PHILJA JUDICIAL JOURNAL

JANUARY-JUNE 2009 VOL. 11, ISSUE NO. 31

Chief Justice Reynato S. Puno Distinguished Lectures

Series of 2008

The PHILJA JUDICIAL JOURNAL

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Chief Justice Reynato S. Puno Distinguished Lectures Series of 2008

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The PHILJA Judicial Journal

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The Supreme Court of the Philippines would like to thank the officials, faculty, staff, and student body of the University of the East (UE), University of Sto. Tomas (UST), Far Eastern University (FEU), and the International Committee of the Red Cross (ICRC) for their generous and committed support that contributed to the success of the series.

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Philippine Judicial Academy
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DOCTOR OF LAWS
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and

The First Distinguished Lecture Series of 2008

REFORM OF THE SPANISH CIVIL CODE: BASIS AND CONTENT

by

His Excellency
Francisco Jose Hernando Santiago
President, Supreme Tribunal and General Council of the Judiciary of the Kingdom of Spain

Wednesday, February 20, 2008, 2:30 P.M.
University Conference Hall, 4F Dalupan Sr. Building
University of the East
C.M. Recto Avenue, Manila

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Associate Justice, Supreme Court of the Philippines

Philippine National Anthem
National Anthem of Spain

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Associate Justice, Supreme Court of the Philippines

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Dean, College of Law, University of the East

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Mrs. Antonieta Fortuna-Ibe
Chancellor, Manila Campus, University of the East

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President and Chief Academic Officer, University of the East

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Dr. Nenalyn P. Defensor
Commissioner, Commission on Higher Education

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Chief Justice of the Philippines
Honorable Andres R. Narvasa
Chief Justice (Ret.) of the Philippines
Trustee, University of the East

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Mr. Divinofiel E. Jaras
Corporate Secretary, University of the East

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UNIVERSITY OF THE EAST CHORALE

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Associate Justice, Supreme Court of the Philippines

LECTURE
HIS EXCELLENCY FRANCISCO JOSE HERNANDO SANTIAGO

Panel of Reactors

JUSTICE JOSE C. VITUG (RET.)
Chairman Emeritus, Department of Commercial Law
Philippine Judicial Academy

JUSTICE RICARDO C. PUNO, SR. (RET.)
Chairman Emeritus, Department of Civil Law
Philippine Judicial Academy

DR. MARIA LIZA A. LOPEZ-ROSARIO
Professor, College of Law
University of the East

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Justice Angelina Sandoval-Gutierrez
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Chief Justice

Supreme Court Hymn
UE Hymn

Masters of Ceremonies
PROFESSOR MERCY L. CANDELARIA
PROFESSOR RENE S. SALVANIA
College of Arts and Sciences-Manila, University of the East


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The Conferment of the Degree
Doctor of Laws
(Honoris Causa)
upon
His Excellency
Francisco
José
Hernando
Santiago
February 20, 2009 - 2:30 p.m.
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4th Floor, F. Dalupan Sr. Bldg.
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Tomorrow Begins in the East
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Opening Remarks*

*Justice Dante O. Tinga***

In behalf of the Supreme Court of the Philippines and the Philippine judiciary, I extend a hearty *Mabuhay* and warmest greetings to our esteemed guest, His Excellency Francisco Jose Hernando Santiago, President of the Supreme Tribunal and General Council of the Judiciary of Spain. Also, in behalf of my fellow alumni on the University of the East, I welcome him to this hallowed campus. *Bienvenido a todos!*

---

* Delivered at the *First Distinguished Lecture, Series of 2008,* held on February 20, 2008, at the University of the East, Manila.

** Justice Dante O. Tinga was appointed to the Supreme Court on July 4, 2003. At the time, he was the dean of the College of Law of the Polytechnic University of the Philippines.

He represented the lone district of Taguig-Pateros in the House of Representatives for three consecutive terms from 1987 to 1998. As a Congressman, he served as House Majority Whip for Luzon from 1992 until 1998 and Speaker's Deputy in the Committee on Rules from 1995 to 1998. As Committee Chair on Energy (1992-1998) he crafted the Power Reform Bill which served as the model of the current Electric Power Industry Reform Act (EPIRA). As Chair on Corporations and Franchises (1987-1992), he liberalized the telecommunications industry, paving the entry of all the current major players. During his three-year term, he also became vice chairman of the House Committee on Good Government and was a ranking member of the House Committees on Natural Resources, Justice, Constitutional Amendments, Appropriations and Ways and Means. He was consistently chosen as an outstanding congressman by various publications and periodicals.

The program this afternoon is a fitting celebration in the name of the law. For law is the ubiquitous hallmark of civilization. As the great Spanish poet and dramatist Pedro

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Justice Tinga received his Bachelor of Laws degree from the University of the East College of Law in 1960. Graduating *magna cum laude* at the top of his class, he placed 15th in the 1960 Bar Examinations with an 87.7 percent rating. He obtained his Masters of Laws degree from the University of California at Berkeley, U.S.A. in 1970, graduating with High Honors and among the top five percent. He specialized in Corporation Law, Securities Regulation, and Transnational Business Transaction.

He was also active in private law practice, first as a senior attorney at one of the premier law firms at the time, the Araneta Mendoza & Papa Law Offices, and later as partner at the Santiago Tinga & Associates, and later still at the Pimentel Cuenco Fuentes Tinga Law Firm. He also served as dean of the U.E. College of Law from 1988 to 1992.

Born on May 11, 1939, Justice Tinga is a recipient of several honors including the Most Distinguished Alumnus in Education in 1991, the Most Distinguished Alumnus in the Legal Profession in 1988, and the Most Outstanding Alumnus in 2006, all conferred by the University of the East. He was conferred the degree of Doctor of Public Administration by the Polytechnic University of the Philippines in 1996. Justice Tinga is a widower (married to the late Atty. Ma. Asuncion Rodriguez Tinga) with six children.

Justice Tinga has authored several notable *ponencias* for the Court. To name some, in the field of political and administrative law, he wrote *Disomangcop v. DPWH* (444 SCRA 403) on the scope of the local autonomy of the ARMM; *Globe v. NTC* (435 SCRA 110) concerning the breadth of the regulatory powers of the NTC; *City of Manila v. Laguio* (455 SCRA 308) on the constitutionality of an ordinance ordaining the forced transformation of a city district, including the banning of motels; *Mijares v. Ranada* (455

Calderon de la Barca said, "If you cannot reconcile yourself to the law, (then) remain in the cradle."

Again, in the name of the law, we have a rare quadruple treat today. In the order of their occurrence, these are *first*, the fine display of collaboration between the Supreme Court and the academe; *second,* the conferment of honorary degree on a most worthy recipient; *third,* the distinguished lecture of the eminent honoree; and *fourth,* a commemoration of the historic and close ties between Spain and the Philippines. These ties have left an indelible imprint on the legal framework of the Philippines.

SCRA 397) on the nature and international law implications of civil suits for the enforcement of a foreign judgment; *Constantino v. Cuisia* (472 SCRA 505) regarding the capacity of the Secretary of Finance to negotiate foreign debt agreements and the interpretation of the provisions of the Constitution on foreign debt; and *Gudani v. Senga* (498 SCRA 671) concerning the interplay of the commander-in-chief powers and the power of Congress to compel attendance of military officers in legislative investigations. In civil and commercial law, he penned *Transfield Philippines v. Luzon Hydro* (443 SCRA 307) on the "independence principle" of letters of credit; *Philcomsat v. Globe,* (429 SCRA 153) on *force majeure; Samsung v. FEBTC* (436 SCRA 402) on a bank's liability to a depositor for paying out a forged check; *Commissioner of Internal Revenue v. Benguet Corporation* (463 SCRA 28) on the nature of the Value-Added Tax and zero-rated transactions; and *Antonio v. Reyes* (484 SCRA 353) on marital psychological incapacity. In criminal law, Justice Tinga authored *People v. Tudtud* (412 SCRA 142) on warrantless searches and seizures; *People v. Bon* (506 SCRA 168) on the graduation of penalties following the renewed ban on the death penalty; and *Valenzuela v. People* (525 SCRA 306), which declared that there was no crime of frustrated theft.

As an appropriate backdrop, allow me to stress the unique dynamics between the Spain and the Philippine legal systems as well as offer a brief overview. Our judicial system, particularly the allocation of jurisdiction of superior and inferior courts, draws its roots from the judicial system set in place during the Spanish era. For one, our Supreme Court has its equivalent on the *Audiencia Real,* established in 1583 by King Philip II. The *Audiencia* served not only as the supreme judicial body in the Philippines, but also a superior council which exercised legislative and executive functions.

This fusion of executive, legislative and judicial power at the level of the *Audiencia Real* extended also to the subordinate offices. On the provincial level, the administration of justice was entrusted to the *alcalde mayor,* who acted as the provincial executive, judge, military commander, and officer of finance. The *alcalde mayor* had jurisdiction over all civil and criminal cases arising within his territory, except cases which were under the ecclesiastical courts and other special courts, as well as other executed civil cases. His decisions were appealable to the *Audiencia Real.*

Towns were headed by *governadorcillos,* who exercised similar judicial functions within their territories as the *alcalde mayores.* Established in 1885 was the office of the *juez de paz* (or justice of the peace), who exercised jurisdiction over civil cases where the property or other interest under issue was less than 200 *peso fuertes* or 1,000 *pesetas.*

Other special courts were established as well with jurisdiction over particular types of case. These are the ecclesiastical courts, the army and navy courts, the treasury courts and the commercial courts.

The localized jurisdiction of the *alcalde mayores,* the *governadorcillos* and even the *juezes de paz* are akin to the localized jurisdictions of the present day Regional Trial Courts and other lower courts. Even the courts of specialized jurisdiction have modern day equivalents.

During the colonial period, all laws enforceable in the Philippines were compiled in the *Recopilacion de las Leyes de Indias* published in 1680. Included in the *Recopilacion* were such laws as *La Novisima Recopilacion, Las Siete Partidas*, and *Las Leyes de Toro.*

During the 19th century, many of the legal codes enacted by Spain were applied to the Philippines. The first of these was the *Código de Comercio España de 1829*, which was extended to the Philippines in 1832. Some of its provisions are still in effect in the country. The *El Código Penal de 1870* took effect in the Philippines in 1887. Notably, the Spanish Penal Code remained in force in the Philippines until the adoption of the Revised Penal Code of 1930, a code strongly influenced by the *Codigo Penal.*

And we should not forget *El Código Civil de España,* on which our esteemed guest shall be speaking shortly. Enacted in 1889, the *Codigo Civil* remained in force in the Philippines throughout the American period and until shortly after Independence before it was supplanted by the Civil Code of 1950.

From time to time, our courts are still called upon to analyze these Spanish laws and their historical antecedents and even apply to actual cases.

In my first year in the Court, we decided a land case which turned on whether acceptance by the donee is essential for the

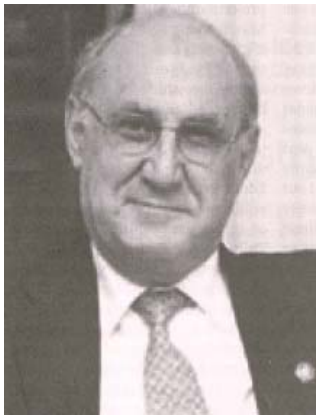
validity of a donation *propter nuptias*. As the donation was executed in 1940, we applied the Civil Code of Spain.

More recently, we have the decision in *Valenzuela v. People,* where the Court examined whether the crime of frustrated theft exists under the Revised Penal Code. It became necessary for us to examine the relevant provisions of the *Código Penal de 1870,* and even compose them to the *Código Penal Español de 1995.* The Court also examined the commentaries of Santiago Viada, which were cited by the Court of Appeals in two decisions in the 1950s where the accused was found guilty of frustrated theft. However, the Court also came across the views of another important Spanish commentator, Eugenio Cuello Calon, who attacked the very idea that frustrated theft was actually possible. You see, the perennial conflict of views not only among lawyers but also among legal experts is not a local phenomenon. The absence of unanimity or certainty on the part of Spanish legal experts on the existence of frustrated theft allowed for a fresh perspective, and the Court concluded that frustrated theft could not be committed under the Revised Penal Code.

