Incorporation

The most serious attack to Incorporation as it is contemporarily understood by the Supreme Court is that it treads dangerously upon a violation of Separation of Powers.

In essence, separation of powers means that legislation belongs to Congress,[414] execution to the Executive,[415] and settlement of legal controversies to the Judiciary.[416] To avoid the potential tyranny that results from an over-concentration of power in one entity, each branch is prevented from invading the domain of others through a system of "checks-and-balances," where the cooperation of at least one other branch of government is necessary before acting.[417] The modern understanding of Incorporation, however, seems to fly in the face of this delicately-balanced system. When incorporating, courts act beyond their traditional Constitutional role as interpreter of law, and assume an essentially legislative function.

First, under what is now the orthodox conception, courts alone determine what rules constitute "generally accepted principles of

413. Parallelisms between the increasing scope of the Incorporation Clause and that of the Alien Tort Claims Act in the United States can be made. That statute originated from the 1789 Judiciary Act, which was of little practical use, until the landmark decision in *Filartiga*. For a succinct discussion of the ATCA, *see* Kochan, *supra* note 105, at 160-62.

414. 1987 PHIL. CONST. art. VI, § 1 ("The legislative power shall be vested in the Congress of the Philippines...").

415. *Id.* art. VII, § 1 ("The executive power shall be vested in the President of the Philippines.").

416. *Id.* art. VIII, § 1 ("The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law. Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.").

417. *See* BERNAS COMMENTARY, *supra* note 24, at 602-03; Myers v. United States, 272 U.S. 52, 293 (1926) ("the doctrine of separation of powers was adopted...not to promote efficiency but to preclude the exercise of arbitrary power.").

international law." Second, it is that same court that then applies the law to a particular case. One cannot overemphasize, yet again, that as international law continues to grow in scope, and the manner of ascertaining what is and is not international law is becoming increasingly fuzzy, the potential areas of incorporatable international law are staggering, and the potential for arbitrariness in *creating* law instead of "finding" or "discovering" it is very real. Incorporation is thus uniquely susceptible to the pejorative characterizations of "judicial legislation" or legislation "through the backdoor."

Mr. Justice Perfecto had valiantly warned of this danger in his largely-forgotten dissent in *Co Kim Cham.* He pointed out that the temptation of assuming the role of a legislator is greater in international law than any other department of law, since no parliaments, congresses, or legislative assemblies exist to enact specific statutes on the subject. "It must be our concern to avoid falling in so great a temptation, as its dangers are incalculable. It would be like building castles in the thin air, or trying to find an exit in the thick dark forest where we are irretrievably lost. We must also be very careful in our logic. In so vast a field as international law, the fanciful wanderings of the imagination often impair the course of dialectics."[418]

Similarly, a lively debate has ensued in the United States' legal literature as to whether federal courts should incorporate customary international law into federal common law. Professors Bradley and Goldsmith, for example, have challenged the propriety of such Incorporation, and the thinking of the "academy" of international lawyers advocating the direct incorporation of customary international law as United States law, and of Court decisions,[419] arguing that it upsets the constitutional balance by thrusting federal courts into a law-making role that should be reserved to political institutions of American government.[420]

The Philippines, however, is significantly different from the United States. Unlike the U.S. Constitution, the Incorporation of international law has explicit Constitutional authority under Article II, Section 2, which gives explicit recognition to international law in the Philippines. This

418. Co Kim Cham v. Valdez Tan, 75 Phil 113, 173-74 (1945) (Perfecto, J., dissenting).

419. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 882 (2d Cir. 1980); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (relying upon various international conventions, declarations, and resolutions to determine that the acts alleged, including genocide, torture, and rape — constituted violations of generally accepted norms of international law).

420. *See* Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law,* 111 HARV. L. REV. 2260 (1998) (arguing that customary international law should not be treated as federal law without authorization from the political branches).

makes it difficult to argue against the constitutional invalidity of incorporation *per se.* But the separation of powers concerns are not assuaged by this alone; to preserve the fundamental character of our system of government, changes to the laxity of the modern conception of Incorporation must be made. This is the critical issue Chapter five seeks to address.

b. Should the finding of customary international law continue to devolve upon the Supreme Court alone?

A second and corollary point pertains to the proper addressee of the Incorporation Clause. Should the Incorporation of customary international law within the Philippine legal system remain a Judicial prerogative alone? Because the Executive traditionally has power and even supremacy over the country's foreign relations,[421] should not the Executive also have the power to ascertain and give effect to principles of customary international law? Or should such lie with the Philippines' repository of legislative power, Congress? After all, identifying new principles of international law and recognizing them as part of the law of the land mimics law-making power. One could also reasonably presume that the Legislature has its pulse on developments in international law when enacting new legislation.

Under current jurisprudence, however, the task of discovering and giving effect to customary international law through the Incorporation Clause seems to fall almost exclusively to the Judiciary. There is no cogent reason why the Executive and Congress should be excluded from the process of identifying what international law is, as each branch of government has an essential duty encompassed by the Incorporation process. Furthermore, having each branch involved in the Incorporation process actually serves to address the separation of powers and checks-and-balances concerns raised earlier. Indeed, in a variety of ways, the Executive already takes customary international law into account when dealing with, say, diplomatic issues.

This author thus proposes that whenever a judge is faced with a case in which a new principle of customary international law may be employed, that the opinion of the Executive, through the Department of Foreign Affairs or the Solicitor General, *may* be sought.[422]

421. Secretary of Justice v. Lantion, 343 SCRA 392 (2000), *citing* Marcos v. Manglapus, 177 SCRA 668 (1989); Salazar v. Achacoso, 183 SCRA 130 (1990) (The Court rightfully accords the highest deference in matters of foreign policy, including treaty making and interpretation, to the Executive branch of government.).

422. Chapter 5, *infra,* presents a proposed framework to guide judges in incorporation cases; this is one of those suggestions.

c. Due Process concerns — the right to know about international law before it is used against you

As noted repeatedly, one of the unique aspects of contemporary customary international law is its dynamism and constant state of flux, and that it is unwritten and thus often lacks the certainty that attaches to acts of Congress.[423] Thus, if one is to take the theoretical function of the Incorporation Clause to its practical extreme, because the Incorporation Clause theoretically adopts customary international law as it is created and *automatically* makes it part of Philippine law, the practical effect is that new principles of international law may bind parties without them even knowing it, i.e., prior to the Judge's determination that international law applies in a case, and that a purported principle actually constitutes custom, none of the parties know what law applies to them. The possibility, therefore, that parties are blinded by principles which they either do not know or do not think constitute customary international law, is not far-fetched.

Such an interpretation of the Incorporation Clause runs afoul of due process, of course. In the celebrated case of *Tañada v. Tuvera*,[424] the Supreme Court stressed the need for publication as a basic requirement of due process; without sufficient publication, it is unreasonable to bind persons to particular laws. Due process, which is a rule of fairness, requires that those who must obey a command must first know the command.[425] Similarly, due process frowns upon vagueness in law, as it fails to give notice of what it commands and the conduct to avoid, and allows law enforcers unbridled discretion in carrying out its provisions.[426]

The due process concerns discussed in *Tañada v. Tuvera* and *People v. Nazario* present serious challenges to the contemporary theory of Incorporation. No authoritative list of "the generally accepted principles of international law" exists within this jurisdiction, let alone published (thus, pejoratively, one may criticize Incorporation as the Judge plucking principles out of thin air). The determination of when a principle constitutes custom is not an exact science either, and the vagaries of that endeavor raise similar due process concerns.[427] Within the process of

423. This flexibility in Customary International law-making was discussed at some length *supra*. *See* discussion in Chapter 1(B).

424. 143 SCRA 443 (1986).

425. *See* BERNAS COMMENTARY, *supra* note 24, at 122.

426. People v. Nazario, 165 SCRA 186, 195-196 (1988), *citing* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 718 (1978).

427. Similarly, making principles of international *criminal* law automatically applicable in the Philippines would run into the brick wall of the Bill of Rights. While international law may allow, due to principles of universal jurisdiction and

Incorporation, therefore, courts should extend every effort to address the notice requirements of Due Process. When the parties themselves do not plead and rebut customary international law, courts seeking to judicially notice custom should afford each party ample opportunity to comment on that prospective Incorporation. Active participation in the process should be sufficient to diffuse any surprises, and address the due process issues.

3. Against Academic "Debating Clubs": Judicial Laxity in Understanding and sourcing Customary International Law

a. Laxity in the Court's identifying principles of customary international law

Buried within long-forgotten *dicta* in the early days of the Court are the most significant discussions on the Incorporation Clause. Those early cases were prepared to meet the most exacting definition of customary international law — that of a uniform, consistent practice of States arising out of a sense of legal obligation.[428]

In stark contrast, the more recent decisions of the Court seem to display neither the sensitivity nor the awareness of customary international law to undergo similar exactitude. Instead, a consistent pattern has emerged in which the Court relies almost exclusively upon secondary sources, principally the opinions of publicists, in ascertaining the content of customary international law, without even a facial attempt at testing the orthodoxy of their conclusions against the high standards of customary law-formation. Moreover, when Conventions are cited as authority under the Incorporation Clause, such is often done without any explanation of why those treaties codify customary international law. Indeed, there is little, if any, insight into the thought-process of the Court when incorporating international law today. One Philippine commentator ably spotted the irony in the Court's over-reliance on the writings of authors as authority of what international law is, given the fact that the Statute of the ICJ itself

obligations owed *erga omnes*, jurisdiction over internationally defined crimes, without at least constructive notice of what the crime is to be avoided through the enactment of domestic legislation, it is difficult to picture any judge convicting a person for a violation of international penal laws.

428. Particularly notable examples of this kind of exactitude were *Compagnie de Commerce* and *Co Kim Cham*. For an exhaustive analysis of those two cases, *see* discussion in Chapter III *supra*.

refers to the writings of publicists as mere "subsidiary means for the determination of the rules of law."[429]

Without doubt, the cautionary note of Chief Justice Fuller's dissent in *The Paquete Habana,*[430] which was magnified by the District of Columbia Circuit in the *Tel-Oren Case,*[431] deserves full attention. Judge Robb stated:

> Courts ought not to serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations. Yet this appears to be the clear result if we allow plaintiffs the opportunity to proceed....The typical judge or jury would be swamped with citations to various distinguished journals of international legal studies, but would be left with little more than a numbing sense of how varied is the world of public international law.[432]

To some extent, the discomfort the Court seems to have at establishing Customary international law can be explained by the ambiguity that attaches to modern customary international law-making, a phenomenon discussed extensively *supra,*[433] and the fact that international law itself is largely unknown to most municipal lawyers, having been only a nominal subject in law school. This notwithstanding, it is difficult to avoid concluding that the Court has simply been less-than judicious, and often downright lax, in its identification of genuine international law — the process that leads the Court towards discovery of whether a purported principle is indeed "generally accepted" or not is one that lies in the shadows.

