reverent hands these heirlooms of wisdom to the vaults of legal history, we bid them adieu without the roll of drums and the boom of cymbals ending a grand symphony.

In their decisions, as quietly as they toiled and lived, our honorees did not shake the moorings of the world nor rock the foundations of the nation, did not delve into the mechanics of governance nor soar into the metaphysics of power.

The *ponencias*, which we viewed afresh and visited anew, were simple judgments that brought the comforts of the law to the problems of the family, to the conflicts of property claims, and to the contentious interplay of rights and obligations in the daily lives of common people. Most importantly, they restored harmony to human relations, peace to the home, and order to the community.

As we unfold the pages of the next hundred years in the epic existence of the Supreme Court and the Justice System, allow me to paraphrase the parting words in my address which I delivered twenty-one years ago at the Law Day Celebration of the Philippine Bar Association.

The next millennium "is a time for reassessment, for reappraisal not only of systems but also of values, seeing the light of truth and hearing the call of reason which are truly there — not the shadows of spectral gloom, nor the voices of disembodied spirits...for there are really none."

A Note on Incorporation: Creating Municipal Jurisprudence from International Law

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Many scholarly thoughts have been devoted to the sources of international law. Rather than presume to contribute to that already rich collection of work, this brief note is confined to some observations relating to the incorporation of the sources of international law in municipal law.

The mechanism for incorporation is set forth in the Constitutional provision that adopts generally accepted principles of public international law as part of the law of the land.[1] By the doctrine of incorporation, rules of international law *ipso facto* become operative and effective within the municipal legal system.[2] The alternative mode for the application of rules of public international law, the doctrine of transformation, is also found in the

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1. PHIL. CONST. art. II, § 2: "The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations."

2. *See* U.S.A. v. Guinto, et al., 182 SCRA 644 (1990) (where the Court correctly suggests that the mention of the doctrine in the Constitution is unnecessary). Speaking for the Court, Justice Cruz wrote:

> Even without such affirmation [in the Constitution], we would still be bound by the generally accepted principles of international law under the doctrine of incorporation. Under this doctrine, as accepted by the majority of states, 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.

Cf. The Holy See v. Rosario, Jr., 238 SCRA 524 (1994); U.S.A. v. Guinto, 182 SCRA 644 (1990).

Constitution.[3] The co-existence of both modes in the Constitution presents considerable flexibility in terms of the adoption of rules of international law, customary or otherwise, into the municipal legal framework.[4]

There appears little difficulty in understanding the process that enables the operation, within municipal law, of rules arising out of purely conventional obligations.[5] Moreover, the content of such rules is ordinarily determined by the terms of the treaty itself and the extent to which the state accepts the obligations of the treaty.[6] Be that as it may, challenges to the validity of the transformation of treaty obligations are not unknown in this jurisdiction.[7] Admittedly, some difficulty may be encountered when the provisions of the treaty differ from the content of municipal law, or when they present new matters not previously addressed by legislation.[8] This may lead to questions regarding whether the treaty or any of its provisions is self-executing, consequently determining the need for further legislative enactment apart from ratification and approval.

In *Agustin v. Edu*,[9] for instance, the Court noted that the 1968 Vienna Convention on Road Signs and Signals recommended the adoption of local

3. 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." The inclusion of this provision among those on the Executive Department suggests that it operates to preclude indirect attempts at legislation by the President.

4. Professor Brownlie, however, suggests that transformation is merely the consequence of a presumption for or against incorporation. *See* BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 43 n.73 (5d ed. 1998).

5. While the Philippine Constitution provides an essentially legislative process for the transformation of treaties, this is neither exclusive nor universal. In any case, the principle of equality among sovereigns implies that states have freedom of action within their competence, having only due regard for satisfying the principle of *pacta sunt servanda*. *See* Vienna Convention on the Law of Treaties, art. 26, 1155 U.N.T.S. 331 (1969), *reprinted in* 8 I.L.M. 679 (1969).