With the background thus recalled, I am confident we are all set for the twin highlights of today's affair. Let us look forward to an enlightening lecture from our esteemed guest of honor. Thank you for your kind indulgence, and I wish one and all a pleasant and memorable afternoon.

REFORM OF THE SPANISH CIVIL CODE: BASIS AND CONTENT*

His Excellency Francisco Jose Hernando Santiago



Chief Justice Francisco Jose Hernando Santiago obtained his law degree from the Complutense University where he held a professorial chair for many years. In recognition of his 25 years as an excellent barrister, he was called to the bench in March 1986, starting his judicial career as magistrate of the Sala Quinta (Fifth Division) of the Supreme Court pertaining to the military. In 1989, he was appointed to the Sala Tercera (Third Division) which deals with contentious administrative cases.

From 1994 to 1997, the Chief Justice was one of eight Supreme Court judges selected by the General Council of the Judicial Power (GCPJ) to sit as members of the Junta Electoral Central (Central Electoral Board).

In November 2001, he was elected president of the GCPJ and also President of the Supreme Court. As head of these important offices, he had to decide cases of maximum importance, such as the declaration of nullity of the 2003 municipal and regional elections in the Basque and Navarra provinces. He also served as Permanent Secretary of the Ibero-American Summit of Supreme Courts and Councils of the Judiciary, comprising 23 Judiciaries of the Ibero-American countries.

The Chief Justice has excelled in the field of Constitutional Law, and has written on the legal aspect of a United Europe, being an ardent exponent of a United European community.

The Chief Justice, a staunch advocate of the independence of the Judiciary, refused to appear at a hearing of the Committee on Justice of the Spanish Congress, stating that his appearance would be contrary to the principle of separation of powers and the independence of the judiciary.

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* Delivered at the *First Distinguished Lecture, Series of 2008,* held on February 20, 2008, at the University of the East, Manila.

My first words are to express my gratitude to the Philippine judicial and academic authorities for the award concerning us today, and for the hospitality and care they have accorded us since our arrival here in this beautiful land.

The Honorary Degree of Doctor awarded me by the University of the East amounts to a motive of great personal joy, and also of deep satisfaction for me as I address you in this symbolic location. I therefore want to publicly display from this platform, where I am honored to be, and before this audience, consisting mainly of academics and lawyers, my appreciation to the university authorities. I express my appreciation for this generous display of recognition which I receive in my capacity as representative of the Spanish judiciary and which I understand not only extends to all magistrates and judges of Spain but to all providers of justice, those who have the status, and those who perform the tasks of a judge, irrespective of where, of the scope of law in which they perform, and of the position they hold within the judicature.

The role of the courts is the keystone underlying the rule of law. So far justice has appeared as the key to substantiating modern states since the establishment by the French intellectual, Montesquieu, of the principle of separation of powers of the state. The dazzling view of the state as an organized system of powers, which are separate from each other and flow from the people, is enshrined with known differences in the two largest existing constitutional models (the North American and French Revolutionary models) and irradiated with logical features specific to all democracies in the world today. In all of them, throughout the face of the earth, the role of the courts is essential as to the

legal protection of rules, and also as to the safeguard of citizens' freedoms and rights from judiciary measures, being an independent guarantee bound only by law and statute.

The courts in all legal systems retain final responsibility for the social peace. The most stable nations are precisely those which enjoy a more efficient and quicker administration of justice, as it was and is man's conquest of civilization, and more than this, an essential element of civilization which preserves civic life under stable laws, and which also embodies as state's response against delinquency through strong institutions based on the rule of law. The courts' place in society is therefore vital, not only for making available fair responses to the demands of citizens, but also because from their responses the confidence of citizens in institutions is generated.

The courts, thereby, also have an essential pedagogic function for society, which is more effective the greater the extent to which they work; and from that effectiveness, they invigorate and make stronger the laws they apply as an instrument for community life. This is where, in the grant of another pedagogic role, justice and universities, which are pedagogic institutions, combine in their work, which is not the only common place between them.

It has to be recognized of course in an academic forum of this kind that courts and universities, in particular through their law schools, perform directly related tasks. For their research work, law schools make use of the materials provided by the courts through their decisions, critically, analytically and not always commonly, but under the one condition that the best solution in law is sought after. Law schools come up with new approaches and new interpretations of the law on the problems detected in court practice. On the part of the courts, the work and research

of universities is made use of as to the new proposals for existing problems, or for detecting new problems under the law or from its application in society, which are, from their study, incorporated in their judgments. At the same time, the judicature is a host for universities in their teaching staffs; they are primary source from where the vocation of future judges flows. This is how the circle of this mutually beneficial relationship for universities and the judicature is closed.

And here today, a Philippine university is faced with the courts, being the Spanish courts which are identified in the person of the President of the Supreme Court. I am therefore obliged to repeat my appreciation, which is for a personal award but which acknowledges the faithful, silent, difficult, and not always leading role of tens of thousand of courts which, in their decisions, give tangible effect to that old maxim of the law as an instrument of justice and social peace on a daily basis.

I consider, moreover, that this event, a display of friendship, would not have been possible without the solid support from the cultural and historical ties existing between the Philippines and Spain. Much has separated us, but much has also united us. And despite the length of time that has elapsed since the loss of this common pathway, it should be noted that we are two nations that are much closer than what the geographical distance between us suggests.

There is a considerable amount of political and commercial links between our countries. These would not have been possible without the diplomatic effort invested for several decades by our respective governments. Thus, I want to point out in this forum that in a globalized world where distances are becoming narrower and narrower, that it is not in a position to set aside diplomacy or

good neighborly relations. We are separated by continents but are united by our history and our predisposition towards the good of the community which we have endeavored to achieve, again demonstrating as well at the international level that community life and respect stem from sources of prosperity.

I have shed light on our shared history and on our common ties, which are cultural, religious, and also legal. The Spanish heritage in all the territories where its dominance extended was also a legal heritage. One example is found in the field of civil law where noteworthy connection points between Spanish and Philippine law exist. That is why this lesson deals with the most important rule of law in the last century within the scope of civil law in Spain, that is to say the Civil Code. Following, I will refer to a rule of law, the importance of which goes beyond the strict limits of private law. It is a technical and political rule of law not without criticism nor unarguable, in the formation process of which by a significant margin many of the features, which throughout history have characterized the legal firmament of a nation deeply rooted in the history of civilization, are reflected. Civil law and civilization from a common Latin root: *cives*, the city; and separating the link has not been possible over the centuries. The advance of civilization is also the advance of citizens' right, which is what civil law is in the true and original sense. For that reason, it is not surprising that those in search of new horizons and that want to export new models of civilization would also accompany such a titanic effort in new national legal systems. And in the wake of the impetus to codify the law, this resulted in the exposure of the Civil Code to those territories where traces of Spanish culture extended.

Paradoxically, the exterior influence of the codification of law can be regarded as late and has been criticized as such by

experts for two reasons: firstly, for the historical circumstance under which it was produced, given that in reality the culmination of the codification movement in Spain coincided in time with the dismemberment of its empire and the emergence of young nations all across the world. In addition, codification concerning Spanish Civil Law has also been regarded by experts as late, taking as their basis the model of the Napoleonic Code by glossing over other more recent models such as those which have been in Germany and Switzerland because of the pandectists.

This, however, did not prevent the Spanish Civil Code from having no influence on Latin America or in other reference places, as is the case with Equatorial Guinea or the Philippines, regardless whether at the time of its promulgation, independence processes were completed. And this is because of a factor not without interest, that is to say, the fact that the standard Spanish Civil Code would lay down all the Castilian Civil Law, meaning the civil law applied in most of the Spanish territory, which is law based on old traditions and legislation and laid down over centuries by compilers of law and those in force.

This is the explanation why many of the rules provided for in the Civil Code at the time of their regulation subsisted in the legal systems of other nations, but through a twin-track approach, that is to say, either directly by translating its rules and institutions from the Civil Code itself, or indirectly, by holding after the independence processes of those institutions of Spanish law which were already applicable in those territories prior to, but which were incorporated during the codification movement to the text of the Civil Code.

Thus, it is no wonder that there are traces of civil institutions provided for in the Spanish Civil Code in the legal systems of

the nations whose independence was subsequent to the time of its promulgation (as is the case concerning the majority of South American nations with the exception of Brazil), or in others where it was not, as is in the case of the Philippines or, for a long time, Puerto Rico.

In the second case, sharing identically rooted institutions is, however, not the sole basis for determining legal proximity, but sharing the same laws is, as is, in particular, in our case. The Philippines and Spain not only share the same Civil Law, but also share the same Civil Code, that is to say, the same systematic set of rules of general private law.

It is there where the interest of this conference lies, which is indeed a very special interest I am obliged to address. It is, thus, my intention to devote this lesson to the Spanish Civil Code, as to its historical evolution since its promulgation in 1889, 119 years ago, until now, so as to inform of the principal phases of a principal rule in the Spanish legal system. It concerned an especially suggestive labor given the legal coincidence between our nations. I am, therefore, obliged to draw your attention to the luck which for the past 119 years that text born in Spain in 1889 has had, by especially pointing out the reforms it has undergone. It is not a work of comparative law, as I refer to a time subsequent to that of comparison of different legal systems. Perhaps from there, it is opportune to inform what such luck is owing to the decades of both the Spanish and Philippine Civil Codes. And perhaps, it is also opportune to justify once more that the rules are not impermeable to the running of time nor to the context in which they are applied, which is contrary to the ideal of codification, as well as the suggestion of unalterable sacred written law.

Perhaps, the general conclusion of these words, even though paradoxically and despite the separate luck of the two twin civil codes, is that the grandeur of the law should bring us to the realization that there is still much that unites us at the legal level, which bears testimony to the heavy influence the principles and institutions, provided for in the rules laid down by a state, have on peoples when they integrate these into their daily life. This is the greater grandeur of the law when, in addition to their legitimization of origin, they acquire overwhelming authority which is provided for the citizens' approval. This is the agent that fuels and gives force to the standards it sets out and the justification, despite the reforms to its period of operation over the decades.

Furthermore, this lesson shall principally serve to set out the principal reforms undergone by the Spanish Civil Code over the 119 years it has been in operation. But first, my opinion is that it is necessary to point out the place that the Civil Code occupies in Spanish law, the point being to contextualize it in a comprehensive way by highlighting some of the peculiarities of its own Civil Code so as to also understand what the evolution subsequent to the Civil Code in Spain has been.

I first refer to the significance of the Civil Code in Spain, which cannot be done without referring to the historical context in which it was promulgated. The Civil Code is, as I had pointed out, the product of the great codification movement which arose in Europe at the end of the 28th century and at the beginning of the 19th century. Codification was preceded by the principles of the Enlightenment and the idolization of written law resulting from popular sovereignty. This is regarded as granting maximum legitimacy in the most radical approaches. Lawyers, therefore, considered that codification sought to channel legal systems to

certain political ideals in such a way as to bring down the tradition of common law and to put into force law in its own right, providing it with stability in general and with systematic rules of the people through parliaments.

Thus, the codification of the Civil Code in Spain resulted late as it arrived a century after the first European Codes. This was, however, not owing to the negligence of the legislator, but to the circumstances themselves of a state affected by great instability during the 19th century. This instability stems from different sources, of the one part combined at the political level where, on the one hand, a not always peaceful change-over of different models of government accompanied the steady loss of overseas territories. The 20th century saw a succession of constitutional rules, alternatives between monarchy and republic, revolutions, military rebellions, which did not encourage a climate for consolidation of the shaping of new codes. On the other hand, strictly at the legal level, the evolution of a Civil Code in Spain, applicable in all of its territory and equally applicable to all of its citizens, was faced with the obstacle of subsistence of particular civil laws which were applicable to certain regions, the origin being tradition in particular aspects of peoples' lives. With the Greenfield Decree of 1715 laid down by King Philip V, the movement to ensure uniformity of the law commenced for all the Kingdom of Spain, but which failed and was especially evidenced in the field of civil law.