The need to redirect this laxity of approach is self-evident; to this end, Philippine courts would be well advised to emulate the U.S. Second Circuit Court of Appeal's groundbreaking decision in *Filartiga v. Pena-Irala,*[434] which some have labeled the "*Brown v. Board of Education* of transnational public law litigation"[435] because of its impact in that jurisdiction. Before concluding that "deliberate torture perpetrated under

429. Jose M. Roy III, *A Note on Incorporation: Creating Municipal Jurisprudence from International Law,* 46 ATENEO L.J. 635, 639 (2001), *referring to* Statute of the International Court of Justice, art. 38(1)(d).

430. 175 U.S. 677, 720 (1900) (Fuller, J., dissenting) (opining that it was "needless to review the speculations and repetitions of writer on international law ... . Their lubrications may be persuasive, but are not authoritative.").

431. Tel-Oren v. Libyan Arab Republic, 517 F. 2d. 774 (D.C. Cir. 1984) (per curiam).

432. *Id.* at 827 (Rob, J., concurring).

433. *See* Chapter III(A) for a discussion on the modern manner through which customary principles are determined.

434. 630 F. 2d 876 (2d Cir. 1980).

435. Harold Hongju Koh, *Transnational Public Law Litigation,* 100 YALE L.J. 2347, 2366 (1991)

the color of official authority violates universally accepted norms of the international law of human rights,"[436] the Court looked to general usages and customs of nations, as evidenced by the works of jurists and commentators, *as well as* treaties and declarations or resolutions of multinational bodies, such as the United Nations.[437] The case presents a model for the kind of exactitude municipal judges are capable of, and more importantly, what degree of intellectual certainty is required before Courts can confidently proclaim international law as "law" in the municipal sense.

b. The Court's Confusion over Incorporation and Transformation.

The process of Incorporation is diametrically opposed to that of *transformation,* which is the functional term to describe how conventional international law is made part of Philippine Law. Under the 1987 Constitution, "no treaty or international agreement shall be valid and effective unless concurred to by at least two-thirds of all the Members of the Senate."[438] Thus, unlike the Incorporation of customary international law, which happens by judicial fiat, the explicit concurrence by the Senate is required before the provisions of a treaty become binding *inter se.* Transformation is a quintessentially a dualistic process, in the final analysis.

Thus, one would be misguided, to say the least, to hold the incorporation and transformation as the same process and legal philosophy. Yet this is what the Supreme Court has done on more than one occasion. Dean Magallona points to the *obiter dicta* of two cases which exhibit the confusion of the Supreme Court between treaty norms and incorporated customary international law.[439] In these cases, the Supreme Court appeared to consider treaty norms as covered by the Incorporation Clause. In *Agustin v. Edu,* the Court declared: "[t]he Vienna Convention on Road Signs and Signals is impressed with the character of 'generally accepted principles of international law' which the Constitution of the Philippines adopts as part of the law of the land."

In *Marcos v. Manglapus,*[440] the Supreme Court quoted certain rights as embodied in the International Covenant on Civil and Political Rights, including the right that no one shall be arbitrarily deprived of "the right to enter one's own country." In doing so, however, the Court failed to mention explicitly that the Philippines is a party to the Covenant which stands valid and effective as Philippine law on that account under the treaty

436. *Filartiga,* 630 F. 2d at 878.

437. *See Id.* at 880-83.

438. 1987 PHIL. CONST. art. VII, § 21.

439. *See* MAGALLONA, *supra* note 52, at 38.

440. 177 SCRA 668 (1989).

clause of the Constitution. Still, the Court found it necessary to explain that: "...it is our well-considered view that the right to return [to one's own country] may be considered as a generally accepted principle of international law and, under our Constitution, is part of the law of the land (Art. II, Sec. 2 of the Constitution)."

The norms embodied in both Conventions have already become valid and effective as Philippine law by virtue of the treaty clause. What was the sense in subsuming them under the Incorporation Clause, then? Perhaps the Court was referring to the principle *pacta sunt servanda* as the customary principle incorporated.

c. How the Court has correctly distinguished between sources of international law

Occasionally, however, the Court does display a sensitivity to the different sources of international law. In *Gibbs*,[441] the Supreme Court distinguished between a "law-creating factor" and "evidence of law" in adverting to Article 38 of the ICJ Statute. It must have had in mind international conventions, international custom, and general principles of law as sources of law in Art 38(1)(a)-(c) when it spoke of a law-creating factor, and when it referred to evidence of law it must have had in mind Article 38(1)(d), in which "judicial decisions and the teachings of the most highly-qualified publicists" were considered a "subsidiary means for determining the rules of law."[442]

As to judicial decisions, the Court said that "judgments of municipal tribunals are of considerable practical importance for determining what is the right rule of international law;" but it failed to appreciate the distinction between "sources of law" and "subsidiary means" when it concluded: "A decision of the Supreme Court of a small Republic of the Philippines is as much a source of International Law as a decision of the Supreme Court of the great Republic of the United States of America." With respect to teachings of highly-qualified publicists, the Court held: "For it is as evidence of law and not as a law-creating fact that the usefulness of teachings of writers has been occasionally admitted in judicial pronouncements."[443]

Conversely, in *Kuroda,* the Supreme Court, referring to the rules on land warfare in the Hague Convention and in the Geneva Convention, observed: "Such rules and principles...form part of the law of our nation *even if the Philippines was not a signatory to the conventions embodying them,* for

441. 41 O.G. 2198 (1952).

442. MAGALLONA, *supra* note 52, at 33.

443. *Id.*, at 33-34

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.*"[444]

This implies the Supreme Court's recognition of the two principal sources of law, treaty and custom. The clear implication of the *Kuroda* decision is that the Court recognizes customary international law as a source of law distinct and separate from treaties, or the "generally accepted principles of international law" under the Incorporation Clause, when it speaks of "rules and principles [which] form part of the law of our nation even if the Philippines was not a signatory to the conventions embodying them." At the same time, the Court referred to "recognition of rules and principles of international law as contained in treaties to which our government may have been or shall be a signatory."[445]

4. An Attitude of Overbreadth: The sources of law "the generally accepted principles of international law" currently encompass, and why such a wide net should not be cast.

Perhaps the most serious problem with the modern position on Incorporation, compounded undoubtedly by the absence of clear Constitutional limitations, lies in the ever-expanding scope of the *sources* of potential legal regimes the Supreme Court is willing to embrace under the ambit of "generally accepted principles of international law." Through feats of judicial creativity chronicled in the previous chapter, the Court has chosen to read the Incorporation Clause as a broad and inclusive license to accept principles far beyond strict public international law.

Cases such as *BPI v. De Reny*[446] and *International School*[447] are authority for the creative advocate to espouse principles of transnational commercial law found in private regimes such as the International Chamber of Commerce, and even "the generally accepted principles of law recognized by civilized nations" found in other States, as part of incorporated Philippine law. This begs a fundamental question about the Incorporation Clause (as the Supreme Court sees it) — apart from custom, what exactly are the sources of law included within the "generally accepted principles of international law"? Should these sources be allowed through the Incorporation Clause?

444. 83 Phil. 171, 178 (1949) (emphasis supplied).

445. MAGALLONA, *supra* note 52, at 32-33.

446. 35 SCRA 256 (1970).

447. 333 SCRA 13 (2000).

a. Should "incorporatable" International Law include commercial rules?

BPI v. De Reny[448] seems to answer the query in the affirmative. By adopting the UCP 500, a document of the International Chamber of Commerce [ICC] providing for Rules on Letters of Credit, as part of Philippine Law through Incorporation, the Court showed that it was willing to adopt legal principles *not* constituting customary international law, as the law-maker in that instance was a private actor (as the ICC is not, in any sense, a State actor), nor capable of engaging in *state* practice. Ultimately, the legacy of *BPI v. De Reny* for the future is that, on the basis of constitutional grant, the judiciary is empowered to "discover" principles of law from an extra-Congressional source, and adopt it as Philippine law, and worse, that the ultimate source does not need to arise from public international law.

One can accept, as a matter of practical validity, the result of the Court in adopting the ICC's rules to regulate Letters of Credit in the Philippines. One can even justify this adoption through the Code of Commerce, which allows for the adoption of general commercial practices in the absence of law,[449] or through party autonomy in the "Incorporation by reference" principle allowed by contract law.[450]

But opening the door to such wide discretion on the part of the judge to decide what to incorporate and what not to, under the guise of Constitutional mandate, presents serious separation of powers issues yet again. Such a reading of the Incorporation Clause is structurally inconsistent with a Constitutional architecture that lodges the power to make law in the legislative branch of government. If, for all its virtue, Congress has decided *not* to adopt the UCP 500 as domestic legislation, such deliberate silence should be considered a deliberate exercise of inaction from the political actor in which that power is reposed. Courts should not be allowed to supplant the authority of the authoritative policy-maker, Congress, by effectively crafting backdoor legislation through the Incorporation of such principles. The Judiciary is thus placed in a policy-creating position, a role it was never authorized by the Constitution to undertake.[451]

448. 35 SCRA 256 (1970).

449. *See* CODE OF COMMERCE, art. 2 ("Acts of commerce...should be governed by the provisions contained in [the Code of Commerce], in their absence, by the usages of commerce generally observed in each place...").

450. *See* CIVIL CODE, art. 1306 ("The contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, public order, or public policy.").