6. While bilateral treaties invariably imply the highest degree of mutuality and consent in respect of their terms and conditions, a state may, for a variety of political, social or legal reasons, restrict the extent to which it accedes to obligations in a multilateral agreement. Precisely, arts. 2(d), and 19-23 of the Vienna Convention on the Law on Treaties refer to reservations to treaties. *See* M. DIXON & R. MCCORQUODALE, CASES AND MATERIALS ON INTERNATIONAL LAW 68 (1991).

7. *See* Tañada v. Angara, 272 SCRA 18 (1997) (where international obligations arising from accession to and ratification of the GATT were challenged for being in direct contravention of constitutional provisions, public and economic policy).

8. *See, e.g.*, Lasco v. United Nations Revolving Fund for Natural Resources Exploration, 241 SCRA 81 (1995) (where the Court referred to treaty obligations and "generally accepted principles" arising from the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations). *But cf.* World Health Organization v. Aquino, 48 SCRA 242 (1972).

9. 88 SCRA 195 (1979).

legislation. Responding to claims of constitutional infirmity, particularly the invalidity of delegated legislative power, the Court described the principles underlying the 1968 Vienna Convention as impressed with the character of "generally accepted principles of international law," evidently applying the doctrine of incorporation to a treaty already adopted by transformation.[10]

Current writings on the sources of law commonly include international arbitral or judicial awards, various global and regional organizations and their organs, particularly those of the United Nations, the European Community, Organization of American States, ASEAN, and APEC, to name but a few.[11] While some authors regard these as independent sources of law, there seems to be little doubt that the ultimate basis must be a treaty or other international agreement among the state-parties.[12] Of course, the practice of states within these organizations may also contribute to the formation of customary law.[13] Needless to state, when non-member states similarly conform to the practice of member states, then a customary rule may develop.

There appears a good deal of latitude left for the exercise of judicial discretion when it comes to the incorporation of other sources of international law. In the case of customary law, it would seem that the doctrine of incorporation merely provides a medium for the municipal legal system to graft rules culled from international law. How that process works, and essentially its outcome, however, is more a matter of municipal rather than international law. In determining the existence of a customary rule, for instance, the Court is not particularly concerned with independently evaluating the separate and concurrent presence of a uniform and general practice among states, coupled with *opinio juris*, over a duration of time. Indeed, it appears that the Court is satisfied to do without its own analysis of the existence of these elements. And, at least in some cases, the Court is content to rely on the conclusions of authors.

For instance, as early as *Compagnie De Commerce Et De Navigation D'extreme Orient v. The Hamburg Amerika Packetfacht Actien Gesellschaft*,[14] the Court rejected the existence of a customary rule granting *laissez passer* or safe conduct for merchant vessels flying the flag of a belligerent shortly after the outbreak of

10. Ratified under authority of Presidential Decree No. 207 (1973) (Ratifying the 1968 Vienna Convention of the United Nations on Road Traffic and Road Signs).

11. *See generally* BROWNLIE, *supra* note 4, at 58-67; D.J. HARRIS, CASES AND MATERIALS IN INTERNATIONAL LAW 58-64 (5d ed. 1998); REBECCA WALLACE, INTERNATIONAL LAW 28-32 (3d ed. 1997).

12. At certain levels, these organizations have been known to label such agreements as "Resolutions," "Protocols," or "Memoranda of Agreement," to exclude them from the tedious processes of ratification required by most municipal legal systems.

13. Undoubtedly, even regional treaty arrangements could evolve into practice accepted as law at least within the region. *See* Asylum Case (Col. v. Peru), 1950 I.C.J. 266 (Nov. 20).

14. 36 Phil. 590 (1917).

war. In reaching this conclusion, the Court relied heavily on the conclusions of authors over what appears to be a survey of state practice indicating a contrary rule.[15]

A contrario, there are instances where the Court makes no apparent attempt to verify the status of a customary rule. In other words, the Court has ascertained or rejected a rule of customary international law as a matter of *stare decisis*, without regard as to whether the precedent relied upon identified and examined the presence of the elements of customary international law.[16] The Court adhered to a similar approach in recognizing an exception to the territoriality principle of jurisdiction by adverting to a somewhat less authoritative source of the customary rule.