As to the reason why more bore on the delay of the process of the creation of the Civil Code in Spain, it was the resistance of the regions with their own civil law to losing it to the new Civil Code. The promulgation of the Civil Code was only possible by a political agreement of the two principal political forces on the basis of a period of great stability for the remaining

20 years of the century and on the exemplary promotion of a number of lawyers to which we still owe today the longevity of many of those rules. Despite its consideration as a code, that is to say, as a general rule, the result of the agreement in reality was that the Spanish Civil Code does not provide for all of the rules of private law applicable in Spain. Spanish Civil Law is due to ultimately cohabiting with particular sets of laws which in particular are applied in the field of family and succession law in certain Spanish regions.

The final result was in an extensive text of heterogeneous consolidation not without criticisms. As regards its structure, the Spanish Civil Code related to the French Roman or Gaius framework and consists of 1,976 articles distributed among four books in addition to a preliminary title. As regards its content, the Code regulates the fundamental institutions that comprise civil law, but not everything provided for by civil law nor everything it regulates in it. In its articles are materials more related to constitutional law, such as in reference to the sources of law and access to nationality or law of procedure (such as the burden of proof); there are rules expressly excluded from its content, even though they are clearly civil, as in the case of legislation of the register of civil status, mortgage law or special properties (waters, mines, intellectual property, among others).

Furthermore, the maxim of an old Spanish lawyer is clarified which considered that the purpose of the law resulted from the legacy of the past, rather than as a systematic unit from the practical point of view. Concerning the longevity of the Code with special civil rules (at the objective or territorial level), the Civil Code was classified as common law, provided for by the original Article 16 (currently Article 4.3) of the Code, which considers its rules

as subsidiary to the matters governed by other laws, whether or not they are civil.

As for the criticisms, the criticisms to the Code were of a different nature, aimed at systematic aspects or the layout plan of certain rules, and in some cases were even deep-rooted questions concerning specific institutions. Its inability to ensure uniformity of all the civil law was criticized, being its French inspiration and the technical precision of some of its rules.

Even its wording and use of language were criticized. The Civil Code is, however, still around with its modifications, but still full in force, which is in its favor. The longevity of a rule of the extension and content of the Civil Code, overcoming a number of historical turns during its vital period, different political regimes and not a few social upsets, is more than an indication of the quality and strength of a rule which is rooted in the inertness of generations of lawyers.

That is why, over the years, history has found that the Civil Code is weighted and more objective, reaching further than the immediate reactions it caused, reactions which were pointed out by Federico de Castro as expressing a side of Spanish character as to longing for what one does not have and taking for granted what one does. The Civil Code was not innovating, but was prudent and conserved Spanish law by shaping it in pursuance of the case law of that period. It was attainable by the Spanish people and was of a literary value much superior to that of other contemporary texts as well as subsequent ones. Perhaps, without this, its longevity would not have been possible nor its influence in other legal systems, which is why we owe our gratitude and respect to the pioneer lawyers who knew how to conserve our

traditional law while, at the same time, ensured its maintenance for future generations.

However, it is well-known that law is not impermeable to time, contrary to the liberal ideal of idolization of written law. Experience has highlighted the certainty of the maxim of Savigny on the idea of law as a product of the history of people. That maxim is so provided for in the Civil Code, in the Supplementary Provision No. 3 where it lays down that the Ministry of Justice, through the Codification Committee, makes reforms as appropriate to be introduced into the Code every 10 years, bearing in mind that the rigidity of the rule can hamper its efficiency as to the evolution of the times and people.

This was a lesson that was well learnt by the Civil Code which, during its vast period of operation, has experienced many legal reforms not only undermining it, but which are the principal source of its strength. Each generation has law to legislate its own laws, so as to not necessarily feel bound by those received by their ancestors when shown to be inefficient and outdated. But a legal system cannot change *ex novo,* as social relationships do not change radically. This appears in the historical experience of law where the best way to avoid traumatic solutions is to encourage prudent change of rules, on the basis of there being deficiencies as regards their use and pursuant to the case law that, in their interpretation, is adopted by the courts.

These are the trends over the last 119 years concerning the Civil Code, and even though many times reforms bring down the foundation upon which the law itself is built, in the case of the Spanish Civil Code not only have its standards been updated but the legitimacy of its provisions have been reinforced.

At this time, in the last part of the lesson, I will refer to, in particular, the principal reforms undergone by the Spanish Civil Code of 1889. In order to do so, I will make use of two classification criteria. On the one part, I shall proceed from the basis of the division of time of operation of our Code into three historical periods in terms of certain key milestones of the recent history of Spain. The first period is from its promulgation to 1936 when the Spanish Civil War began, which meant the breakdown of the state to be substituted by a totalitarian government. The second period covers the life of the Civil Code of 1936 until the arrival in 1978 of the constitutional monarchy currently in force. The third period covers the length of time that the Constitution of 1978 has been in force. On the one hand, I will refer to the reforms of its own articles, that is to say, the modification of its own standards by substituting old provisions for newer ones integrated in the Code itself. On the other hand, the reform of the Civil Code is performed from outside the Code, that is to say, subsequent to the publication of specific and implementing laws from a practical viewpoint, which have steadily repealed some of the legislation originally provided for in the Civil Code.

A. Promulgation of the Code (1936)

The first of the historical periods I will refer to is from the promulgation of the Code to the year 1936. In those almost 50 years made up of large political upsets, there were few specific reforms underwent by the Code.

The first reform dates back to 1904 and consisted of the cancellation of a holograph will validity requirement which, in particular, was the need for it to be drafted on official form. The

intention was for the testator's wishes to have precedence over the specific form of the document which contained his last wishes, whereas the essential elements of the will were provided for. The second reform having great social relevance limited the law to inherit, in the absence of a will, to persons related collaterally to the fourth degree. This was reformed in 1928 and the purpose was to reduce the amount of controversy where the deceased's last wishes were not expressly provided for. Aside from these reforms, the reform in August of 1899 which modified Article 1108 on the statutory rate of interest should be pointed out. It can, therefore, be said that the decennial review of the Civil Code was not met and that the Code enjoyed great stability.

Of the provisions laid down by law which complement the Code and belong to the aforementioned first period, the Law of July 23, 1908, on loans at an unconscionable rate of interest and on unreasonable loans, as an assurance for the weaker contracting party, and another law in 1917, which provided for registered agricultural liens, such as many provisions referring to labor legislation and on agricultural tenancy and rented property, especially during the Republican period from 1931 to 1939, should be pointed out as to their interest. Also, during this period a number of rules in family law was laid down, which would be repealed by the state arising from civil war and affected, in particular, that concerning marriage, in so far that divorce was regulated for the first time in Spain.

B. Partial Amendments to the Civil Code (1939)

From 1939, partial amendments to the Civil Code were made more frequently, presumably resulting from the new ideological trends.

As a consequence of the war, in the year itself of 1939, the reform of the rules on declarations and declaratory judgments of death with shortening of deadlines appeared as an improvement to the regulation of the temporary situation brought on by the absence and admission of *todeserklärung* of German law, the permission to declare somebody dead in special cases of disappearance. Also, as a consequence of the war, in 1939, Article 396 was reformed in order to provide for real estate property in a system of community of property, which was completed at a later time in 1960 with the publication outside of the Code of the law on co-ownership.

In 1941, registered liens (charges) from the special law on published materials of 1954 were introduced into the Code, which placed the institution outside of the Code. The reform of 1954 was the most important, as it drafted 66 new articles and amended the heading of the two Titles of Book I. Its purpose was to adapt the Code to the Treaty of Conciliation of 1953 concluded by the Vatican concerning marriage. It laid down the new legislation on adoption, which was more advantageous for women than in the law prior thereto, on matters such as the rights of surviving spouses or eligibility to witness wills or a household's financial regime for the purpose of protecting a wife from abuse by her husband.

Among other reforms, two more in the latter part of this period should be pointed out, the first being the **preliminary title of 1974**, which is of great relevance as it is organic and general in nature and provides for the entire process of interpretation of the Supreme Court, which affected the system of sources of law, the application and efficiency of the rules and system of conflict-of-law rules in terms of international legislation

and Spanish domestic legislation, once the collection of the regional civil statutes were concluded. The second reform concerned **married women and the rights and obligations of spouses**, being the first impetus to modernize gender relationships and affect access to nationality; the capacity to act in the administration of joint ownership of movable property and all property acquired during wedlock, among other concerns.

C. Spanish Constitution of 1978

And lastly, we are left with the period from 1978 until now, that is to say, the time from the adoption of the Spanish Constitution in force. In general, its influence on the Civil Code over the past 30 years is undoubted in particular as regards its rules and fundamental freedoms. Many of the reforms pursued during this time aimed to adapt the Code of the Constitution, while simultaneously with its promulgation a number of articles of the Code were modified so as to adapt them to the Royal Decree which laid down the age of legal majority at 18, being the first of an overwhelmingly large number of novel laws that were civil in nature.

In 1981, parentage, authority of parents, and a household's financial regime were reformed by treating those circumstances as equivalent to marital and non-marital children and deleting the latter as illegitimate. Paternity tests have also been authorized and the authority of parents was conceived as the right to rely on joint custodianship. During this same year, marriage was modified and civil divorce was reintroduced. In 1982 and in 1990, the reform affected Articles 17 and 26 on nationality, and in 1983, on judicial protection, thereby affecting two titles of the first book. In 1985, civil prohibition *(interdicción civil)* was erased

from the Code. In 1990, the Code was reformed by the application of the principle of non-discrimination, which implied the substitution of the word "wife" for "spouse" in many provisions. In 1991, wills were modified. In 1996, the law on the protection of the child modified the legislation of the Civil Code on food, abandonment, and placement of children. And in 1999, it was modified concerning forenames and order of surnames.

The publication of the Code of Civil Procedure in 2000 was important, and which set out to eliminate all of the procedural references of the Code by repealing anything concerning the rules of evidence of foreign law, the rules of procedure concerning parentage and eligibility, and those concerning the burden of proof.

Over the past years, three more important reforms are highlighted in the scope of family law. In 2003, novelties to benefit disabled people were introduced in relation to the inheritance legislation. In the same year, the Code was being modified concerning separation and divorce, by making compliance dependent on the relationship coming to an end, in addition to legal grounds, on the basis only of a voluntary act on the part of contracting parties. The most recent reform as of this past December modified Article 154 of the Civil Code by qualifying the authority of parents to make physical corrections on their children.

Together with these domestic reforms of the Code is a large number of modifications contained in the complimentary rules over the past 30 years, affecting very diverse matters such as insurance contracts in 1980; the protection of honor, privacy and personal reputation in 1982; arbitration in 1998 and 2003; residential letting in 1994; industrial and intellectual properties; patents and consumers, among many others, as required by

membership in the European Union. And there are others, as a consequence of constitutional development and publications in different autonomous regions, where rules differ pursuant to region, ranging from family law to co-ownership, which have reduced common law to only a supplementary source of law in such territories.

Before I come to a close allow me to draw your attention to one more general concern. I refer to the work of the courts in updating and following up the law. I have referred to a large list of reforms of the Code, but perhaps I have not pointed out as I should that the majority of them are a consequence of the previous work of interpretation of law carried out by the courts. It is the courts that have detected the defects in the law and that have to be the legislator for the need for reform. I want to stress this point as a display of the devotion of the courts which have acted under the integrity of legal order in order to bring new life to the content of the law and improve its strength.

Perhaps, this is the secret of the legal force of the Civil Code after so many years, evidenced in my briefing on the experience of the Spanish Code in its long life as being the legal connection that keeps us united, despite the time elapsed since the end of the period of our shared history. I hope that this account has been interesting and hopefully useful in order to better acquaint yourself with the origins of the Code of the Philippines and, where appropriate, to highlight the areas most needing of update and reform.

Thank you.

Reactions on the Reform of the Spanish Civil Code: Basis and Content*

*Justice Jose C. Vitug***

I am honored by the invitation of the Honorable Court, through the Philippine Judicial Academy, to react to the instructive lecture of His Excellency Francisco Jose Hernando Santiago, President of the Supreme Tribunal and General Council of the Judiciary of the Kingdom of Spain.