451. One possible explanation to justify the *De Reny* and kindred decisions as consistent with Separation of Powers, is that the Incorporation Clause constitutes

But the more substantive reason why Incorporation should be limited to Public International Law alone is found in its defining characteristic — the fact that unlike other principles of law, international law is created through the free consent of States. Whether it be customary or conventional international law, it is only through the common consent of States (custom) or the specific consent of parties to a treaty (conventional law) that legitimate, binding rules of international law are formed.[452] Thus, the acceptance of international law as part of the law of the land becomes more palpable, even given a rigidly dualist conception of the interplay, because States such as the Philippines themselves are at least theoretically considered to have consented to the law they are adopting, and have played a part in its formation. This negates the notion that international law is a supreme over-law that dictates rules from above. Transnational commercial practices and other non-public international law sources of law are simply not entitled to such presumptions.[453] Furthermore, as previously discussed, the Incorporation of international law was formulated and consistently understood in cases such as *Tañada v. Angara* as another mode pursuant to the greater scheme of cooperative foreign policy. The incorporation of principles that are "international" only in the sense that they may affect individuals situated in different States is to construe the Incorporation Clause as a bludgeon through which virtually *any* principle of law may be justifiably incorporated. The only remaining check to unbounded judicial tyranny would be the Court's own sense of propriety. Cases such as *BPI v. De Reny* do not encourage such faith.

a constitutional exception to the exclusivity of legislative power reposed with Congress. Is this proper justification? The Philippines' Constitutional Law scholars are silent on this regard.

452. Indeed, customary international law, as with treaty law, is grounded upon the common consent of states. Both the State practice and *opinio juris* requirements reflect the notion that international law is grounded in state consent. Bradley & Goldsmith, *supra* note 42, at 838. A classic affirmation of this is found in the famous *S.S. Lotus* case of the Permanent Court of International Justice, which held that "International law governs relations between independent states. The rules of law binding upon States therefore emanate from their own free will..." S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

453. While some commentators argue that international law is done a disservice if viewed solely as *public* international law, *see, e.g.*, Henry H. Perritt, Jr., *The Internet is Changing International Law*, 73 CHI-KENT L. REV. 997 (1998) (arguing that public and private international law are inextricably linked, and will continue to be, especially in the field of international commercial law). For purposes of incorporation, a restrictive view of the term 'international law' should be adopted. This is not an act of marginalization; rather, it is a recognition that unless safeguards are made as to what international law actually is, the potential for judicial legislation is magnified exponentially. The wall preventing this view, of course, is the dictum in *BPI v. De Reny*.

b. Should "general principles of law recognized by civilized nations" be considered a source of "incorporatable" international law?

Even within public international law itself, however, not all the accepted sources of law should be considered susceptible to incorporation. Customary international law has overwhelmingly been employed through Incorporation (albeit in an implicit matter most of the time). Quite recently, however, *International School*[454] defied this traditional conception, and explicitly referred to General Principles of Law as part of Incorporated international law in the Philippines. Is this good law, however? And what are the ramifications of such a sweeping inclusion? A proper answer entails, at the outset, a detailed inquiry into the *nature* and *content* of the source itself.

i. The elusive meaning of "general principles of law recognized by civilized nations."

"The general principles of law recognised by civilized nations" identified by the ICJ Statute[455] is arguably the most elusive source of international law of all. The very meaning of the phrase provokes remarkable uncertainty, even judged by international law standards.[456]

While some writers consider that the expression refers primarily to general principles of *international law*, and only subsidiarily to principles obtaining in the municipal law of the various States, others hold that it would have been redundant for the Statute to require the Court to apply general principles of international law, and that, therefore, this provision can refer only to principles obtaining in *municipal law*.[457] Moreover, some writers maintain that "general principles of law" do not form part of existing international law at all, but only form part of the law to be applied by the World Court by virtue of the enabling provisions in its Statute.[458] The greatest conflict of views, however, concerns the part played in

454. 333 SCRA 13 (2000). For an extended critique of the case, *see* discussion in Chapter 3 *supra*.

455. Statute of the International Court of Justice, art. 38 (1)(c).

456. Professor Cheng's seminal work on this source of law exposes its ambiguous nature well. *See generally* BIN CHENG, GENERAL PRINCIPLE OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 1-26 (Grotius Reprint, 1987). This section will therefore lean heavily upon his scholarship.

457. *Id.* at 2-3.

458. Professor Cheng quotes Professor Cavaglieri's opinion at length: "These principles do not, in our opinion, belong to international law. They are rules of justice, of natural law, which, being to a great extent observed in the municipal law of civilized countries, are declared applicable by the Court, in the absence of actual rules of international law, conventional or customary."

international law by these "general principles." While some regard them merely as a means for assisting the interpretation and application of international treaty and customary law, and others consider them as no more than a subsidiary source of international law, some modern authors look upon "general principles" as the embodiment of the highest principles — the "superconstitution" of international law.[459]

While these theoretical discussions should not be underestimated in importance, greater weight is naturally placed upon the meaning intended by the drafters of the Statute themselves, as revealed in the *travaux préparatoires*. However, even in the drafting process, five distinct opinions arose concerning the provision.[460] The consensus that emerged out of the extensive discussions was that "general principles of law" were necessary to place the international judge in the same position of the national judge, the Advisory Committee members having realized that if the international judge were permitted to apply only treaties and custom, he might in certain cases be forced to commit a denial of justice by declaring a *non-liquet* for want of a positive rule.[461] They were anxious to obviate this danger, without however attaching too much importance to the formula to be chosen.

In adopting this provision, the members of the Advsory Committee did not intend to add to the armory of the international judge a new adjunct to existing international law. Actuated by the belief that existing international law consisted in more than the sum total of positive rules, in adopting the formula "the general principles of law recognised by civilized nations," they were only giving a name to that part of existing international law which is not covered by the conventions and custom *sensu stricto*.[462] The term was not meant to encompass pure equity, however: it was decided that the latter would require the express consent of the parties concerned. Hence, Article 38(2) of the Statute allowed parties to authorize the ICJ to decide a case purely *ex aequo et bono*.

Thus, while conventions can easily be distinguished from the two other sources of international law, the distinction between "custom" and "general principles of law recognised by civilized nations" is often not very clear, since customary international law, understood in its broadest sense, may include all that is unwritten in international law, i.e., both custom and general principles of law.[463] In Article 38, however, custom is used in a strict sense, being confined to what is a general practice among States

459. *See* CHENG, *supra* note 456, at 4-5.

460. For a more detailed discussion, *see Id.* at 10-26.

461. *See Id.* at 16-18.

462. *Id.* at 19.

463. *Id.* at 23.

accepted by them as law. General practice among nations, as well as the recognition of its legal character, is therefore required.[464] This part of international law does not consist, therefore, in specific rules formulated for practical purposes, but in general propositions underlying the various rules of law which *express the essential qualities of juridical truth itself*, in short of law.[465]

Among the examples of these general principles of law which were cited in the *travaux* were the principles of *res judicata*, good faith, certain principles relating to procedure, the principle that what is not forbidden is allowed, the principle proscribing the abuse of rights, the principle according to which, under special circumstances, the stronger takes rightful precedence over the weaker, and the principle *lex specialibus generalibus derogat*.[466]

Ultimately, it is of no avail to ask whether these principles are general principles of international law or of municipal law. It is precisely of the nature of these principles that they belong to no particular system of law, but are common to them all. The general principles of law envisaged by Article 38(1)(c) of the ICJ Statute are indeed the fundamental principles of every legal system. Their existence bears witness to the fundamental unity of law, a purposeful discipline which seeks to establish peace and dispense justice in human relations by reconciling different interests, by maintaining a certain moral standard in human conduct, by requiring the *restitutio in prestinum* wherever the juridical order is disturbed and by providing means for the peaceful and impartial settlement of disputes on the basis of respect for law. Indeed, an unmistakable feature of international arbitral and judicial decisions is the assumption by international courts and tribunals that this universal concept of law exists, independently of any particular system. International law is precisely the application of this universal concept, which has long been applied to the relations between individuals, to the relations between States.

ii. The incompatibility of General Principles of law with the philosophy of Incorporation.

Certain concepts of law are in a sense extra-national, because their validity and application by the international legal system is nct dependent on whether they are identified as principles found in municipal law. There is simply no *a priori* reason why international principles of right and justice are different from domestic notions of the concept. Thus, when Professor

464. *Id.* at 24

465. *Id.*

466. *Id.* at 25-26.

Cheng identifies the primary "general principles of law" culled from the various international decisions as *salus populi suprema lex*,[467] the principle of good faith,[468] the concept of responsibility,[469] and certain general principles with respect to judicial proceedings,[470] one is not taken by surprise, for these principles, whether international or domestic in nature, are (at least ideally) given effect in virtually every court decision and legal transaction.

If general principles of law thus possess such ecumenical validity,[471] it is wrong to consider these rules as extra-Philippine, and existing in the Philippines by virtue of incorporation. Whether "general principles of law" actually constitutes one of the sources of international law which we can incorporate as part of our law, seems to this author quite open to serious legal and policy questions. The leading texts on public international law are unvaryingly silent on this third source in their chapters on the relationship between international and municipal law, an implicit indication of its insusceptibility to Incorporation.

The reason for this is the nature of the source itself. "(T)he general principles of law recognized by civilized nations" in Article 38(1)(c) of the World Court's Statute was originally conceived to fill the void for International Courts, who could not rely on legislatures or a common-law system to create law. In fact, the Third Restatement acknowledges "general principles common to the major legal systems of the world" as a source of international law. However, such general principles of law are identified by the *Restatement* as a "secondary source" of international law, and thus not ranked on par with treaties and customary international law.[472]

467. *See Id.* at 29-102 (discussing the principle of self-preservation as a general principle of law).

468. *See Id.* at 105-60. This general principle includes, *inter alia*, the principle of *pacta sunt servanda*.

469. See *Id.* at 163-253.

470. See *Id.* at 257-373. Among these judicial principles are the familiar concepts of *competénce de la compétence*, proof and burden of proof, and the principle of *res judicata*.

471. *See Id.* at 390 n. 10, *citing* Abu Dhabi Oil Arbitration, 1 INT'L. COMP. L. Q. 247 (1951), wherein the Arbitrator, in denying the name law to the system applied by the Ruler of Abu Dhabi, tried to find the "proper law" applicable in construing an agreement between the parties. He found them in such general principles of law, although he did not call them so. He considered them as "a sort of 'modern law of nature'" possessing "ecumenical validity. *Id.* at 251.

472. RESTATEMENT (THIRD), *supra* note 34, § 102. Professor Cheng makes a convincing argument otherwise, contending that in some ways, general principles of law are in fact on a *higher plane* than either treaties or custom.