In *Asaali, et al. v. Commissioner of Customs*,[17] the Court cited as authority the persuasive opinion of Justice Marshall in *Church v. Hubbart*[18] that the power of a state to "secure itself from injury may certainly be exercised beyond the limits of its territory." Of peculiar interest is the observation of the Court that the proof that "*Chuch v. Hubbart* is a leading case is attested by its being cited almost textually in such leading case books as Hudson,[19] Fenwick[20] and Briggs."[21] Here, the authoritative basis of the asserted rule relies almost

15. 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 the other belligerents it is said that England and Austria-Hungary 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 apparently intended for conversion into vessels of war, and sequestered the rest — a distinction without any very substantial difference.

Id. at 624.

16. *See* People v. Wong Cheng Ming, 46 Phil. 729 (1922) (where the Court explained that the Philippines observed the English rule on jurisdiction over crimes committed in vessels because this was the same rule recognized by the courts of the United States).

17. 136 Phil. 522 (1969).

18. 6 U.S. 187 (1804).

19. HUDSON, CASES ON INTERNATIONAL LAW 354 (3d ed. 1951).

20. *See Asaali, supra* note 17, at 544.

21. BRIGGS, THE LAW OF NATIONS 336 (1947); *Cf.* Philip Jessup, *The Anti-Smuggling Act of 1935*, 31 AM. J. INT'L. L. 101 (1937).

exclusively on the opinion of authors, albeit expressed in the decision of the foreign court.

It is ironic that the Statute of the International Court of Justice refers to the writings of authors as a "subsidiary means for the determination of the rules of law." Clearly, however, that this has not deterred the Court from the manner by which it assesses the prevailing rules of customary international law. The irony lies in that insofar as the approach of the municipal court is concerned, the work of authors extends well beyond that which might be expected of a mere secondary source of the law.

Unlike *People v. Wong Cheng*,[22] the Philippines was no longer a colony of the United States at the time *Asaali* was promulgated. Yet, in respect of the U. S. Court, the Philippines seems to have developed a 'habit of *stare decisis*.' This observation is best exemplified in *Raquiza v. Bradford*,[23] where the Philippine Court upheld the exemption of U. S. troops from civil and criminal jurisdiction of the Philippines as a rule of international law, by relying for the most part on a decision of the United States Supreme Court.[24] The Court would later advert to the doctrine of immunity from suit as a "generally accepted principle of international law" having "undoubted applicability in this jurisdiction."[25] Relying on judicial precedent, subsequent decisions would further refine the rulings on this doctrine.[26]

The system of precedents, apart from securing stability in jurisprudence, provides a convenient means for the authoritative restatement of rules of international law. As can be gleaned from this cursory foray into the application of the incorporation clause, the Court is not predisposed to an extensive investigation of the status of a particular rule of international law. As a practical matter, the limitations of a municipal court render them unfamiliar

22. 46 Phil. 729 (1922).

23. 75 Phil. 50 (1945). This case would serve as authority for subsequent rulings on the immunity of government from suit for acts of the armed forces and other agents. *See e.g.*, Tubb and Tedrow v. Griess, 78 Phil. 249 (1947); Miquiabas v. Commanding General, 80 Phil. 262 (1948); Dizon v. Commanding General of the Phil. Ryukus Command, 81 Phil. 286 (1948); Syquia v. Almeda Lopez, 84 Phil. 312 (1949); Marvel Building Corp. v. Philippine War Damage Commission, 85 Phil. 27 (1949); Marquez Lim v. Nelson, 87 Phil. 328 (1950); Philippine Alien Property Administration v. Castelo, 89 Phil. 568 (1951).