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* Delivered at the *First Distinguished Lecture, Series of 2008,* held on February 20, 2008, at the University of the East, Manila.

** Honorable Jose C. Vitug, Associate Justice of the Supreme Court of the Philippines from 1993 to 2004, is now Chair Emeritus of PHILJA's Department of Commercial Law. He remains to be a consultant of the Supreme Court Committees on the Revision of the Rules of Court and Legal Education and Bar Matters. He is also a consultant of the Manila Electric Company, a director of Aboitiz Equity Ventures, Inc., Dean of the Angeles University Foundation (AUF) Law Center, a graduate professor, a lecturer, and a bar reviewer.

In the Supreme Court, he was Acting Chief Justice from May 17-23 and May 25-27, 2004; Working Chair of the First Division; Chair of the Supreme Court Third Division; the House Electoral Tribunal, the Committee on Legal Education and Bar Matters, and the 2003 and 1997 Bar Examinations; Co-Chair of the Committee on Appropriations; Senior Member of the Senate Electoral Tribunal; and Consultant to the Judicial and Bar Council.

In the government service, he was lecturer and reviewer at the University of the Philippines; Member of the Civil Code Revision

Indeed, the legal milieu is fast moving. It is inevitable. The continuing evolution of societal thinking, an unrelenting advance of Science and Technology, and an expanding boundary of the global village are compelling and irresistible forces of change.

Committee at the UP Law Center and the Board of Advisers to the Commissioner of Internal Revenue, BIR; and Technical Assistant to Justice Jose B.L. Reyes of the Supreme Court from 1957 to 1961.

In the academe, he was former Dean of the Arellano Law Foundation; Chung Chi Professor for the Chung Chi Professorial Chair; Graduate Professor in Advance Corporation Law, Corporate Business and Finance, Advance Taxation and Advance International Law; and Professor of Law and Bar Reviewer in Civil Law, Taxation and Commercial Law.

In the professional and private sector, he was Chair of the Board/Officer/Director/Trustee/Consultant/General Counsel in various domestic and transnational corporations/associations/organizations; Partner, Dizon & Vitug Law Office; and Of Counsel, Gupit, Navarette & Diaz Law Office. He was also constantly invited as Resource Person/Lecturer/Discussant/Guest Speaker in various private entities and government agencies.

He participated in various capacities in international fora among which include: First International Forum for Training of the Judiciary, Jerusalem, Israel (March 17 to 21, 2002); Australia-Philippine Judicial Cooperation Project and the Federal Court of Australia (October 18 to 24, 2001); Millennium Law Conference, Singapore (April 10 to 12, 2000); Global Conference on Anti-Corruption and Safeguarding Integrity, Washington, DC, USA (February 24 to 26, 1999); WIPO Asian Regional Colloquium on the Judiciary and The Intellectual Property System, New Delhi, India (December 11 to 13, 1996); and the Diplomatic Conference on Convention Agency in the International Sale of Goods, Geneva, Switzerland (January 31 to February 17, 1983).

A prolific author, the books that have been published and used as college text books in law schools include: *Pandect of Commercial*

The Philippine legal system has been a mixture of civil law and common law rules and principles. The strong influence of civil law brought about by the almost four centuries of Spanish presence in the archipelago is reflected in the generally strict adherence to statute law. So, also, the extensive infusion of

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Law and Jurisprudence, The Family Code Annotated, Compendium of Civil Law and Jurisprudence, Selected Ponencias of Justice Jose C. Vitug, and *Selected Opinions of Justice Jose C. Vitug*. He is also co-author, with Presiding Justice Ernesto D. Acosta of the Court of Tax Appeals, of the book *Compendium of Tax Law and Jurisprudence.*

Among the awards and commendations conferred on Justice Vitug include: a doctorate degree (2005); the Supreme Court Plaque of Recognition (2004); National Defense College of the Philippines Distinguished Achievement Award (2004); Court of Tax Appeals "Special Tribute" (2004); Integrated Bar of the Philippines Plaque of Recognition (2004); Philippine Association of Law Schools Plaque of Appreciation (2004); Philippine Association of Law Professors Plaque of Recognition (2004); The Outstanding Filipino (TOFIL) Award (2001); Supreme Court Centenary Book Awards (2001); First GAWAD Arellano Achievement Award (2001); Outstanding Manilan (2000); Outstanding Kapampangan (1999); Outstanding GNC Alumnus (1999); Outstanding MLQU Alumnus (1993); and the National Defense College of the Philippine Outstanding Alumnus Award (1992).

A consistent honor graduate and scholar since primary school, Justice Vitug finished his law degree, *cum laude;* obtained a Master of Laws and Master of National Security Administration degrees; and was a Fellow of the Commonwealth Judicial Education Institute, Dalhousie University, Halifax, Nova Scotia, Canada.

He is also Founding Signatory of the International Organization for Judicial Training (IOJT) in Jerusalem, Israel; a Lay Minister at St. Jude Shrine in San Miguel, Manila; and a Reserve Officer of the Armed Forces of the Philippines.

common law into the system with the implantation of American sovereignty in the Islands has resulted in the recognition of the common law responsibility of judges. A happy mixture has resulted ultimately into the Philippine courts being held to be not only courts of law but also courts of equity as well.[1]

The Civil Code of the Philippines which took effect on August 30, 1950, was for the most part patterned after and based on the Civil Code of Spain, the governing law in the country from December 8, 1889, until the day before the new Civil Code took effect in 1950. The most telling change made thereafter was the Family Code of the Philippines that became effective on August 3, 1988. The amendatory legislation introduced changes on the 1950 Code governing marriages, the personal and property relations of spouses, adoption, and, in general, the rights and duties appurtenant to family relations.

For instance, the Family Code accepted the trend to liberalize the acknowledgement or recognition of illegitimate children in an attempt to break away from the traditional idea of keeping well apart legitimate and non-legitimate relationships within the family in favor of the greater interest and welfare of the child. The Code also adopted the Canon Law concept of a void marriage due to psychological incapacity of a party.

A relatively recent development is the growing preference for the application of equity and of practical approaches, in the solution of civil law disputes in various areas. Under the 1889 Civil Code, courts have been mandated to apply, in the absence of statutes and customs, the general principles of law. The

[1] *U.S. v. Tamparong*, 31 Phil. 321 (1915); *Rustia v. Franco*, 41 Phil. 280 (1920); *Asiain v. Jalandoni*, 45 Phil. 296 (1923); *Alonzo v. Padua*, 150 SCRA 259 (1987).

omission of this specific language in the 1950 Code cannot be deemed to have abandoned that rule. After all, in its Article 10, the role of the general principles of law, largely, based on equity, has been institutionalized for, in the application of laws, the legislature must be presumed to have intended right and justice to prevail, and that law cannot be held ever to have intended otherwise.[2]

An interesting case, illustrative of a paradigm shift, involved a lady court interpreter who, admittedly while married to another, had long been cohabiting with another man, himself married to another. The woman was charged administratively. In her defense, she contended that under the rules of the Jehovah's Witnesses, a religious sect of which she was a member, the act of signing a Declaration Pledging Faithfulness, would be sufficient to legitimize a union which otherwise could be classified as truly being adulterous and bigamous. She and her partner signed that Declaration Pledging Faithfulness which, she argued, legitimized the couple's relationship by the religious denomination.

The *ponencia* discussed the ramifications of the constitutionally protected right of freedom of religion clause on the issue and took efforts to distinguish between secular and private morality. The Supreme Court finally reached a conclusion by the

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[2] CIVIL CODE, Arts. 8-10 and 19-24; *Alonzo v. Padua*, 150 SCRA 259 (1987); *Pangan v. Court of Appeals*, 166 SCRA 375 (1988); *Agcaoili v. GSIS*, 165 SCRA 1(1988); *ABS-CBN Broadcasting v. Court of Appeals*, 301 SCRA 572 (1999); *Bricktown v. Court of Appeals*, 239 SCRA 126 (1994); *Estrada v. Escritor*, A.M. P-02-1651, June 22, 2006; *Morigo v. People*, G.R. No. 145226, February 6, 2004; *Newsweek v. IAC*, 142 SCRA 171 (1986); *MVRS v. Islamic Da'wah Council*, G.R. No 135306, January 28, 2003.

majority that the law, an instrument of the secular State, should basically concern itself with secular morality.

Verily, it would be hard for the Court to ignore the argument that the State should interfere with "private moralities" only to the extent that they affect the public good. Defining, however, the line where an immoral conduct crosses the private sphere to the realm of a general concern could be a most daunting task.

Philippine laws on the subject are veritable repositories of moral laws that sanction immoral conduct which, at first glance, could appear to be private and to cause no harm to larger society but nevertheless dealt with. Examples of such instances include general references to "good moral character" as a qualification and as a condition for remaining in public office, and sex between a man and a prostitute, though consensual and private, and with no injured third party, remains illegal in this country. Until just recently, the United States Supreme Court has outlawed acts of sodomy or consensual sexual relations between two consenting males, even if done in the privacy of the bedroom.

Great leaps in science and technology, as well as globalization and cross border societies, that have started not long prior to the turn of the century may indispensably alter the picture of, by and large, still to be described as seeming docility in the legal landscape to one of awareness, if not of serious anxiety, in the new era.

Even now, a convergence of the civil law and the common law systems is noticeably, *albeit* slowly, taking place, and it may just be as well.

Statutory Law would be hard put in coping with and keeping up in step with the digital age that will task courts to inevitably make initial responses to new issues. Expectedly, the law on persons

and family relations, legal presumptions on paternity and filiations, and the like will continually evolve. Presumptions of paternity and filiation particularly, are now, in fact, being drawn close to the exit area. We may have to shortly contend with the legal implications of cloning once the raging debate thereover is concluded. The statutory rule of interpretation and construction that makes legislative intent to be a primary factor in the proper application of law is here obsolete, for when Emperor Napoleon ordered the codification of both civil law and commercial law, neither he nor his legal experts could have been aware that cloning would one day be discovered and indeed become reality.

The use of DNA in court proceedings has been gaining ground after getting an early jurisprudential foothold in the Philippines similar to most countries of the world. Not too long ago, the Supreme Court has come up with special rules on DNA evidence, holding, still later, that DNA test results are admissible in evidence and compulsory testing would not be violative of the right against self incrimination.[3] Thus far, the application of DNA has caused a reversal of a number of criminal convictions in the United States and elsewhere where post-sentencing DNA testing is allowed. The decision of the Court in a petition for a writ of habeas corpus by convicted prisoner Reynaldo de Villa,[4] decided last November 17, 2004, holding in sum that DNA results would not constitute newly discovered evidence, might yet need a revisit or, if it is minded, a statute or a provision of the rules to adopt post-sentencing DNA testing.

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3 *Agustin v. CA*, G.R. No. 162571, June 15, 2005.

4 In Re: The Writ of Habeas Corpus for Reynaldo de Villa, G.R. No. 158802, November 17, 2004.

When barely a few months back, the Supreme Court, reversing a Regional Trial Court ruling, has refused to sanction a case of sexual transformation in the Philippines, the tribunal could have, wittingly or unwittingly, spelled doom on the legality of a marriage taking place between a man and a "woman," who once used to be a man, even when the sex change to becoming a woman is confirmed by medical surgeons.

It is quite understandable that the enactment of laws may verily fall behind. In the Philippines, the only significant e-law that has been legislated thus far is the Electronic Commerce Act of 2000, which means to us that substantially more can be expected to still be in the drawing board. Meanwhile, placing a reliance on judicial jurisprudence could increasingly become frequent since the dearth of enacted law will not excuse a judge from deciding a case before it. Effectively, the judge, rather than Congress, may be bound to first confront and tackle an issue. There is thus merit in the statutory provisions that do not allow judges from declining judgment by reason of the silence, obscurity, or insufficiency of laws and whose decisions would henceforth form part of the law of the land.[5]

A borderless society can have great impact on the need for universal rules on the perfection, formalities, and enforcement of contracts. Electronic and transnational agreements transcend territorial boundaries and can affect the basic and traditional concepts of consent along with the settled theories, heretofore recognized, on the binding effects and due observance of contracts. Similar uniform rules may be desirable on matters relating to property rights and the extra-contractual relations of quasi-contracts and torts.