Be that as it may, some Philippine scholars, perhaps persuaded by the Supreme Court's interpretation of the Incorporation Clause *vis-à-vis* the sources of international law, have accepted the idea that general principles of law form part of our law.[473] The *International School* case, and to some extent, *BPI v. De Reny*, can be invoked as authority for the proposition that general principles of law are part of Philippine law. This is no great matter though, so long as the Court adheres to the original meaning of "general principles of law" as meant by the framers of the ICJ Statute. Should that occur, only principles such as equity and justice may form part of our law, despite their normative fuzziness. At best, the domestic analogies inherent in 38(1)(c) are principles which the Civil Code itself authorizes, and one that seems common to all municipal systems.[474] It is therefore difficult to see why any such "incorporation" should be considered as having been accomplished pursuant to the Incorporation Clause.

Because the phrase is susceptible to such an expansive interpretation, one wonders what limitations, apart from judicial self-restraint, there are in applying virtually any principle of law found in any State. It must be

> [T]here has been much discussion among writers as to the hierarchical order between general principles of law and rules of law formulated through the will of the States, namely, treaties and customs. The problem has to be approached from two different angles. From the juridical point of view, the superior value of general principles of law cannot be denied; for these principles furnish the juridical basis of treaties and customs and govern their interpretation and application. From the operative point of view, however, the hierarchical order is reversed. Rules of law though in derogation of general principles of law are binding. But the possibility of establishing rules in derogation of general principles of law must not be exaggerated. It may be compared to the theoretical omnipotence of the British Parliament to legislate except in order to make a woman a man, and a man a woman.

CHENG, *supra* note 456, at 393.

473. Dean Magallona is of this persuasion. *See supra* note 52 and accompanying text.

474. In fact, Professor Cheng himself identifies the Philippines and its Civil Code as one of the states that apply general principles of law directly into its legal system. He quotes Articles 9 ("No judge or court shall decline to render judgment by reason of the silence, obscurity or insufficiency of the laws") and 10 ("In case of doubt in the interpretation or application of laws, it is presumed that the law-making body intended *right and justice* to prevail.") as well as "an extremely interesting new Chapter (Chapter 2) of eighteen articles (Arts. 19-36) on "Human Relations" of the Civil Code (begins with Art. 19: "Every person must, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith."), as one of the municipal codes which provide for the application of law, equity, or natural law. *See* Cheng, *supra* note 456, at 407-08.

remembered that "general principles of law" were included as a source of international law precisely to allow *International Courts* to employ elements of legal reasoning and private law analogies in order to make the law of nations a viable system for application in a judicial process. Through general principles of law, an international tribunal chooses, edits, and adapts elements from better developed systems: the result is a new element of international law the content of which is influenced historically and logically by domestic law.[475] There is little logic in incorporating principles and analogies culled from domestic law back into the domestic sphere in a kind of *two-step shuffle*. This is the ultimate reason why the Incorporation Clause should not be considered as including general principles of law.[476]

The law student is told, from a very early time, not to consider the law in terms of "equity or justice" — such is resorted to, and even then with trepidation, only in the absence of *law*.[477] The reason for suspicion is simple: allowing for the individual judge to determine *ad hoc* what right and justice *is* in every given case is frowned upon as dangerously bestowing upon him or her arbitrary power. Consistency and predictability in the law, as well as objective standards to follow, as adjuncts of due process, are the overriding motivations for limiting such discretion.

But in the end, perhaps most damaging about allowing the Incorporation Clause as a tool to do "justice and equity" is the way it facilitates the perception that international law is *less-than law*, or a kind of moral code that may be employed *with a wink* as a justification of last resort. Disdain and reticence for international law, both among the Bench and Bar, is the inevitable consequence of such looseness. Disallowing general principles of law as a source of incorporatable international law is thus

475. BROWNLIE, *supra* note 17, at 16.

476. One should not overemphasize the point, however, as the Civil Code allows courts to apply just and equitable remedies in the absence of specific legal provisions regulating those aspects of human conduct. Thus, the content of 'general principles of law' as is understood under international law may certainly compose the same precepts that domestic courts use to arrive at just decisions. Indeed, the Civil Code itself seems to sanction the employment of 'uncodified' principles consistent with equity and justice. It would be confusing, and certainly counterproductive, however, to think of these general principles as being incorporated international law. They simply are not, and should not, be considered a source of incorporatable international law.

477. Manning International Corporation v. NLRC, 195 SCRA 155, 162 (1991) ("[e]quity has been defined as justice outside law, being ethical rather than jural and belonging to the sphere of morals than of law. It is grounded on the precepts of conscience and not on any sanction of positive law."); Conte v. Commission on Audit, 264 SCRA 19, 33 (1996) ("Equity, or justice outside legality, is applied only in absence of, and never against, statutory law or judicial rules of procedure.").

ultimately an appeal for sobriety in the use of sources, so as not to undermine the efficacy of international law for all who may validly seek its protection.

5. Against Judicial Omniscience: why International Law should not be Judicially Noticed.

Traditionally, it was deemed "elementary" that courts notice those laws which "regulate the relations of the dominant powers of the earth — the law of nations. While foreign municipal laws must be proved as facts, those rules which by common consent of mankind have been acquiesced in by law stand upon an entirely different footing."[478] Indeed, from a strictly legal viewpoint, judicial notice dispenses with the burden of proving "generally accepted principles of international law." Theoretically at least, its cumulative effect as combined with the Incorporation Clause is to require no proof at all for the application of generally accepted principles of international law to become operative as Philippine law in a case before a Philippine court. In short, it is as good as statutory law in terms of probative value.[479]

Despite this unqualified acceptance in the Rules of Court, however, both Philippine and foreign authorities devote scant consideration to the details regarding the judicial notice of international law. So great a scholar as Moran was, his Commentaries are hardly illuminating on the matter, providing little more than a restatement of the Rules of Court. The same observation may be made even of Professor Wigmore's otherwise monumental work.[480] Undoubtedly, this silence is reflective of the provision's inactivity within Courts themselves — even considering the entirety of Supreme Court case law, the Judicial Notice of the "law of nations" was never once directly invoked — and of the esoteric nature in which international law is viewed.

Be that as it may, the rule of *mandatory* judicial notice of the "law of nations" remains the black-letter policy in the Philippines.[481] Is this sound,

478. VICENTE J. FRANCISCO, 7 THE REVISED RULES OF COURT IN THE PHILIPPINES: EVIDENCE 71 (Ricardo J. Francisco ed., 1997) (*citing* Hilton v. Guyot, 159 US 113, 40 L. ed. 95, 16 S. Ct. 139). It bears mention, however, that *Hilton* concerned conflicts-of-law issues, not strict public international law.

479. MAGALLONA, *supra* note 52, at 39.

480. For a more detailed discussion on the nature of the judicial notice vis-à-vis international law, *see further* discussion in Chapter 2, *supra*.

481. Rules of Court, The 1989 Revised Rules on Evidence, Rule 129, § 1. In common law, facts and law are often Judicially Noticed, indeed, but always under the principle that the Judge retains the discretion as to whether certain facts or principles of law capable of divergent views can be noticed. This is qualified by

however? Should international law, as it is currently understood, remain a matter subject of mandatory Judicial Notice? Even when international law was not so expansive, some authors did not seem to think so.[482] Today, the scope and complexity of international law has so outgrown its "law of nations"[483] progenitor that it hardly seems congruous to argue that international law can be noticed as a matter of obligation, even based upon the letter of the Rule.[484]

A more fundamental reason for rejecting the notion that international law is entirely suited for judicial notice is its inconsistency with the underlying logic behind judicial notice itself. The clear implication of its common law origins is that only clear, indisputable principles of law should be noticed.[485] The problems inherent in judicial notice come uniquely into focus when the law sought to be noticed is as elusive by nature as international law. As the function of the Judicial Notice of Law is essentially to recognize the *fact* of what the law is,[486] the law's essential consistency and incapability of interpretation is counted on. These precise principles are not present respecting international law, an essentially changing and malleable area of law.

the term "may" — facts and law *may* be noticed, but are not mandatorily required to be so. *See* WIGMORE ON EVIDENCE, *supra* note 107, § 2567-71. Our Rules of Court, in contrast, employ the term "shall", which seems to indicate that the Court is obligated to take Judicial Notice of the "law of nations" at all times.

482. Professor Wigmore, for example, qualified admiralty law, "so far as [it is] international and therefore common to all States," as capable of judicial Notice, but made no mention of general international law. *See* WIGMORE ON EVIDENCE, *supra* note 107, § 2573.

483. Chapter 2 discusses the original conception of the "law of nations" and the principles traditionally understood to be part of that law.

484. The practical problem of judicial notice when applied to international law, is that it was made at a day and age when the principles were relatively few and readily recognized. As noted initially, modern international law has grown massively in scope and content since then. *See* introductory discussion, *supra*, at pages 1-4.

485. Thus, though maritime law is a matter of judicial notice, such is true only insofar as those rules have become part of general maritime law. Less widely recognized maritime rules of foreign countries are treated like foreign law generally and are required to be proved, unless they have been published by government authority or embodied in a widely adopted international convention. 2 MCCORMICK ON EVIDENCE 421 (4th ed. 1992), *citing* The New York, 175 U.S. 187 (1899); Boyd v. Conklin, 54 Mich. 583, 20 N.W. 595 (1884); Black Diamond Steamship Corp. v. Robert Stewart & Sons, Limited, 336 U.S. 386 (1949).

486. PAUL RICE, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE 1121 (3d ed. 1996).

There indeed seems to be no cogent reason remaining for making international law a mandatory matter of Judicial Notice upon judges, as the premises upon which the principle was first distilled under Anglo-American Common Law, the universality and common recognition of certain "admiralty" and perhaps, laws of war, no longer exist in the present. Parties seeking refuge under international law should thus prove the existence of those principles, in a manner akin to proving of foreign law.[487] Judges may take initial cognizance of the *possibility* that principles of international law would find application in an instant case. However, much like the Common Law, a more judicious path would be for the court to allow parties to be heard regarding principles of international law that may be employed, if such was not impleaded by the adverse party, in order to allow for the fundamental fairness inherent in an adversarial system of due process.[488]

International law should not take parties by surprise. Neither should it be made to apply to a case through the expedient of Judicial Notice, without allowing parties to contest the standing of those principles. The author thus holds serious doubts as to the acceptability of having international law automatically made part of Philippine law, and proposes its abolition from the provision of the Rules of Court concerning mandatory judicial notice.