24. Coleman v. Tennessee, 97 U.S. 509 (1926). The cited rule of international law states that a friendly army permitted to stay in or pass through the territory of another state is immune from the civil and criminal jurisdiction of the latter. *See*, however, the dissenting opinion of Ozaeta, *J.*, to the effect that "[t]he United States Army is not foreign to the Philippines.... It has the same right to be here as it has to be in Hawaii or California."

25. *See* Baer v. Tizon, 57 SCRA 12 (1974).

26. *See* U.S. v. Reyes, 219 SCRA 192 (1993); Shauf v. Court of Appeals, 191 SCRA 713 (1990); U.S. v. Guinto, 82 SCRA 644 (1990). These cases deal specifically with the immunity of the U. S. Government from suit or jurisdiction for claims arising out of acts of the agents of the military forces stationed in the Philippines.

with current state practice for the simple reason that to undertake such an investigation in the course of the resolution of a pending dispute may prove impracticable or unwieldy. Reliance, however, on *stare decisis*, raises cause for concern. The stability ensured by *stare decisis* could operate to advance or retard the progressive development of international law.[27] The impact of such decisions of municipal courts on the status and development of international law is, concededly, a matter better left to a separate study.

There are other instances where the decisions of the Court appear to suggest *opinio juris* in respect of certain rules of international law. In *Mejoff v. Director of Prisons*,[28] the Court identified certain provisions of the Universal Declaration of Human Rights[29] as conferring rights upon an alien facing deportation. The language of the Court unmistakably implied that the binding force of the Declaration results from its unanimous approval by the General Assembly, of which the Philippines is a member.[30]

Appreciation for the Declaration would, however, be taken in a different light in a later decision. In *International School Alliance of Educators v. Quisumbing*,[31] the Court cited the Universal Declaration of Human Rights, among other international instruments,[32] as evidence that a general principle against discrimination exists in international law. In this labor dispute, petitioners claimed that the higher salaries paid to certain employees of the same rank and title constituted discrimination on the part of the employer. Of peculiar interest is the statement that the Philippines has incorporated this principle (of non-discrimination) as part of its national laws.[33] The Court employed a novel treatment of the incorporation clause, referring to certain treaties and other international instruments for the purpose of authoritatively establishing the existence of some legal principle to aid in the resolution of the dispute at bar.

27. The same might be said of the earlier writings of different authors.

28. 84 Phil. 218 (1951). Petitioner Boris Mejoff was described as an "alien of Russian descent," although he claimed statelessnes.

29. G.A. Res. 217A (III) (Dec. 10, 1948).

30. Most interesting about this decision is that it came a mere 3 years after the Declaration was passed. To this day, the debate about the legal character of certain aspects of the Declaration rages on.

31. 333 SCRA 13 (2000).

32. *See* International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, G.A. Res. 2200A (XXI), U.N. GAOR, U.N. Doc. A/RES/2200A (1966); International Convention on the Elimination of all Forms of Racial Discrimination, U.N.G.A. Res. No. 2106 (XX) (1965); Convention Against Discrimination in Education, *adopted in* Paris, France, Dec. 14, 1960; Convention Concerning Discrimination in Respect of Employment and Occupation (No. 111), *adopted at* the General Conference of the International Labor Organization, Geneva, Switzerland, June 25, 1958.

33. *International School of Alliance of Educators, supra* note 31, at 21.

Essentially, the *International School* case made a selective analysis of similar provisions in each of the international instruments cited to establish authority for the principle of non-discrimination. Having done this, the Court then crafted a subsidiary principle tailor-made to resolve the dispute at hand, ruling that the international instruments, together with pertinent provisions of municipal law amply establish the applicable rule.[34] The Court did not dwell on the binding force of the international agreements and seemed to indicate that their significance in this case is merely as evidence for the existence of a principle of law.

Repeatedly, the law student is told that the judicial function involves the pacific resolution of disputes and the proper application or interpretation of laws towards that end. The considerable latitude granted by the doctrine of incorporation provides more than sufficient flexibility for the discharge of the judicial function. In many respects, it presents opportunity for egregious exercise of power. Bound only by its sense of propriety, the Court may introduce at any time "generally accepted principles of public international law" to buttress its decisions.