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5 Civil Code of 1950, Arts. 8-9.

It is yet early to tell precisely and exactly how the law would lend itself to the inevitable in the many more generations to come; if today, we are still unsure, how do we then aptly grasp tomorrow. Marvin Minsky, said to be the father of artificial intelligence, has once bluntly remarked to our great discomfort, I am sure, that "We should be lucky enough if the new machines would be willing to keep us, human beings, as household pets."

I most certainly join the call to alertness suggested by His Excellency in looking forward and doing some recalculations even as we pay tribute to the men and women who have provided us with the foremost two legal systems that today are still intact in good measure.

Thank you.

Reactions on the Reform of the Spanish Civil Code: Basis and Content*

*Justice Ricardo C. Puno, Sr.***

En nombre de los abogados antiguos de nuestro pais, tenemos el honor y placer de saludar a Su Excelencia el Presidente del Tribunal Supremo de España.

In the name of the aging lawyers of our country, we have the honor and pleasure of greeting His Excellency the President of the Supreme Tribunal of Spain.

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* Delivered at the *First Distinguished Lecture, Series of 2008,* held on February 20, 2008, at the University of the East, Manila.

** Justice Ricardo C. Puno, Sr. served in all three branches of the government: District Judge of the Court of First Instance, Associate Justice of the Court of Appeals (1973-1978), Representative of the National Capital Region (NCR) to the Batasang Pambansa (1978-1984), and Minister of Justice (1979-1984). He obtained his Bachelor of Arts degree *summa cum laude* from the Ateneo de Manila University and his law degree (*magna cum laude* and class valedictorian) from Manuel L. Quezon University. He also earned the titles Doctor of Laws (1981), Doctor of Humanities (1982), and Diplomate in Juridical Science (2005). He practiced law and taught at leading law institutions of the country. Being an expert in civil law, he appeared as *amicus curiae* before the Central District Court of California and the Supreme Court of the Philippines. He was bar examiner in civil law and remedial law and was co-chair of the Civil Code Revision Committee that drafted the New

Mis contemporaneos y nuestra generacion fuimos un eslabon de la cadena que une la clasica cultura Hispano-Filipina con la surgente civilisacion Anglo-Filipina.

El legado Hispanico no ha desaparecido. Vive y vibra – en la sangre que corre en las venas de muchos Filipinos, en las palabras castellanas que existen en nuestros dialectos, en los colegios y universidades que fundaron los misioneros, en las capillas hermosas y iglesias muy esplendidas que se mantienen como centinelas de piedra, en la sagrada religion que sostiene nuestra filosofia del vivir.

My contemporaries and my generation are the links that bind the classical Hispanic-Filipino culture with the Anglo-Philippine civilization of the next generation.

The Hispanic legacy has not disappeared. It is vibrantly alive in the blood that runs in the veins of numerous Filipinos, in the Spanish expressions that pervade in our dialects, in the colleges and universities founded by the missionaries, in the beautiful chapels and splendid churches that still stand as sentinels of stone, in the sacred religion that sustains our philosophy of life.

Family Code of the Philippines. He was the first Filipino to participate in the Appellate Judges Seminar of the Institute of Judicial Administration in New York University. He coordinated the First International Conference of Appellate Magistrates in 1977. He was a key official in the Manila World Law Conference in 1977, and was a delegate of the Philippines to the 33rd, 35th, 36th, and 37th General Assembly of the United Nations. He served as Vice Chair of the Philippine Delegation to the Conference on the Law of the Sea. He is a founding partner of the Puno and Puno Law Offices, and Chair Emeritus of PHILJA's Department of Civil Law.

In my many years of service in the ranks of the academe and in the three branches of Government, I have been privileged to listen to countless brilliant lectures. The enlightening dissertation of President Hernando Santiago stands out and in bold relief.

His analysis of the bases and contexts of the reforms in the Spanish Civil Code are methodically segmented into three distinct time frames for a clear understanding of its cultural, historical, philosophical, and legal dimensions. All these parameters are united and merged into a common bond between the Spanish and the Philippine Civil Law systems.

Although Civil Law "compilations" started in 1255 in the reign of Alfonso X, codification in Spain began six centuries later. His Excellency President Hernando Santiago has accurately traced the three periods in the developmental transitions of the Spanish Civil Code. The first period was from its promulgation in 1889 to the start of the Spanish Civil War in 1936. The second period lasted from 1936 to the installation of the Constitutional Monarchy in 1978. The third period began from 1978 and winds up to the present time. The long span of 119 years has its counterpart in the Philippine Justice System.

Our Philippine Civil Codal System has likewise gone through three periods, and also originated in 1889 when the Civil Code of Spain was extended to the Philippines by the Royal Decree of July 31, 1889. It took effect on December 7, 1889.[1] The effectivity of the Spanish Civil Code during our own first period lasted through two colonial occupations, from the Spanish into the American regime right up to 1950. The second period commenced on August 30, 1950, when the Civil Code of the Philippines

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[1] *Mijares v. Nery*, 3 Phil. 195 (1904).

took effect, and replaced the Civil Code of Spain. The third period, which has witnessed and still undergoes radical changes in the original Book One of the Philippine Civil Code governing Persons and Family Relations was begun by the promulgation of the Family Code of the Philippines which took effect on August 3, 1988.

The coincidental parallelism is quite obvious:

Spanish Civil Codal System	Philippine Civil Codal System
First Period: 1889 to 1936	First Period: 1889 to 1950
Second Period: 1936 to 1978	Second Period: 1950 to 1988
Third Period: 1978 to the present	Third Period: 1988 to the present

Admittedly and avowedly, the Civil Code of the Philippines was modeled upon the Civil Code of Spain. In fine, as President Hernando Santiago has stressed:

> the Philippines and Spain x x x share the same Civil Law x x x the same Civil Code x x x.

He quite correctly called them the "two twin civil codes," and observed that both codes have the same "four books and a preliminary title."

But changing times call for changes in the law. The reforms in the Spanish Civil Code enumerated by President Hernando Santiago are responsive to modern times.

Spain's reforms of 1904 consisting of the simplification of the requisites of holographic wills are mirrored in our Article 810 which ordains that the personally written will is "subject to no other form x x x and need to be witnessed."

In the law of intestate succession, we note, however, that while our guest of honor refers to "persons related collaterally to the fourth degree," Article 1010 of our Code extends hereditary rights up to "the fifth degree of relationship in the collateral line."

Spanish legal abhorrence of an "unconscionable" rate of interest and "unreasonable loans" is shared by our own usury laws and jurisprudence.

The reform movement in Spanish law during the Republican period (1931-1939) including the concerns whereby "divorce was regulated for the first time in Spain" is more than adequately matched by our own Code which does not even allow the grant of the decree of divorce.

The reformation in 1960 of the law on community property and on co-ownership formerly covered by Article 396 of the Spanish Code finds counterpart treatment in the Philippine Family Code regarding the system of absolute community,[2] the conjugal partnership of gains,[3] and the system of co-ownership in "unions without marriage" or in void marriages.[4]

We followed the example of the Spanish Royal Decree which reduced the legal age of majority to 18 years under our Republic Act No. 6809 which amended Article 234 of the Family Code.

Spain and the Philippines have been marching in step as regards the protection of the rights of illegitimate children, the exercise of parental authority, the use of forenames and surnames, the benevolent treatment of disabled persons, the protection of human privacy, reputation, and intellectual property.

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2 Family Code, Arts. 88-104.

3 Family Code, Arts. 105-133.

4 Family Code, Arts. 147-148.

The ties that bind Spain and the Philippines are enduring and find constant recognition in international concourses and global interactions.

As a member of the Philippine Delegation to the United Nations General Assembly from 1978 up to 1984, I recall that the Philippines was an accredited member of the huge Hispanic group of Spanish speaking countries of Europe, Central and South America.

When I was sent by our Government as the first Philippine representative to attend the Appellate Judges Seminar of the American Institute of Judicial Administration in New York City in 1974, I found myself identified with the Justices of the Civil Law States led by California, Louisiana and New Mexico in their spirited debates with the more numerous common Law States.

President Hernando Santiago concluded with the assurance that the reforms in Spanish Civil Law system have been assured effective compliance by the companion reforms in Spanish Procedural Law.

We must all acknowledge at this point that our Remedial Law is a mixture of two cultures – the Spanish and American procedural systems. Grateful appreciation is due to both predecessors.

I was made fully aware of this debt of gratitude when I was invited to lecture on the subject of Criminal Justice at the International Session of the United Nations, Asia and Far East Institute in Tokyo, Japan, in March 1982. In one session, a spirited debate erupted on the subject of preliminary investigation. The delegate from France argued that his country's police investigation was the most expeditious. The American representative contended

that the prosecutorial investigation conducted by their District Attorneys was most efficient. The third debater, a distinguished Justice of India, emphatically stressed that the preliminary investigation conducted by their trial judges best suited the function of the preparatory stage to a judicial trial. At this juncture, the Chairman looked towards my direction and asked: "In the Philippines, which procedure is followed?"

I replied: Mr. Chairman, the Philippines observes all three procedures – the police investigation, the prosecutorial investigation conducted by local, city, provincial, and state prosecutors, and the judicial preliminary investigation of probable cause by trial courts.

The Chairman then remarked, amid the nodding approval of participating audience: "The Philippines obviously has the best procedure."

I humbly answered: "Thank you, Mr. Chairman."

And so, just as humbly I now conclude: Thank you, Ladies and Gentlemen.

Reactions on the Reform of the Spanish Civil Code: Basis and Content*

*Dr. Maria Liza A. Lopez-Rosario***

I am deeply honored and very grateful to the University for giving me the opportunity to be a reactor to the *discurso* of a very important prominent and legal luminary, the President of the Supreme Court of Spain, *su Excellentissimo, Señor Don Hernando Santiago.*

In this *discurso,* Don Hernando said that the Filipinos and the Spaniards are "separated by continents but are united by our history and our predisposition towards the good of the community."

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* Delivered at the *First Distinguished Lecture, Series of 2008,* held on February 20, 2008, at the University of the East, Manila.

** Dr. Maria Liza A. Lopez-Rosario obtained her Bachelor's Degree in Philosophy (*Magna Cum Laude,* Rector's Awardee for Academic Excellence, 1984) and Bachelor of Laws (*Magna Cum Laude,* Rector's Awardee for Academic Excellence, 1988) from the University of Santo Tomas. She was admitted to the Philippine Bar in 1989. In 1998, she obtained her Doctor of Civil Laws degree from the Universidad Complutense de Madrid *(Apto Cum Laude por Unanimidad).*

Dr. Lopez-Rosario worked as a Public Attorney I at the Public Attorney's Office in 1991. Presently, she is a Partner at the Romulo Mabanta Buenaventura Sayoc & De Los Angeles Law Offices. She teaches Persons and Family Relations, Obligations and Contracts, Credit Transactions and Civil Law Review I.

If we take a short glimpse of the 350 years of Spanish dominion in the Philippine territory, we can say with sincerity that the Spaniards left valuable gifts to us Filipinos which we will always cherish. For one, the Spaniards introduced Christianity to us. Up to the present, Catholicism has remained to be the predominant religion in the Philippines. Second, the name of our country, Philippines or "Filipinas," was taken from the name of the King of Spain El Rey Felipe. Most Filipinos carry Spanish names: Valdez, Lopez, Rosario, Cruz, to name a few. These, together with the *siesta* and the *mañana* habit, are some of the things we inherited from Spain. The influence of Spain in the lives of Filipinos also extended to Philippine laws. As mentioned by Sr. Don Santiago:

> The Philippines and Spain not only share the same civil law, but also share the same Civil Code, that is to say, the same systematic set of rules of general private law.