487. One point to ponder is why foreign law should be treated as conceptually different from international law in the first place. Why should foreign law need proof, while international law remain subject to judicial notice? Theoretically, at least, the answer may lie in the *consensual* nature of international law, and on the policy of incorporation itself — international law is, at least theoretically, part of law *within,* and is not law to be discovered from *without* in the same way that foreign law may only be gleaned from access to that jurisdiction's statute books.

488. There is a perceptible move towards making foreign law a matter of judicial notice, as traditional methods of proof (*e.g.*, testimony of experts in foreign law) seem to maximize expense and delay and hardly seems best calculated to ensure a correct decision by judges on questions of foreign law. 2 McCORMICK ON EVIDENCE 418 (4th ed. 1992), *citing* Nussbaum, *Proving the Law of Foreign Countries*, 3 AM. J. COMP. L. 60, 63-64 (1954).Thus, a more sensible approach has been adopted by state and federal courts in the U.S.: a party who intends to raise an issue of foreign-nation law must give notice of his intention to do so, either in his pleadings or by any other reasonable method of written notice. Once the issue of foreign law is raised, the court need not, in its effort to determine the tenor of that law, rely upon the testimony and other materials proffered by the litigant, but may engage in its own research and consider any relevant material thus found. 2 McCORMICK ON EVIDENCE 419 (4th ed. 1992).

6. Should *stare decisis* apply to issues of Incorporated International Law?

The forthright answer is no. *Stare decisis* is a judicial tool that furthers the legal ideals of consistency and uniformity in the appreciation and application of the law. Under the doctrine, once issues of law have been deliberated upon and settled by decision, it forms a precedent which is not afterwards to be departed from, and must apply to all future cases where the facts are substantially the same.[489] However, the inherent logic behind *stare decisis* relies upon the stability of the law itself, or at least, upon the identifiability of the authoritative law-maker, for without such, the rules upon which precedent is based is of questionable foundation.

The authority to create law within the municipal sphere is lodged with Congress. Congress can define offenses against the "law of nations" (as was done through the Revised Penal Code). It can even pass laws inconsistent with international law, and the courts will give effect to the act of Congress and disregard international law. But Congress cannot legislate international law or amend it. A determination by Congress as to the rule of international law on a particular subject is not binding on the courts, although even if the courts do not agree with that determination, they may see fit to interpret the act of Congress as a directive to apply that determination as domestic law without regard to what international law actually requires.[490]

Thus, if one is to accept that it is ultimately the judge that determines the content of international law as he sees it, as the executor of the Incorporation Clause, the judge looks not towards Congress, nor to its past determinations on any principle of international law. As the ultimate source of authoritative law-making resides outside the Philippines (and indeed, in the case of customary international law, that power resides in no single international actor), the judge ascertains the state of international law *at that time.* In other words, Courts determine international law for their purposes, but the determinants are not their past judgments or precedents. Courts interpret law that exists independently of them, law that is "legislated" though the political actions of the governments of the world's States. While international law continues to develop, judicial decisions merely "catch" customary principles of international law at one stage in its development (if the judicial decisions are right to begin with). To give unqualified precedential effect to that rule of law would not only be

489. This, at least, is the most uncontroversial restatement of the principle. BLACK'S LAW DICTIONARY 978-79 (6th ed. 1991).

490. Henkin, *supra* note 55, at 1562 n. 27, *citing* the US District Court's treatment of the U.S. Congress' statement of international law in the Hickenlooper Amendment. Banco Nacional de Cuba v. Farr, 243 F. Supp. 957 (S.D.N.Y. 1965), *affirmed* 383 F.2d 166 (2d Cir. 1967), *cert. denied,* 390 U.S. 956 (1968).

recalcitrant, it would negate the very essence of customary international law and turn the judge-created rule into hard domestic legislation — moreso, without congressional authority.

Dean Magallona supports this implication of the Incorporation Clause:

> "The Court deals with the question of identification of principles that already, by virtue of the Incorporation Clause, form part of Philippine law. In other words, the judicial act is not constitutive of what forms part of domestic law. It is merely declaratory of what already forms part of domestic law as derived from general international law."[491]

Does this view find support in the case law of the Philippines, however? A survey of relevant cases reveals a vacillating Court on this point. Early on, in *Compagnie de Commerce*,[492] the Court had, in fact, disregarded *stare decisis*, ruling that even the U.S. Supreme Court's binding precedent[493] was only binding upon international law issues if it accurately depicted the state of contemporary international law.[494] Later decisions, however, manifest the Court's implicit adherence to *stare decisis* in deciding issues of international law where decisions on the same topic abound. In the many sovereign immunity cases the Court has made over the years culminating in *Holy See*,[495] for example, one notices the clear adherence to the Court's past decisions as authority, without in many cases even bothering an independent assessment to determine if the state of international law on that point had changed.[496]

491. MAGALLONA, *supra* note 52, at 40. There is also ample support for this view in other jurisdictions. Trendtex Trading Corp. v. Central Bank of Nigeria, 1 All E.R. 881, 890 (1972) (English Court of Appeal). In that case, Lord Denning held "that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this court, as to what was the ruling of international law 50 or 60 years ago, is not binding on this court today. International law knows no rule of *stare decisis*."

492. 36 Phil. 590 (1917). Chapter III discusses this point in more detail.

493. At that time, of course, the United States was sovereign over the Philippines, and in the judicial hierarchy of the Philippines, the U.S. Supreme Court was at the apex, holding the power of judicial review over the Philippine Supreme Court. Its precedent was therefore binding. For an illuminating historical discussion of the Court during those times, *see generally* Anna Leah Fidelis T. Castaneda, *The Origins of Philippine Judicial Review,* 46 ATENEO L.J. 121 (2001).

494. *Compagnie de Commerce,* 36 Phil. at 623-24.

495. 238 SCRA 524 (1994).

496. In fact, as previously discussed, the current incantation of the sovereign immunity doctrine is incorrect, when compared to contemporary international law.

7. The necessity of Black-Letter Incorporation: is the Incorporation Clause really an unnecessary redundancy?

In *U.S.A. v. Guinto*,[497] the Court, through Justice Isagani Cruz, made the categorical pronouncement that "[e]ven without [the Incorporation Clause], we would still be bound by the generally accepted principles of international law under the doctrine of incorporation." This is so, because "such principles are deemed incorporated in the law of every civilized state as a condition and consequence of its membership in the society of nations. Upon its admission to such society, the state is automatically obligated to comply with these principles in its relations with other states."[498] Is the Incorporation Clause then truly an unnecessary redundancy, as the *Guinto* Court seems to imply?

In one sense, Justice Cruz is correct. International law was, in fact, being utilized by the Supreme Court as a source of law even before the mandate of the 1935 Constitution.[499] In many other ways, however, that view is simply imprecise. It is incorrect to say that the incorporation of international law would have proceeded in the same manner because, absent explicit constitutional mandate, the acceptability of international law as a direct source of rights and duties *inter se* would be uncertain.[500] In many jurisdictions, the most notable of which is the United Kingdom, the acceptability of international law and its status within domestic law, is nebulous, largely because the policy on how international law is treated. Thus, cases may be cited in support of the fact that the United Kingdom neither provides nor allows for the automatic incorporation of customary international law within their jurisdictions; only when so identified and legislated upon do British Courts give customary international law effect.[501] On the other hand, British courts have also upheld the principle of incorporation over transformation, as far as customary international law is

497. 182 SCRA 644 (1990).

498. *Id. Cf.* Holy See v. Rosario, Jr., 238 SCRA 524 (1994).

499. Indeed, cases such as *In re Patterson* in 1902 and *Compagnie de Commerce* in 1917 relied extensively on international law.

500. For Dean Magallona's view, and the author's qualification on the matter, *see supra* note 52 and accompanying text.

501. *See* Chung Chi Cheung v. The King, 1939 A.C. 160. In that case, Lord Atkin said: "It must be always remembered that, so far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rule upon our own code of substantive law or procedure." *See also* Thakrar v. Home Secretary, 1974 Q.B. 684, 701 ("[T]he rules of international law only become part of our law in so far as they are accepted and adopted by us).

concerned, i.e., that no legislative act is required for customary international law to be effective.[502]

Certainly, there is no stopping a sovereign State from disengaging international law completely within its municipal system, if it so chooses, *unless* its own Constitution or laws mandate otherwise. Through the Incorporation Clause, therefore, the Philippines counts itself among those States that maintain international law through a system of *automatic standing incorporation,* in which present and future rules of international law are automatically part of Philippine law, without need for *ad hoc* legislation.[503]

8. Acid Test of Attitudes: How the Court should rule when Conflicts Arise between Customary International law and Philippine Law

The theoretical and practical problems surrounding incorporation become particularly acute when customary international law comes into conflict with domestic law, whether constitutional or statutory. While courts are generally able to give domestic law a construction which does not conflict with international law,[504] the possibility of irreconcilable conflict is not altogether remote.[505]

In practice, the Supreme Court has never directly addressed a situation where customary international law and a statute were in irreconcilable conflict. The closest to this was *Ichong v. Hernandez* and *Reyes v. Bagatsing*. In both those cases, the Court displayed an unwillingness to adhere to international law, should conflicts arise. In *Reyes*, for example, Justice Fernando made it clear that should the Constitution have come into conflict with an international obligation, the Constitution would understandably be upheld, realizing fully the consequences of the Philippines' acts under international law.[506] The strong State sovereignty overtones to those cases, especially in *Ichong,*[507] undoubtedly influenced their reticence. Other cases

502. *See* Maclaine Watson v. Department of Trade and Industry, 80 I.L.R. 49 (1988).

503. *See* CASSESE, INTERNATIONAL LAW, *supra* note 18, at 168-69.

504. BERNAS, FOREIGN RELATIONS, *supra* note 97, at 18-19.

505. Father Bernas suggests, however, that conflicts between treaty law and Philippine law are much more susceptible to conflicts than customary international law and Philippine law. "Conceivably, however, there should be no such conflict between the Philippine Constitution or statutes on the one hand and customary international law on the other because the Constitution when formulated accepted the general principles of international law as part of the law of the land. Problems can more likely arise between treaties on the one hand and the Constitution on the other." *Id.* at 19.

506. *See* extended discussion *supra,* Chapter 3.