In contradistinction, the doctrine of transformation retains a special feature consistent with the system of checks and balances in a republican form of government. Hence, while primary responsibility for foreign relations rests with the Executive branch of government, the ratification and formal accession to treaties must undergo congressional approval. The undoubted wisdom of this procedure confines the exercise of legislative power to the Legislature, preventing the Executive from indirectly promulgating rules or laws through treaties and other international agreements.[35] There is no such safety net for the power of the Court to make pronouncements on the "generally accepted principles of public international law."[36]

At any rate, the Court has demonstrated a pattern of openness on matters affecting foreign policy. While its record has been less than perfect, there is an abundance of cases to show that the Court has been sensitive to the policy-directions taken by the other branches of government in matters relating to international obligations. Be that as it may, there have also been differences of

34. The Court said, "[t]he foregoing provisions impregnably institutionalize in this jurisdiction the long honored legal truism of 'equal pay for equal work.'"

35. There are treaty provisions, self-executing in nature, which would theoretically become immediately effective within the municipal sphere, if ratification and accession were completed by mere executive approval.

36. At least in the case of jurisprudence relating to purely municipal law, the legislature may overwrite a judicial decision by legislative enactment. It is highly unlikely, however, that Congress would attempt to repeal a "generally accepted principle of public international law."

opinion with the other branches of government, producing somewhat embarrassing consequences.[37]

It is well to recall that the international legal system has been described as primitive, being as it is, in a state of development. Although the concept of universal laws has begun to gain acceptance in respect of *jus cogens* rules, this view is not without its skeptics.[38] At least, in this jurisdiction, the role of the Supreme Court as the final arbiter of what constitutes municipal *and* international law remains unchallenged, albeit unchecked.

Finally, caution is raised as to the content of the observations presented in this note. They are submitted only with great reluctance, not in any wise purporting to be definitive views on the issues discussed.

37. Indeed, *amicus* briefs and pleadings of competent government authorities should ordinarily eliminate any disagreement. The Court had occasion to explain its role in matters of foreign relations in *DFA v. NLRC*, 262 SCRA 39 (1996), *citing WHO v. Aquino*, 48 SCRA 242 (1972) *viz.*:

> It is a recognized principle of international law and under our system of separation of powers that diplomatic immunity is essentially a political question and courts should refuse to look beyond a determination by the executive branch of the government, and where the plea of diplomatic immunity is recognized and affirmed by the executive branch of the government. . . it is then the duty of the courts to accept the claim of immunity upon appropriate suggestion by the principal law officer of the government, . . . or other officer acting under this direction. Hence, in adherence to the settled principle that courts may not so exercise their jurisdiction . . . as to embarrass the executive arm of the government in conducting foreign relations, it is accepted doctrine that 'in such cases the judicial department of government follows the action of the political branch and will not embarrass the latter by assuming an antagonistic jurisdiction.

Unfortunately, that proscription described as a political question was ignored by the Court in *Liang v. People of the Philippines*, 323 SCRA 692 (2000). The Court ruled that an officer of the Asian Development Bank could be made subject to criminal jurisdiction of Philippine courts over the unequivocal declaration of the government that he enjoyed diplomatic immunity. For an extensive discussion of the case, *see* Joyce Corrine O. Lacson, *Jeffrey Liang v. People of the Philippines: Rethinking the Immunities of International Organizations* (2001) (unpublished J.D. thesis, Ateneo de Manila University School of Law) (on file with the Ateneo Law School library).

38. *See, e.g.*, Florentino P. Feliciano, *The Principle of Non-Refoulment: A Note on International Legal Protection of Refugees and Displaced Persons*, 57 PHIL. L.J. 98 (1982) (questioning the authoritativeness of alleged rules of *jus cogens*).

The Philippine Law on Conditions of Patentability and Patentable Subject Matter

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