After the declaration of the Philippine Independence in 1945, Executive Order No. 48 was issued on March 20, 1947, creating a Commission of five members to work on a project to prepare for the codification of our civil laws. The project was done in 1948 and was submitted to the Congress for its approval. Congress approved the project in 1949 with the passage of Republic Act No. 386, also known as the Civil Code of 1950. In the report of the Philippine Code Commission, its members admitted that the Civil Code of the Philippines was based on the Spanish Civil Code of 1889. Out of 2,291 articles, approximately 25 percent thereof was taken from the Spanish Civil Code of 1889. The following provisions in the 1950 Civil Code compare with the Spanish Civil Code of 1889:

a. The Philippine Civil Code like the Spanish Civil Code is divided into four books: Persons (Book 1); Property, Ownership and Its Modifications (Book 2); Different Modes of Acquiring Ownership (Book 3); and Obligations and Contracts (Book 4).

b. In addition to the four books is the preliminary title which embodies the fundamental or basic principles of law.

c. Usufruct, easement under Property or *reserva troncal* under succession and different modes of extinguishing an obligation under obligations and contracts are some of the provisions under the Spanish Code which have been adopted by our Philippine Code.

The Philippine Commission said:

> although the Civil Code of 1950 is written in English, its content is Spanish-Philippine law. Thus, the translated words should be understood not from the point of view of Anglo-American law but from the Spanish-Philippine law, as it was incorporated in our Code.[1]

His Excellency emphasized the principal legal reforms done to the Spanish Civil Code of 1889. Citing Supplementary Provision No. 3 of their Code:

> the Ministry of Justice, through the Codification Committee, makes reforms as appropriate to be introduced into the Code every 10 years, bearing in mind that the rigidity of the rule can hamper its efficiency as to the evolution of the times and the people.

His Excellency has enumerated specific reforms made in their Codes since the time of its enactment in 1889 up to the present.

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[1] Report of the Philippine Code Commission, page 8.

This is what could be lacking in our Philippine Civil Code of 1950. Since the time of its effectivity on August 30, 1950, only the provisions on marriage and family relations have been reformed. The Books on Property, Modes of Acquisition of Ownership as well as Obligations and Contracts have never been updated. It is about time, as His Excellency said, that the courts and law schools, who have a mutually beneficial relationship, should continue to work together to update and improve our laws. He has clearly mentioned:

> x x x law schools make use of the materials provided by the courts through their decisions x x x. On the part of the courts, the work and research of universities is made use of as to the new proposals for existing problems, or for detecting new problems under the law or from its application in society x x x."

Finally, I would like to take this opportunity to personally thank the Spaniards through His Excellency for the two most valuable things we have inherited from them: *Muchisimas Gracias por la introduccion de la cristianidad en Filipinas y Muchisimas Gracias por la introduction del codigo civil en nuestro pais.*

Closing Remarks*

*Chief Justice Reynato S. Puno***

The honorary doctorate of laws degree and plaque of appreciation we confer today on His Excellency Francisco Jose Hernando Santiago, President of the General Council of the Judiciary of Spain and Chief Justice of the Supreme Court of Spain, is a homage not only to the accomplishments of a great man, but also to a legacy that his country has bequeathed to our own. I speak, of course, of the Civil Law tradition, which is the basis of our own Civil Code and Family Code. In addition to these codes, Spanish Law is also the basis of another Philippine legal code of fundamental importance – the Revised Penal Code.

Karl Marx, in a very well-known passage, said that:

> The tradition of all the dead generations weighs like a nightmare on the brains of the living.[1]

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* Delivered at the *First Distinguished Lecture, Series of 2008,* held on February 20, 2008, at the University of the East, Manila.

** Chief Justice Reynato S. Puno was appointed the 22nd Chief Justice of the Philippines by then President Gloria M. Arroyo on December 7, 2006. He is also the concurrent chair of the SC First Division and ex officio Chair of the Judicial and Bar Council (JBC) and the Presidential Electoral Tribunal (PET).

Prior to his appointment to the High Court in 1993 by President Fidel V. Ramos, he served as: Associate Justice of the Intermediate Appellate Court and the Court of Appeals (CA), Deputy Minister

1 Marx, *Eighteenth Brumaire of Louis Bonaparte* (1852).

Obviously, Marx does not appreciate the importance of tradition. Certainly, tradition is not mere deadweight. Rather, tradition "represents the judgments of earlier generations, revealing choices

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of Justice, acting Chairman of the Board of Pardons and Parole, Solicitor in the OSG (1971), Assistant Solicitor General in 1974, and City Judge of Quezon City. He holds the distinction of being the youngest appointee to the CA at the age of 40 in 1980.

As Chief Justice, he chairs the Court's First Division, the *Court Systems Journal*, and the Supreme Court Committee that digests the Court's decisions for distribution to members of the Judiciary. He also heads the High Court's Committee on Revision of the Rules of Court that has drafted the Rules of Procedure in Election Contests Before the Courts Involving Elective Municipal and Barangay Officials, among many others.

Chief Justice Puno obtained his Bachelor of Science Degree in Jurisprudence and his Bachelor of Laws Degree from the University of the Philippines in 1962. He served as editor in chief of *The Philippine Collegian*. He pursued his post-graduate studies in the United States on a full scholarship. He obtained his Master of Comparative Laws degree at the Southern Methodist University, Dallas, Texas, with high distinction and as class valedictorian; his Master of Laws at the University of California, Berkeley; and completed all the academic requirements for the degree of Doctor of Juridical Science at the University of Illinois, Champaign, Urbana. In 2005, he became the first Filipino to receive the Distinguished Global Alumnus Award from the Dedman School of Law, Southern Methodist University, Dallas, Texas. He has been conferred honorary doctorates by five of our universities and by the Hannam University, South Korea.

While a post-graduate student, Chief Justice Puno received five American Jurisprudence Prizes for Excellence awards given by the Lawyers Cooperative Publishing Co. of New York and the Bancroft Whitney Publishing Co. of California.

they have made and values they have adopted. Tradition thus has the capacity to teach us from where we have come, and to cast light on where we may go. It can enrich our understanding of our own world by allowing us to see the possibilities, the consequences,

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In 1962, he started professional practice at the Gerardo Roxas and Sarmiento Law Office as Assistant Attorney. Upon his return from the United States in 1969, he joined his brother, the late Judge Isaac S. Puno, Jr., in law practice.

On August 1, 1986, Chief Justice Puno was reappointed to the Court of Appeals. In 1993, then President Fidel V. Ramos appointed him as Associate Justice of the Supreme Court. He was Chair of its Second Division.

He served as Bar Examiner in Criminal Law in 1970, Mercantile Law in 1989, and Taxation in 1993. He was also a Lecturer of the UP Law Center, Institute of Judicial Administration, and a Professor of Law at the Far Eastern University from 1969 to 1973. He now lectures at the Philippine Judicial Academy (PHILJA).

Among Chief Justice Puno's most prestigious awards are: Ten Outstanding Young Men Award (TOYM), Araw ng Maynila Award as Outstanding Jurist, UP's Most Outstanding Law Alumnus, Grand Cross of Rizal from the Order of the Knights of Rizal, Grand Lodge Gold Medal from the Grand Lodge of Free and Accepted Masons of the Philippines, and Centennial Awardee in the field of law given by the United Methodist Church on the occasion of its 100th anniversary.

The Chief Justice is active in civic and church activities as a lay preacher of the United Methodist Church and Chairman of the Administrative Council of the Puno Memorial United Methodist Church.

Chief Justice Puno was married to the former Supreme Court Clerk of Court Atty. Luzviminda D. Puno with whom he has three children.

and the limits of human experience. The value of tradition is that it supplies the potential for insight."[2]

But even then, we must always be critical of tradition; there always ought to be a process of refinement that must occur. Respect for tradition is given not through blind adherence to the past, but to its adaptation to meet changing times. Rationality is the only way in which tradition may be maintained.[3] Indeed, all great traditions generate opposition within themselves, aimed at improvement or transformation of the tradition.[4]

Our distinguished guest has elucidated the many reforms that have benefited Spanish Civil Law. In our own laws, we will find many vestiges of Spanish law that arguably are not anymore attuned with the times. Barely a month after it became effective, former Supreme Court Justice and eminent Civilist J.B.L. Reyes published his proposed amendments to our Civil Code.[5] Since then, many amendments to the Civil Code and the Revised Penal Code have already been enacted, including the Family Code and the Anti-Rape Law of 1997. In other jurisdictions, many developments of late can assist us in the improvement of our laws. The field of Law and Economics, which has as one of its focus, the laws of property and contracts, has been well received by legal scholars. In particular, recent laws and amendments introduced in other jurisdictions, like the reforms to the Spanish Civil Code, are also a fertile field for inspiration.

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2 Rebecca Brown, *Tradition and Insight,* 103 Yale L.J. 177, 222 (1993).

3 *Id.* at 16.

4 *Id.* at 25.

5 J.B.L. Reyes, *Observations on the New Civil Code on Points not Covered by Amendments Already Proposed, in* Civil Code Reader 371-463 (Carmelo Sison, Ed., 2005).

Nevertheless, we must be cautious in introducing changes to the laws that for so long have served us well in the past. In weaving novel threads to our intricate legal tapestries, we must first ruminate and ask: "What will happen to a minor doctrinal variation, seen as ingenious, interesting and benign at the time of its formulation, once its full implications are realized over several generations?"[6] To paraphrase Dean Roscoe Pound: although law cannot stand still, the law must always remain stable.

Again, I thank His Excellency Francisco Jose Hernando Santiago for the first ever visit and lecture of a President, Supreme Tribunal and General Council of the Judiciary of the Kingdom of Spain to the Philippines. I thank our distinguished panelists: Justice Jose C. Vitug, Justice Ricardo C. Puno, Sr., and Dr. Maria Liza Lopez-Rosario for their enlightening reactions. Last but not the least, I thank the University of the East for co-hosting this Special Convocation and conferring the Degree of Doctor of Laws Honoris Causa to our distinguished guest.

A pleasant day to all.

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[6] *Ibid.*

Supreme Court of the Philippines
Philippine Judicial Academy
in cooperation with the
Pontifical and Royal University of Santo Tomas
(The Catholic University of the Philippines)

present

The Second Distinguished Lecture Series of 2008

THE JUDICIAL ADMINISTRATION OF INDIGENOUS AFFAIRS IN NEW ZEALAND

by

Justice Edward Taihakurei Durie, DCNZM (Ret.)
High Court of New Zealand

Monday, March 10, 2008, 2:30 P.M.
Continuing Medical Education (CME) Auditorium
Medicine Building
University of Santo Tomas
España, Manila

Program

Invocation
Reverend Father Isidro C. Abaño, O.P.
Secretary General
University of Santo Tomas

Philippine National Anthem
New Zealand National Anthem

Greetings
Professor Roberto A. Abad
Officer in Charge, Faculty of Civil Law
University of Santo Tomas

Opening Remarks
Honorable Leonardo A. Quisumbing
Senior Associate Justice, Supreme Court

Musical Intermission
UST Conservatory of Music

Introduction of the Lecturer
Honorable Ruben T. Reyes
Associate Justice, Supreme Court

LECTURE
Justice Edward Taihakurei Durie, DCNZM (Ret.)

Panel of Reactors

Professor Sedfrey M. Candelaria
Associate Dean, Ateneo Law School
Chairperson, Department of Special Areas of Concern
Philippine Judicial Academy

Dr. Maria Liza A. Lopez-Rosario
Professor, Faculty of Civil Law
University of Santo Tomas

Presentation of Plaque of Appreciation
by
Chief Justice Reynato S. Puno
Justice Antonio T. Carpio
Justice Ameurfina A. Melencio Herrera (Ret.)
Reverend Father Isidro C. Abaño, O.P.

Closing Remarks
Honorable Reynato S. Puno
Chief Justice

Supreme Court Hymn
UST Hymn

Master of Ceremonies
Honorable Adolfo S. Azcuna
Associate Justice, Supreme Court


Distinguished lectur
"THE JUDICIAL A
OF INDIGENOUS
DCNZM
ADMINISTRATION OF INDIGENOUS AFFAIRS"
KATAAS-TAASANG HUKUMAN

Opening Remarks*

*Justice Leonardo A. Quisumbing***

Mr. Chief Justice, Honorable Reynato S. Puno; Reverend Rector Magnificus, Father Rolando V. dela Rosa, and Regent Father Maximo Gatela, and our Hosts Professor Roberto A. Abad here in the University of Santo Tomas
Our Highly Esteemed Lecturer from New Zealand
Our Colleagues in the Court and in the government service
Distinguished Guests
Members of the Faculty
Fellow Students
Ladies and Gentlemen.