507. The police power of the State was a primary justification for R.A. No. 1180, in the Court's view. For an extended discussion, *see supra*, Chapter 3.

surveyed in Chapter 3, however, display a more conciliatory attitude. One notable attempt at harmonization was the Court's decision in *Co Kim Cham,* which displayed the Court's willingness to go to extreme lengths to reconcile these potential conflicts through principles of statutory construction.[508] As international law continues to grow in scope and urgency, discord will inevitably grow more commonplace.

Were such irreconcilable conflict to exist, Professor Magallona opines that in appropriate cases, the conflict may be resolved by the application of (1) *lex posterior derogat priori* (later rules prevail over the earlier); and (2) *lex specialis derogat generali* (particular or special rules prevail over the general).[509] This mode of harmonization does, indeed, have some merit, as customary international law has the force and effect of statute as "part of the law of the land." Thus, rules of statutory construction, which place the later enacted statute as prevailing over an earlier one, are made to apply to international custom — principles that were long-established must yield to a latter expression of legislative will through statute. Taking that logic further, however, it should equally be true that once a principle is elevated to the status of customary international law, any prior inconsistent statute of Philippine law should be deemed *ipso jure* repealed.

This presents a serious practical problem, however. The analogy to orthodox rules of construction is only valid insofar as the judge is able to accurately pinpoint the time at which a particular rule of customary international law was formed. The dynamic and largely uncodified nature of custom, which may crystallize at a relative instant (the so-called "instant custom"), or conversely, only after a long expanse of time,[510] without concern for formalities, makes it extremely difficult to point out *when* exactly a principle became law. It is much more complex, than, say, investigating when an act of Congress was promulgated, which is certainly more static. Except for decade or centuries-old principles such as humanitarian law and diplomacy, therefore, resolving conflicts through an application of chronology is of little practical efficacy.

Thus, any sensible way of resolving conflicting rules must pay overriding attention to *harmonization* principles, where the integration of seemingly conflicting values are balanced with greater sensitivity to

508. *See, e.g,* Co Kim Cham v. Valdez Tan, 75 Phil. 113 (1945) (where the Court adopted an interpretation of the Proclamation of General MacArthur in a manner consistent with international law) *discussed supra.* The desire to harmonize international law when construing the Bill of Rights was also seen in *Marcos v. Manglapus, supra.*

509. MAGALLONA, *supra* note 52.

510. For a discussion on the manner through which customary international law-making is done, see Chapter 3, *supra.*

international law and justice, without, however, unduly denying the legitimate areas supremely within a State's domestic jurisdiction.

VI. A Framework for the Structurally Consistent Use of Customary International law in Philippine Courts

Due to that characteristic pliability and imprecision of international law, the drafters of our Constitution had to content themselves with "generally accepted principles."

We must insist, therefore, that the principles should be specific and unmistakably defined, and that there is definite and conclusive evidence to the effect that they are generally accepted among the civilized nations of the world and that they belong to the current era and no other epochs of history.

- Justice Gregorio Perfecto
Dissenting Opinion
Co Kim Cham v. Eusebio Valdez Tan[511]

Clearly, the Court can no longer leave the integrity of its decisions concerning international law to serendipity. The challenge is thus to formulate rules governing the incorporation of international law in Philippine courts that are simultaneously *pliant* (any attempt at tailoring rules meant specifically for each area of Public International Law runs the very real risk of future obsolescence, as customary international law continually grows and changes) and *structurally sound*, i.e., conformant to a proper understanding and employment of the Incorporation Clause, so that each judge seized with jurisdiction over a case dealing potentially with issues of international law are equipped with effective guidelines to lead them through the incorporation process. It is to this task that the final chapter is devoted.

A. Refining the Tools for Incorporation: Practical Considerations

1. The Pitfalls of over-reading the Incorporation Clause

Continually to be guarded against is the understandable tendency of judges to use international law to achieve certain desired ends. The varied nature of international principles from which a judge might find international "law" may result in the ability of a judge to reach *any* outcome due to the plethora of sources with varying degrees of legitimacy that might justify the result he wishes to obtain. The risk that a judge will abdicate his judicial role in favor of a legislative one is heightened by the mass of potential sources from which he might find "authority," the large number of commentators (often acting as advocates for their own specialized fields in international law) willing to profess that some principle is "law" and the

511. 75 Phil. 113, 173-74 (1945) (Perfecto, J., dissenting) (emphasis supplied).

fact that international documents portending to be law are ever-growing.[512]

Great evidence of this phenomenon is the tendency to "cater" customary international law to particular needs as a legitimizing tool for municipal court decisions — this, arguably, has already made headway, inadvertently or otherwise, in Philippine jurisprudence. Courts cannot be allowed to continue using the Incorporation Clause as a reservoir of malleable principles from which to derive certain 'just' rules. To adapt one learned view is another aspect of Constitutional Law, this doctrinal stance is a fallacy that has resulted in an unconstitutional assumption of powers by courts, which no lapse of time or respectable array of opinion should make us hesitate to correct.[513] This call becomes ever more important when one considers the geometric increase in the 'internationalism' of the world's economic and political structures. The Philippines, for example, already a member of the U.N., ASEAN, the WTO, and the APEC, is beginning to feel, even within the judiciary, the effect of these international bodies, as they continue to churn out Resolutions, tribunal decisions, and new regulations, binding both as treaty and customary international law,[514] resulting in an ever-wider and deeper arsenal of principles from which judges may draw.

If left unchecked, the reservoir of principles made to pass for 'incorporatable' international law will grow far beyond any current form it has taken so far. Judges would then have the license to act as legislator, causing serious damage to the Constitutional architecture upon which the Republic was built.

2. The practical problems behind ascertaining Customary International Law

The straightforward language of the Incorporation Clause and Article 38 of the ICJ Statute masks the practical difficulty of identifying exactly when a principle has attained customary status, and the exact content of that principle. The placid definition of customary international law as composed of "state practice" and "*opinio juris*" belies the enormous

512. Similar views have been expressed about the United States' use of International Law, especially because of the fuzzy nature of the Alien Tort Claims Act. *See* Kochan, *supra* note 105, at 196.

513. Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518, 532-33 (1928) (Holmes, J., dissenting).

514. *See generally* Merlin M. Magallona, *Globalization Trends: From Republican Democracy to Authoritarianism;* Pacifico A. Agabin, *Globalilzation and the Judicial Function, in* ODYSSEY AND LEGACY, THE CHIEF JUSTICE ANDRES R. NARVASA CENTENNIAL LECTURE SERIES (Antonio M. Elicaño ed. 1998).

conceptual disputes about the material indicators of customary international law.[515] Previous chapters have exposed these problems at length, but a brief reiteration bears mention at this point.

Customary international law is bedeviled today by an overabundance of potential sources and little definitive guidance about source hierarchies. The increasing number of recognized actors under international law, and the increasing scope of international law itself, helps only to muddle, not clarify, what the law's customary content is. Professor Goldsmith puts it rather cynically: "The identification of [customary international law] has become even more difficult during the past quarter century because the traditional focus on the actual practice of states has begun to shift to an even vaguer "consensus" criterion that looks to treaties (ratified or not), General Assembly Resolutions, and domestic enactments as additional sources of [custom]."[516]

This less-than sanguine assessment of customary international law is not without merit. Overall, however, such concerns should not overcome the tremendous benefits of custom as a source of international law; for indeed, the fact that custom is borne out of varied practice, and is largely uncodified, is also one of its strengths. It is dynamic, immediately responsive by nature to changes in individual, group, and state behavior. Thus, while the author can certainly empathize with the doubters that seek judicial stability and shun any promotion of arbitrariness within the legal order, the Incorporation Clause does serve the admirable end of promoting harmony, and on a more fundamental level, furthering justice in the Philippines, through the adoption of the 'universal sense of justice' of the international community.

B. *Proposed Rules governing Courts seized with Customary International law issues*

Culled from the theory and practice of incorporation, and the author's synthesis in the last chapter, the following methodology comprises a

515. Even (or perhaps especially) for the International Court of Justice, ascertaining customary international law has always been a slippery and somewhat incongruous affair. *Compare* North Sea Continental Shelf Cases, 1969 I.C.J. 4 (Feb. 20), *with* Military and Paramilitary activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27); Case Concerning the Gabchikovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. (Sept. 25).

516. Jack L. Goldsmith, *Regulation of the Internet: Three Persistent Fallacies,* 73 CHI-KENT L. REV. 1119, 1130-31 (1998). For an extended discussion of Professor Goldsmith's views on the matter, *see* Curtis A. Bradley & Jack L. Goldsmith, *supra* note 42, at 839-40. *See also* Filartiga v. Pena-Irala, 630 F.2d 876, 882 (2d Cir. 1980) (containing an extended discussion of potential sources of international law in determining whether the proscription against torture comprised existing customary international law).

checklist of steps each judge ought to take before any purported principle of customary international law is incorporated. In this manner, the movement towards a more structurally consistent use of international law in Philippine Courts will have taken giant strides forward.

STEP 1: Does the case involve, or need to involve, principles of public international law? Or merely private international law, foreign law, the *lex mercatoria*, admiralty, or "general principles of law"?[517]

Faced with a case in which the judge is either faced with direct invocations of international law through the parties' pleadings, or alternatively, should the judge suspect that international law may be involved in the case, the judge must first make a preliminary determination that principles of public international law may potentially be involved in the case. If the answer is in the affirmative, the judge proceeds to the next step.

If, on the other hand, principles of private international law, or transnational commercial laws are involved (the *lex mercatoria*),[518] judges are not permitted, under the guise of the Incorporation Clause, to arrogate the power to determine the issue upon themselves. They may, of course, employ traditional rules governing domestic legislation, and the precedent of the Supreme Court. If "general principles of law" or commercial customs are invoked, as was done in *International School* and *BPI v. De Reny,* respectively, the Court cannot proceed to consider Incorporation; it may, however, use the general provisions of the Civil Code, the Code of Commerce, or the Labor Code to advocate the adoption of these just and equitable principles or customs, following domestic precedents.

STEP 2: If public international law is involved, what source is it derived from? Is the principle evoked purportedly treaty or customary international law?

It is necessary to differentiate between treaty and customary international law, because each norm is subject to its own constitutional mechanism for either incorporation or transformation into Philippine law. The determination of its category is needed in order to comply with the constitutional requirement peculiar to that status. Thus, it is decisive for Courts to determine whether an invoked norm has met the requirement of incorporation in the case of customary law, or of transformation in the case of conventional law under the treaty clause of the Constitution.

517. For an extended discussion on the sources of international law susceptible to Incorporation, *see supra* at Chapter 4(B)(4).

518. The actual scope and content of the *lex mercatoria* is a topic of particularly acute divisiveness among legal scholars. *See supra* note 379 and accompanying text.

Parenthetically, this step is also important as a rectification of the erroneous commingling of sources that has not been infrequent.[519]

If a treaty is being invoked by the parties (or is being considered for application by the Court), the proper process is *not* to consider incorporation, but rather, transformation. The Court should first inquire as to whether the treaty was duly concurred in by the Senate and ratified by the President. If so, that treaty has, by virtue of Article 7, §21 of the Constitution, the force of statutory law within the Philippines, and should be treated as a direct source of rights and obligations between parties. In the event that conflifct in the interpretation of treaty provisions occur, the Court is authorized to adopt rules of interpretation to resolve the disagreement.[520] However, when the disagreement lies between the treaty and the Constitution, and neither the treaty nor the Constitution can be interpreted in harmony, the latter must prevail over the former, despite possible responsibility under international law.

If customary international law is being invoked or is potentially applicable, however, or the parties cite multilateral treaties not ratified by the Philippine government, the Judge proceeds to the next step.

STEP 3: The opinions of the Solicitor General and the Department of Foreign Affairs may be sought each time a novel issue of international law is invoked, or the judge has reason to believe, either by length of time or otherwise, that a recognized incorporated principle of international law before the Philippines has changed.[521]

Psychologically, Philippine judges may understandably prefer to apply a provision of Philippine law with which they are familiar instead of making considerable efforts to find out whether a rule of customary international law exists that may be relevant, or perhaps in conflict, with domestic statutes. As a matter of fact, difficulties do arise in ascertaining not only the existence but also the content of a rule from a less-known legal order that is only rarely relevant for a municipal court.[522] Thus, the agencies of the Executive which possess a greater knowledge of international relations and

519. *See Agustin v. Edu* and companion cases, discussed in Chapter 3 and critiqued in Chapter 4, *supra*.

520. While beyond the scope of this work, a question may arise as to whether the rules of interpretation of the statute are those of the Rules of Court, or those of the Vienna Convention of the Law of Treaties. In keeping with the international nature of the obligation, and of the fact that a parochial mentality must be obviated, the author advocates the latter.

521. For further discussion on the background to this step, *see supra* Chapter 4(B)(2)(a).

522. Christoph Schreuer, *International Law and Municipal Law, in* 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 253 (1987).

of the specific positions taken by the Philippines should aid judges in fulfilling the function mandated by the Incorporation Clause.

The opinion of the Solicitor General and the Department of Foreign Affairs are essential for three principal reasons: *first,* it gives due respect to the co-equal branch of government charged under the Constitution with the power to formulate and execute Foreign Affairs, and thus blunts the possibility of Separation of Powers conflicts; *second,* on a more practical level, the Judge may not be as adept in handling principles of international law, and will need the expertise of the executive agencies competent in that field in order to arrive at a scholarly and accurate representation of contemporary public international law; and *third,* the channeling of all issues pertaining to international law with these instrumentalities of the government will help promote harmonization among the different courts in the Philippines.

Thus, as a possible procedural amendment to the Rules of Court, when a principle of customary international law is either being invoked or is sought to be *motu proprio* introduced in the Philippines, the Court *may* direct the Department of Foreign Affairs and/or the Solicitor-General to comment.[523]

STEP 4: The opinions of *amici curiae* should also be sought whenever new principles of international law are being invoked.

Professors of Public International Law from the leading law schools in the Philippines, and other experts in the field, should, as a matter of discretion, be given the opportunity to appear and file *amicus* briefs in support or refutation of particularly contested principles of public international law. While the risk of biases in favor of particular advocacies are sometimes even more pronounced from members of the academe, the judge may still find useful information, and comprehensive research on State practice, from these scholars. Taking their opinions with a grain of salt, together with those of the Executive Department and of the parties themselves, the judge will then have before him or her a more

523. This process is akin to the Rule where "[i]n any action involving the validity of any treaty, law, ordinance, executive order, presidential decree, rules or regulations, the court, in its discretion, may require the appearance of the Solicitor General who may be heard in person or through a representative duly designated by him." Rules of Court, The 1997 Rules of Civil Procedure, Rule 3, § 22. It goes without saying, however, that should Government be party to the dispute and should invoke customary international law as applicable (as in *Lantion*), then the Solicitor General or other Executive agency (*e.g.*, the Department of Foreign Affairs or Department of Justice) may not be deemed impartial, such that all that should be required is that the adverse party have the opportunity to squarely address the State's invocation of customary international law.

comprehensive view of the state of international law on the matter, and may proceed to make a decision.

STEP 5: If the parties did not implead public international law, and the Judge *motu proprio* preliminarily determines that customary principles may be employed to resolve the case, the parties must be given a chance to comment before judgment is made. Automatic mandatory judicial notice should not be allowed.[524]

In order to obviate potential due process issues involved in automatic incorporation without notice to parties, with the court judicially noticing principles of international law without the parties' knowledge, the Court, when deciding *motu proprio* to employ customary law, must duly inform the adverse parties and give them a chance to comment in support or in refutation of the invocation.

STEP 6: After receiving the comments and opinions from steps 3-5, if customary international law is potentially applicable, the purported rule must be tested strenuously against the standards necessary for a principle to be elevated to the status of custom. Customary International Law should not be judicially noticed, and total commitment to the avoidance of "academic debating Clubs" must be made.[525]

In essence, this step requires the Judge to be mindful that the manner of *finding* international law cannot be done with perfunctory citation, and requires a rigorous analysis of the material sources of law.[526]

The first, and most important, change courts must take towards a more systematic and accurate incorporation of customary international law is to develop a mindset concerning international law in which purported principles of law are continually de-mystified through rigorous analysis. To do so, only primary sources of custom, such as the actual practice of States, multilateral conventions, U.N. General Assembly Resolutions, and similar direct sources, must be accepted as indicative of the "state practice" and "*opinio juris*" requirements of international law. Academic 'debating clubs,'

524. *See* extended discussion on the Due Process issues surrounding the application of the Incorporation Clause at Chapter 4(B)(2)(c), *supra*.

525. Regarding the need to obviate the laxity in determining whether a principle has crystallized into customary international law, *see supra* Chapter 4(B)(3) For a extended discussion on why international law should not be the subject of mandatory judicial notice, *see supra* Chapter 4(B)(5).

526. Courts can take the cue from the decision of *Filartiga v. Pena-Irala,* or the Supreme Court's decision in *Compagnie de Commerce*. Both are excellent examples of judicial scholarship concerning international law.

in which *only* the opinions of publicists are counted on in ascertaining the content of international law, should be avoided. Publicists' views and advocacies must not be allowed *per se*, and should only be accepted insofar as they accurately and unbiasedly represent the state of customary international law.[527] Thus, secondary sources must be juxtaposed against the primary sources of Public International Law — the acceptable sources should be limited to treaties, General Assembly resolutions, consistent and uniform State practice.

The necessity of following the requirement of the Constitution that only "generally accepted principles of international law" may be incorporated is an absolute *sine qua non*; a rigid application of the rules is the only way through which an unconstitutional usurpation of jurisdiction is avoided. Otherwise, as established previously, the judge will be acting as law-maker instead of law-finder (or, more accurately, law-identifier). In addition, it assures that a parochial interpretation of international custom is not made. For indeed, determining the content of an international rule with a self-interested municipal slant is wholly inconsistent with the concept of Incorporation.

The person or entity asserting the existence of a customary rule must bear the burden of proof, as he is attempting to positively establish the state of the law at that time. This does not, however, have to take the form of proving the existence of foreign law,[528] as customary international law is of a much more informal character.

Also, a number of concepts must be borne in mind by the Judge. First, the Court must remember that *stare decisis* plays no part in Incorporation; if at all, it is only valid insofar as past cases *still* accurately depict the state of contemporary international law concerning the principle incorporated or sought to be incorporated. Second, courts must also be mindful that the

527. *See* The Paquete Habana, 175 U.S. 667, 700 ("[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; *and as evidence of these. To the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.*")

528. Unlike ascertaining the content of foreign law, which is largely a product of facial research, questions of international law are not so easily found out. Scholars with their own well-meaning agenda will often advocate that *de lege ferenda* principles are customary norms. (A good example is the *Echegaray* case, wherein the dissenter was willing to argue that the death penalty itself is proscribed by international law through a piece-meal citation of authority, despite clear authority to the contrary.) It is therefore imperative that judges be even more circumspect when dealing with international law.

Court's decisions form part of the corpus that creates general international law, conformant with Article 38(1)(d) of the ICJ Statute.[529] Thus, as Philippine courts are makers of international law in a very real sense, they should be more circumspect in either overturning an existing rule, or establishing a new rule of customary international law. Lastly, courts must be always be ready to err on the side of orthodoxy. Whether invoked by the litigants to a case, with corresponding authorities cited, or done by the judge *motu proprio*, the test must always be the general consensus of States, and the stringent test for international custom as ascertained by the judiciary alone. For if the principle merely comprises *de lege ferenda* principles, as purported principles often do, the Judge must be constrained, even if the purported rule is undoubtedly desirable and just, to rule that no binding rule of customary international law exists — such was the import of the World Court's holding in the *North Sea Continental Shelf Cases*.[530] Indeed, so much of contemporary international law is characterized by the "soft law" nomenclature, i.e., international law is full of principles that promote international cooperation, harmony, and respect for human rights and the environment, most of which amount to little more than well-meaning desires and plans, without the support of either State practice or *opinio juris*. In other words, courts should not be afraid to declare a *non-liquet* when faced with international law concerns, after all, a *non liquet* may be avoided insofar as municipal law is concerned through the use of Article 9 of the New Civil Code: "[n]o judge or court shall decline to render judgment by reason of the silence, obscurity or insufficiency of the laws."[531]

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529. A great example of this is the Court's ruling in *Oposa v. Factoran,* which has made the rounds of the Academy of international lawyers specializing in environmental law. *See* Alan Boyle & David Freestone, *Introduction,* INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT 14 (1999) (citing *Oposa* to buttress the idea that intergenerational equity is attaining the status of customary international law).