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* Delivered at the *Second Distinguished Lecture, Series of 2008,* held on March 10, 2008, at the University of Santo Tomas, Manila.

** Senior Associate Justice Leonardo A. Quisumbing was born in Masbate, Masbate. He obtained his Ll.B. degree in 1964 from the University of the Philippines, and was awarded a Master of Laws degree in 1969 by the Cornell University as a NEC-AID Grantee.

As a student, he was a college scholar, president of the UP Student Council, editor in chief of *The Philippine Collegian,* president of the Student Councils Association of the Philippines, and member of the National Debating Team to Australia that won the Wilmut Cup. He capped his achievements by placing 12th in the 1966 Bar Examinations. At the MLQU, he edited *The Quezonian* and graduated *magna cum laude*, A.B. Journalism. He has been awarded four honorary doctorate degrees in law, public administration, and humane letters.

Our Master of Ceremonies today, Mr. Justice Adolfo S. Azcuna, has given us a hint of who and what to expect this afternoon.

It was hardly a month ago that we had the Chief Justice of the Supreme Court of Spain as our first distinguished lecturer of the 2008 series. His views on civil law reforms were certainly well received.

For this, the second distinguished lecturer for this year, we are very much honored to have with us the Honorable Retired Chief Justice of the High Court of New Zealand, the Honorable Taihakurei (Eddie) Durie. Our topic is certainly one of great and fundamental interest to all students of ancestral domain and agrarian reform law, for he will dwell on the subject of *The New Zealand Experience of Resolving Indigenous and Land Issues in the Context of Treaty Settlement Process.* His views came from a very unique perspective, both enlightening and authoritative. I suppose the Treaty referred to is the Treaty of Waitangi, 1840.

It is my understanding that our speaker has devoted a great number of years of his career in law to the development of a

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He taught and practiced law for almost 15 years, then served the government in various posts for over 21 years. Prior to his appointment to the Supreme Court in 1988, he was Secretary of Labor and Employment. Before that, he served as Undersecretary of the Department of National Defense during President Corazon C. Aquino's administration and then as Senior Deputy Executive Secretary to President Fidel V. Ramos. Before his court appointment, he also held the rank of Commodore of the Philippine Coast Guard, 106th Auxiliary Squadron.

Justice Quisumbing took special training in Management of Public Agencies at Cornell Graduate School, Research at Georgetown University, Communications at Michigan State University, and Public Sector Negotiations at Harvard University.

legal system in the Pacific region, of which New Zealand is indubitably one of the active leaders. There is much to be gained from his experiences in the development of strategies, judicially and constitutionally, as well as in the management of Pacific customary law, statute law, and human rights. For we too have outstanding law and ancestral domain issues involving mostly our indigenous Filipinos that are yet to be settled successfully.

In mid-1964, I did have a chance to attend the international student conference in Christchurch University. And not only did I visit New Zealand's vast sheep farming areas and so wonderfully green hills, but I also ventured to the scenic beaches of Akaroa, a South Island tourist attraction. Later, in 1967 to 1968 at Cornell University, my roommate was a Ph.D. student from Dunedin, the southernmost city of New Zealand. Recently, from several Filipino families who have migrated to that country, I got the unanimous impression that New Zealand is one of the most democratic and progressive countries of the world, with a very high standard of living, specially with excellent environment, health care and public education facilities.

His published works include *Constitutional Control of the Election Process; Compensation in Land Reform Cases; Comparative Public Law Study; ASEAN Comparative Law* (Vol. IV ed., Corporation Law) *in the EEC and the ASEAN; Two Regional Experiences; Law on Taxation in the Philippines; Labor Law and Jurisprudence* (1992-1998); and *Access to Justice*, a lecture delivered before the 1993 ASEAN Law Association Conference in Singapore.

Justice Quisumbing is married to Ambassador Purificacion Valera Quisumbing, former Chairperson of the Commission on Human Rights and now Special Envoy on Human Rights, Humanitarian Affairs, and other International Law Matters. They have two daughters: Josefa Lourdes, an aspiring artist and Cecilia Rachel, a Commissioner on Human Rights.

Thus, it is a privilege for me to open this distinguished lecture today and to invite everyone to a productive afternoon of learning and exchange of views from our esteemed panel of reactors. Let us listen to our honorable distinguished lecturer for whom we prepared a most pleasant afternoon in this venerable legal institution of higher learning. A unique academic experience certainly awaits all of us.

THE JUDICIAL ADMINISTRATION OF INDIGENOUS AFFAIRS IN NEW ZEALAND*

Justice Edward Taihakurei Durie, DCNZM (Ret.)

Justice Edward Taihakurei Durie, a member of the Distinguished New Zealand Order of Merit for his services to the Maori Land Court, Waitangi Tribunal and New Zealand High Court, was appointed a High Court Judge in 1998. In 2004, while continuing to serve as judge, he was appointed as a New Zealand Law Commissioner. As Commissioner he proposed a legal framework for the management of tribal organizations, and also for the development of legal systems in Pacific states, and judicial and constitutional strategies for managing the interface of Pacific custom law, state-made law, and human rights.

In 1980, he was appointed Chief Judge of the Maori Land Court and then as Chairperson of the Waitangi Tribunal, a body to hear Maori claims against the Crown in respect of historic losses and current policies – his main focus for the next 20 years. Previously, in 1974, as a judge of the Maori Land Court, he was involved in the reform of

Maori land law as an adviser to the New Zealand Maori Council.

He obtained his law degree from Victoria University of Wellington and received honorary degrees from Victoria University, Massey University, and Waikato University.

In 2006, while in Manila to speak at the Liberty and Prosperity Forum, he took part in workshops with the Government, civil society, indigenous groups, and MILF on indigenous issues.

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* Delivered at the *Second Distinguished Lecture, Series of 2008,* held on March 10, 2008, at the University of Santo Tomas, Manila.

Madame Chancellor Honorable Justice Ameurfina A.
Melencio Herrera
Honorable Chief Justice Reynato S. Puno
Reverend Father Isidro C. Abano
Your Honors
Your Excellencies
Distinguished Guests.

Magandang hapon po sa inyong lahat.

Nga rangatira, nga kaiwhakawa, tena koutou. Tena tatou katoa.

It is a great honor to address this Academy. I acknowledge the senior level at which the Academy is operated, as befits its critical role in judicial education and in maintaining the ethical conventions and constitutional standards necessary for good governance.

I. Introduction

This address will refer to the law and indigenous peoples in the context of indigenous Maori of New Zealand, of whom I am a member. The Maori are reputed to have come from Asia's outer islands on the Pacific rim. They represent the final stage of that oceanic migration by which the Pacific was populated. So with you at one end of the South Pacific and Maori at the other, I am hoping we can stake a claim to the ancestral title of the Pacific as the Alpha and the Omega of the Pacific peoples.

Today, our countries share a commitment to certain values of increasing universality. I refer to the concept of the rule of law. I refer as well to the ethic of judicial independence and acknowledge in so doing, the leadership of your Chief Justice,

Reynato S. Puno, in maintaining the high standards necessary for an independent judiciary.

The doctrine propounds the right of indigenous peoples to ownership of the lands traditionally possessed by them. The scope of the right has not been finally determined and is still in construction, as was evident in New Zealand in the 1980s when the Courts applied the doctrine to recognize Maori fishing rights. It was evident again this century when it was used to uphold the potential right of Maori to areas of seabed and foreshore.

The right of indigenous peoples to the ownership of the lands they traditionally possessed also found expression in a Treaty between the Imperial government and the Maori people on the annexation of New Zealand in 1840. It too has been used by the Courts as a source of principle. This has occurred most commonly where the Treaty has been incorporated into the relevant law by statute, but in some instances which, if copied often enough could lead to a significant change in New Zealand law, the courts have used the Treaty as a source of principle even without statutory reference.

Today, however, the international community has effectively reformulated those principles, that is, the principles of both the Treaty of Waitangi and the doctrine of aboriginal title. I refer, again, to the Declaration of Indigenous Peoples' Rights. The Declaration is at once wider and more specific than the material relied on in the past.

The Declaration of course, is a declaration, not a convention, and as such has moral rather than legal force. That could change through the development of a customary international law but that is a matter of future prospect. For the present it has moral force.

Nonetheless, it is a moral force that is particularly compelling. The Declaration gives definition to amorphous rights that are already part of the law by virtue of the doctrine of aboriginal title. It gives specificity to an existing legal principle.

As a statement of principle, the Declaration also gains strength because it has the support of 143 states and because indigenous peoples themselves were involved in its formulation. They were involved through the meetings of the working group on indigenous peoples over about 20 years.

This contrasts with the doctrine of aboriginal title which was formulated initially by only a small group of Spanish jurists who, it seems, had never actually been abroad. It contrasts as well with the Treaty of Waitangi which was formulated by or on the advice of a small number of British officials. In both cases, the indigenous people were involved. Now, for the first time, the indigenous people have been significantly engaged, giving an element of legitimacy to the declaration that the doctrine did not enjoy.

These circumstances provide compelling grounds for judges to interpret rights under the doctrine of aboriginal title in terms of its modern reformulation in the Declaration.

II. Domestic Legislation

Whether or not a conservative or reforming approach is taken to the doctrine of aboriginal title, the judge must first give effect to the relevant domestic legislation. In New Zealand, Maori land rights have been provided for, from the beginning of settlement leading up to the creation of a Maori Land Court in 1862.

It would not be unusual were further legislation to follow from the UN Declaration in order to ensure a legislative framework for the protection of Maori interests in a manner more obviously consistent with that Declaration. While New Zealand did not vote in support of the Declaration, our commitment to indigenous rights is profound and legislation that supports those parts of the Declaration that are not in issue for New Zealand would be consistent with New Zealand's position.

Before referring to the existing legislation that underpins New Zealand's commitment to indigenous rights, it is necessary to explain the context. Indeed, context is everything. It explains why some legislation which one might expect to find is absent and why we have enacted legislation that others would consider unnecessary.

First, the only ethnic distinction necessary when considering indigenous peoples' rights in New Zealand is that between Maori and subsequent settlers. Elsewhere that is not always so. In your southern island of Mindanao, for example, a distinction is made between indigenous, settler, and Moro.

Second, the indigenous Maori are a single, ethnic group with a common culture and language. In the Philippines there are several distinct ethnicities.

Third, the distinction between Maori and settler can be readily explained in terms of first and second settlers. Here, those in each of the three groups can claim descent from ancient occupiers somewhere in the many Philippine islands.

It is also necessary to refer to the distinctive parts of our history. For present purposes only, two episodes of New Zealand history need mention.

First, as already discussed, New Zealand was annexed as a British colony on the basis of a Treaty of 1840, called the Treaty of Waitangi, whereby Maori purportedly ceded sovereignty to the British Crown. This cession was made on undertakings that Maori would be protected in the ownership of their lands, estates, forests and fisheries or in the alienation of lands for European settlement.

Second, the government failed to deliver on the protective undertaking. Instead, Maori landholdings were rapidly reduced from 100 percent of the country in 1840 to about 5 percent today. This was mainly as a result of confiscations following war between Maori and the government and as a result of land purchases on an unconscionable scale.

The consequences of that history are significant when comparing New Zealand with other jurisdictions.

First, it follows from the British assertion that the sovereignty of New Zealand was acquired by cession from Maori, that Maori had the sovereignty in the first place; and from that it must be deemed that they possessed the whole of the New Zealand territory. Accordingly, it was not for Maori to prove their right to any particular part of the land but for government to prove some cognizable act to extinguish the Maori interest, like a purchase or some compulsory acquisition.

Elsewhere, including the Philippines, it has been for the indigenous people to establish their right to some particular land area where that is possible, by reference to long term, exclusive use.