530. North Sea Continental Shelf Cases, (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 4 (Feb. 20).

531. The intent of the Code Commission in framing article 9 was as follows:

Under the old Civil Code, it was expressly stated that "when there is no statute exactly applicable to the point in the controversy, the custom of the place shall be applied, and, in default thereof, the general principles of law." (*Art. 6.*) This rule was modified by the Code Commission in the original project of the Civil Code when it provided that, in default of customs, the judge shall apply that rule which he believes the law-making body should lay down guided by the general principles of law and justice. *Believing that this change would result in an undue delegation of legislative power, Congress deleted the entire provision.* As it now stands, the Civil Code of the Philippines is silent with respect to this point. It is, however, submitted that we can still apply the old rule considering the provisions of Arts. 10, 11 and 12 of the present Civil Code. In other words, if the law is silent, or is obscure or insufficient with respect to a particular controversy, the judge shall

STEP 7: If custom is potentially inconsistent with Philippine law, a court must go to extreme lengths to harmonize. If truly irreconcilable, and the custom conflicts with the Constitution, the conflict must be resolved in favor of the Constitution. If the conflict is with a statute, and harmonization is impossible, the court may apply principles of statutory construction, insofar as they are valid.[532]

After determining the exact scope and content of a particular rule of customary international law, the next step is to determine whether such violates any statute or provision of the Constitution. If the answer is negative, the principle can be directly applied as a source of rights and duties between the parties, as any other statute would.

If the answer is in the affirmative, however, and it is a statute that is engaged in conflict,[533] there are two methods of resolution. First, primary consideration must *always* be given to the harmonization of international law with the Philippine legal order.[534] In fealty to *Co Kim Cham*,[535] courts faced with a possible conflict between Philippine laws and customary international law should extend every possible effort at harmonization. This is particularly important in the field of Human Rights — as the survey in Chapter 3 has shown, international human rights law has been an area in which the Court has been especially active. The Court has, on many occasions, employed international law as a repository of correlative principles to the Bill of Rights, or in furtherance thereof. Thus, in general, the Court has (albeit with a few notable exceptions) generally bent backwards to accommodate international law.

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apply the custom of the place, and in default thereof, the general principles of law and justice. (emphasis supplied)

DESIDERIO P. JURADO, CIVIL LAW REVIEWER 8-9 (19th ed. 1999).

532. For a extended discussion on harmonization and conflict between international norms and Philippine laws, *see supra* Chapter 4(B)(8).

533. Indeed, if it is a Constitutional provision that is in direct conflict with incorporated international law, it is almost self-evident that international law will bow to the Constitution, as the Constitution is always, within the Philippines, the supreme law.

534. The usual approach is to presume that Congress intends for statutory law to be interpreted as consistent with international law. In the United States, this is denominated as the so-called "*Charming Betsy* canon." *See* Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law,* 86 GEO. L.J. 479, 482 (1998) (exploring the Constitutional implications of the doctrine that U.S. statutes should be interpreted so as to be consistent with international law).

535. *Co Kim Cham*, 75 Phil. at 133. The ruling to the contrary in *Ichong v. Hernandez* should be disregarded.

If harmonization is impossible, however, a direct conflict between international custom and a constitutional provision should be resolved in favor of the Constitution as supreme law of the land. In cases of direct conflict between international custom and a statutory directive, rules of statutory construction may be resorted to, such that first, the more specific rule is made to apply over the general one, or *lex specialis derogat generali*. In the rare event that this cannot be done, the rule of *lex posterior derogat priori*, where the later rules prevails over the earlier, may be employed. However, unless the principles of customary international law are those of long standing, because of the difficulty in pinpointing when a principle achieved the status of customary international law, statutes should *prima facie* be given effect, unless adequate proof is proffered to establish otherwise.

VII. CONCLUSION:

Safeguarding Incorporation for the Future

International law is indisputably part of our law. The role of Philippine courts under the constitutional structure afforded by the Incorporation Clause is to identify what particular norm or principle of international law belongs to the category of general international law, in relation to a specific claim before the court in which that particular norm is to be applied as domestic law.[536] Once so ascertained and found applicable, the role of the court is to complete the cycle, by enforcing international law in the Philippines to adjudicate the respective rights and duties of litigants as it would pursuant to domestic legislation. In this sense, therefore, domestic courts are truly the executors of international law *par excellance*.

This work has consciously tried, however, to steer clear from the pitfall of overly deifying international law. The legislators of individual states remain the most important, and potentially just, source of law for intra-State actors and individuals. Much has, in fact, been said of overly-idealistic manner through which the academy of international law scholars portray the interplay between international and domestic law, their commentary bearing little resemblance to the actual attitudes of government actors.[537] One consequence of these unrealistic expectations is that they may heighten the skepticism of some that international law is "less than law," and should not, as a practical matter, be taken seriously. A

536. MAGALLONA, *supra* note 52, at 39-40.

537. *See* Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 566 (1999) (positing that the unrealistic expectations of the academy of international lawyers in the domestic sphere may hinder the ability of international law to take root in municipal systems).

jolting reminder of the need to match idealism about international law with reality came with the infamous *Breard* case.[538]

Certainly, the thrust of much of this work has been that while international law should not be used as a panacea for all social ills, neither is it a Pandora's Box, so long as the proper safeguards and the judicial restraint of courts is ever kept in mind. International law has not yet (nor may it ever be) developed to a level wherein it may viably supplant national legislatures; indeed, perhaps that should not be the goal to which international law should aspire.[539] On the other hand, one must not underestimate the importance of international law in the domestic sphere; international law deserves its rightful place in the pantheon of Philippine Law. In many ways, particularly in the field of human rights and the environment, it is more dynamic, more just, and more humane. The fact that it seeks to regulate human activity on a worldwide scale makes international law uniquely capable of dealing with issues of global impact, such as the environment, universal human rights, and in this post-September 11 world, terrorism.

Thus, this work has attempted to cross the bridge between an overstayed embrace of utopic universality and, conversely, of chauvinistic parochialism under the guise of "sovereignty,"[540] arguing the need for structural limitations on the near-unbridled discretion the present Rules of Court and

538. Breard v. Greene, 118 S. Ct. 1352 (1998), the United States Supreme Court declined to stay the execution of a Paraguayan diplomat, notwithstanding the *amicus* advocacy of the leading international law scholars in the United States, and a provisional order by the International Court of Justice itself, directing the United States to "take all measures at their disposal" to stay Breard's execution. Apart from reminding us of the dualist nature of the United States (or its Supreme Court at least), *Breard* reminds us how little, by way of direct coercive power within a domestic sphere, international law possesses. *See* Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. (Apr. 9), *reprinted in* 37 I.L.M. 810 (1998).

539. Indeed, one wonders whether international law should ever been understood as this kind of *uber*-law. The remarks of our own legal scholars along those lines now seem rather quaint, but largely unreal. (Then) Professor Paras, for example, suggested that the remedy to make international law more alive and enforceable "in the far, far, far future" is to have a "World State with a World Government (complete, perhaps, with a President of the World, a Congress of the World, and a Supreme Court of the World). This is not an impossible dream." Edgardo L. Paras, *The Role International Law Has Played*, 5 SAN BEDA L.J. 18, 20-21 (1962).

540. Delegate Osias' speech on the provision that was to contain the Incorporation Clause in the 1935 Constitution bears reiteration. "It behooves this Nation to steer its course between the Scylla of chauvinistic nationalism and the Charybdis of utopic internationalism." Speech of August 24, 1934, *in* 1 PROCEEDINGS OF THE PHILIPPINE CONSTITUTIONAL CONVENTION (1934-35) 467 (Salvador Laurel ed. 1963)

the state of Incorporation Jurisprudence has given to Judges in the Philippines. It is hoped that the framework presented in Chapter 5 bridges these competing and equally valid views with circumspection. Certainly, the Incorporation Clause should not be laden with procedural barriers that would make its application almost impossible; neither should the near-absence of light as to the scope, meaning, and application of the Incorporation Clause from the Framers detract Courts from applying the Clause to serve the needs of modern society. This should not mean, however, that the opposite is permissible — Courts cannot, under the guise of Interpreting the Incorporation Clause, allow for principles of International Law to have the force and effect of Philippine law, based on advocacies or whim. To do so would amount to an assumption of a function it was not granted under the Constitution — the power to make law.

The analysis of the existence of principles of International law must therefore be given an objectively rigorous approach to ascertain their true status. They should not be made susceptible to the whims of individual judges seeking to achieve 'just results.' As the decisions now stand, hardly any limit but the sky exist in the use of the Incorporation Clause, should the majority of the Supreme Court decide that the incorporation of a principle is for any reason desirable. The Incorporation Clause could not have been meant to give the Court *carte blanche* to embody the economic or moral beliefs in its prohibitions or authorizations, with no guide but its own discretion.[541] As ultimately an issue of *judicial self-restraint*, therefore, the placement of appropriate structural safeguards is the order of the day in the application of the Incorporation Clause.

Indeed, perhaps in the final analysis, it is better to describe the endeavor as one of interaction and cooperation, rather than making veiled references to formal hierarchies,[542] as international law needs the cooperation of States to fulfill its promise, and reciprocal collaboration from municipal courts, to ground it in reality.

541. These thoughts bring to mind a similar, but more famous, struggle Courts have faced — the limits to the exercise of judicial review over statutes. *See, e.g.*, Baldwin v. Missouri, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting) ("I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be constitutional rights of the States. As the decision now stands, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions.").

542. *See generally* Myres S. McDougal, *The Impact of International Law Upon National Law: A Policy-Oriented Perspective,* 4 S. DAK. L. REV. 25, 37-38 (1959), *reprinted in* MCDOUGAL AND ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER 157, 171-72 (1960).

Taking *The Most Serious Crimes of International Concern* Seriously

*Pedro Roman M. Ariston**

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ABSTRACT

On 28 December 2000, the Republic of the Philippines became the 124th State Signatory to the Rome Statute of an International Criminal Court (ICC). Consistent with the country's treaty-ratification process, Senate concurrence would secure "State Party-hood." Accordingly, the Executive Department is thoroughly assessing the Statute. The emerging general consensus favors ratification, albeit aware of complex and difficult constitutional and legal concerns. One key concern queries whether the core crimes of genocide, crimes against humanity and war crimes can be construed as criminalized under Philippine domestic law sans statutory criminalization and yet compliant with the principle of complementarity and principle of legality, nullum crimen, nulla poena sine lege. This thesis tackles this issue.

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περί τῆς ἀγαπητῆς Ἀγγελικῆς μοῦ, βόσκεις μέ.

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