Second, such Maori land as survived the confiscation and early land purchase era, was defined by survey and brought in under the Torrens land registration system. As far as is known,

the right to every part of the country has now been determined and secure titles have been given for the lands, Maori lands or otherwise, now in private ownership.

Third, the history of warfare and of Maori land losses came to weigh on the national conscience. The result was specific legislation to prevent the same thing happening again in the future.

The legislative reforms began in earnest in the 1860s, with legislation to establish the Maori Land Court to determine the true owners of Maori land before the land was purchased. The old system whereby the government purchased from those whom the government decided were the true owners was too open to the temptation that government would prefer as owners those who were willing to sell. It was precisely a claim of that kind that had led to the New Zealand wars.

The next strategy, which came later, was to expand upon the functions of the Maori Land Court to protect Maori in the ownership of such land as remained and to empower them to make the best use of it, for their sake, and for the sake of the national economy. Legislation directed to those ends was introduced in the 19th century and dominated Maori policy in the first half of the 20th century.

The final strategy did not develop until the second half of the 20th century. It was a strategy to provide the tribes with some compensation, in the form of land returns and cash. The broad objective may be seen as one of securing to each of the main tribal groups a sufficient endowment for the tribes' future needs, including a financial backing for the perpetuation of the culture, and the engagement of tribal members in productive industries.

That leads me to the second point in this presentation on the judicial administration of indigenous affairs in New Zealand. You will recall that the first concerned the role of judges in determining the ambit of indigenous peoples' rights. The second, to which I now refer, concerns the role of judges in maintaining an oversight of the necessary measures to actively protect and enhance those rights through specialist courts and tribunals.

III. The Maori Land Court

The Maori Land Court was the first specialist tribunal. Its origins have already been described. Its functions developed over time but included these:

- To determine the precise ownership of those lands that had not previously passed to the government;
- To maintain an oversight of the necessary steps to survey those lands and obtain secure titles;
- To supervise all proposed alienations, whether by sale, lease or otherwise, to ensure that they were demonstrably in the interests of the Maori owners; and finally
- To develop sound legal entities to manage the lands on behalf of the several owners having regard to both cultural and commercial imperatives.

While this court, first established in 1862, has been subjected to much and often justified criticism over the many years of its operations, it served to provide a great deal of protection for Maori people in the ownership, use, and retention of their lands and to advance the peoples' development.

IV. The Waitangi Tribunal

The second tribunal was not established until 1975, and was not significantly operative until after 1980. This is known as the Waitangi Tribunal. It was established to hear Maori claims that they are or have been prejudiced by the state policies or practices which are contrary to the principles of the Treaty of Waitangi, which I have mentioned; and where the Tribunal considers those claims to have been proven, to recommend to government the steps which might be taken to compensate for or remove that prejudice.

Accordingly, the Tribunal serves to examine both current state policies, legislative or administrative, and the historic policies by which Maori suffered their major resource losses.

In some cases on the settlement of historic claims, the Tribunal may go further than that of merely recommending. It may order that certain former state assets, including former state farms and forests, be transferred to tribal ownership. But so far it has not been necessary to make those orders. Government has negotiated with the tribes to achieve substantial and comprehensive settlements from which the tribes have been able to advance. Claims in respect of more than half the country have now been settled.

Those settlements have not been limited to land matters. The first major settlement concerned Maori fishing interests. It resulted in Maori tribes owning some 40 percent of the New Zealand Fishing Quota and buying into the infrastructure of the New Zealand fishing industry.

V. Tribal Corporations

Presently, there is a Bill before the New Zealand Parliament for a law to facilitate the establishment of tribal authorities to represent tribes on the settlement claims. If enacted, it would add to the role of the Maori Land Court.

To date, the development of appropriately mandated entities for the purposes of settlements with tribes has been handled administratively. However, the New Zealand Law Commission has seen the prospect of conflict. It is a conflict reminiscent of the early days when the government chose the person with whom to negotiate on the purchase of Maori Land. That same conflict is reenacted when government determines the persons with whom it will negotiate the settlement of a claim for compensation for land losses. It is in that context that the New Zealand Law Commission proposed that the development of entities representative of the tribes should be managed under the supervision of an independent court.

VI. The Case for Judges in Specialist Roles

Why did New Zealand opt for such a hands-on role for judges in Maori administration? Elsewhere in the world such matters have been handled by government bureaucracies.

Sometimes it seems that the New Zealand system developed by chance rather than design, as a pragmatic response to particular concerns as they arose. But I also suspect that notwithstanding that for a long time the Treaty of Waitangi was overlooked in the administration of New Zealand, there was an underlying appreciation that indigenous people do have rights, social,

economic and political rights that are distinctive to them. Likewise there was an appreciation that those rights, like all rights, are fragile, and are easily lost unless active steps are taken to protect them.

Consideration is then due to the number of persons with interests adverse to the Maori to appreciate that robust systems were needed if active protection was to be achieved in fact. The concern most commonly expressed by politicians and officials was that it was necessary to protect Maori people from the avarice of private developers and speculators. However, as a result of Maori protests, it was also plainly evident that the most significant interest adverse to that of Maori was government itself. Government had interests in acquiring Maori land for settlement, for the development of projects of national importance, for roads and other public works, and for scenic and conservation purposes.

In these circumstances it was necessary to draw on the strengths of the judicial system. Under that system, judges were trained to act only in accordance with principle, to seek out the higher principles for the orderly management of affairs and to act impartially, without fear or favor. Most of all judges, unlike government administrators, were independent and espoused a tradition of maintaining that independence.

So it was that New Zealand judges stepped outside their normal role of resolving conflicts to engage in an inquisitorial role to protect and enhance the rights of indigenous peoples.

We share as well a commitment to human rights. I note in this context the newest addition to the compendium of human rights instruments, the Declaration on the Rights of Indigenous Peoples.

To the credit of both our countries we had arrangements in place for the management of indigenous peoples' rights well before the United Nations Declaration. In your country, the provisions for the indigenous are most notably represented in the Indigenous Peoples' Rights Act.

I make no comment on the arrangements you have made for indigenous people. Even were it right to do so I am insufficiently familiar with those arrangements to be able to comment on them in any depth. However, I believe it would be mutually beneficial to begin a dialogue on this area of law. We can learn from each others' experiences, and come to a greater understanding of our common values and beliefs. Equally, we can work together to understand the circumstances that are unique to our respective countries. It helps us to appreciate that although the principles relating to indigenous peoples' rights are universal, they must be variously applied accordingly to local context. Some things that work well in one place may not work well elsewhere.

VII. Synopsis

With those introductory thoughts I come to the topic, the judicial administration of indigenous affairs in New Zealand. "Judicial administration" means here, the administration of the relevant law by judges. However, in this instance, the term accommodates more than the usual judge's role of determining the ambit of the relevant law in the context of specific disputes. It extends as well to the protective and supervisory functions that judges may perform as members of specialist courts and tribunals. This address covers both functions.

VIII. The Judge's Role in Determining the Ambit of Rights

I turn now to the first of those functions that I have mentioned, that is, the role of the courts in determining the scope of indigenous peoples' rights.

In my country, we followed the lead of Chief Justice John Marshall of the United States Supreme Court in recognizing what New Zealand lawyers now call "the doctrine of aboriginal title." Chief Justice Marshall gave expression to the doctrine in the 1830s. It was applied for the first time in New Zealand in 1847.

Was this approach successful? There has been valid criticism of the fact that the Court, following a statutory direction, was responsible for converting tribal titles to individual ownership, in the process, diminishing the capacity of the tribe as a corporate group. On the other hand, the Court was instrumental in obtaining secure titles for Maori land. Its interventions on proposed land transactions also helped to secure the land for future generations.

There has also been justifiable criticism of the Court's paternalism. On the other hand, the Court has been responsible for developing tribal entities to manage the land independently of court, and for developing systems for the resolution of disputes through mediatory processes outside the Court system.

Through its promotion of trusts and incorporations for land management, the Court has proven that multiple or tribal ownership is not a barrier to commercial development. In illustration, the incorporations have expanded their operations from the primary industries of agriculture, horticulture and forestry

to the secondary industries of processing, packaging, and marketing. Along with the tribal corporations established from the settlement of historic claims they are also now investing in the tertiary sector, in commercial and residential properties and tourism for example. Forty percent of Maori investments are now in this sector.

Chief Justice, your honors, New Zealand takes note most seriously the commitment of its judges to the principles of judicial independence. I have endeavored to illustrate the value of that by reference to the traditional function of judges in upholding rights in the context of particular cases, and by reference to the additional contribution that judges have made while serving in specialist tribunals. Through adherence to judicial impartiality and independence in the administration of indigenous peoples' affairs, judges have made a major contribution to peace and prosperity in New Zealand.

You adhere to the same value of judicial independence and subscribe to the same goals of national peace and prosperity. It has been a great honor to say something of the New Zealand experience in that area, and to learn something of your own experience and vision for the Philippines.

Maraming salamat po.

The IPRA: Indigenous Peoples and Their Rights*

Chief Justice Reynato S. Puno

This is the second time that the Honorable Taihakurei Durie has visited the Philippines to share with us his wisdom. The first time was two years ago when he participated in a video conference during the Liberty and Prosperity Forum hosted by former Chief Justice Artemio V. Panganiban. While in Manila for that Forum, Justice Durie took part in a number of workshops with our Government, civil society, indigenous groups, and the Moro Islamic Liberation Front on indigenous issues, particularly ancestral domain. He is recognized as an expert on indigenous people in the Asia-Pacific region. I would like to thank him for following through with the work he started two years ago. His lecture today on New Zealand's experience of resolving indigenous and land issues in the context of a treaty settlement process imparts invaluable insight that will greatly benefit us in our efforts to ameliorate the lot of our Indigenous Peoples. We also thank the Panel, Professor Sedfrey M. Candelaria, Dr. Maria Liza-Lopez Rosario, Secretary Rodolfo Garcia for their enlightening comments on the lecture of Justice Durie.

Eleven years ago, our Congress enacted a law that sought to correct a grave historical injustice to our indigenous peoples. The

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* Closing Remarks delivered at the *Second Distinguished Lecture, Series of 2008,* held on March 10, 2008, at the University of Santo Tomas, Manila.

law was Republic Act No. 8371, more popularly known as the Indigenous Peoples' Rights Act of 1997, or the IPRA. It came as a welcome daybreak to end the long night of the centuries-old neglect of our indigenous peoples.

Republic Act No. 8371 was meant to break the common thread in our legal and social systems that forced the marginalization of our indigenous peoples. History reveals that like the Spaniards, the Americans pursued a policy of assimilation of our indigenous people. After the Philippines gained independence, our Congress adopted a policy of integration, which was like the colonial policy of assimilation understood in the context of a guardian-ward relationship. These attempts towards assimilation and integration did not succeed as they were met with fierce resistance from our indigenous Filipinos.

The result was a paradigm shift in the 1973 Constitution. It provided the guide that "The State shall consider the customs, traditions, beliefs, and interests of **national cultural communities** in the formulation and implementation of State policies." The **1987 Constitution goes further** than the 1973 Constitution **by expressly guaranteeing the rights of tribal Filipinos to their ancestral domains and ancestral lands**. By recognizing their right to their ancestral lands and domains, the State has effectively upheld their right to live in a culture distinctly their own.

This change in policy from assimilation and integration to recognition and preservation is statutorily implemented by the IPRA. In synopsis, the IPRA recognizes the existence of indigenous peoples as a distinct sector in Philippine society. In doing so, it provides for their civil, political, social and cultural rights, acknowledges a general concept of indigenous property

rights and their title thereto, and creates the National Commission on Indigenous Peoples as its independent implementing body.

Despite all the noble intentions, the enactment of the IPRA has not stopped the injustices suffered by our indigenous peoples. In the hinterlands, armed rebel groups recruit our indigenous people's youth to be child soldiers; powerful politicians use armed mercenaries to burn their villages and grab their lands; and large corporations and mining companies intrude into their unprotected communities[1] in the mindless pursuit of profit.

The world has taken cognizance of the plight of indigenous peoples. The United Nations General Assembly, of which the Philippines is a member, has adopted the United Nations Declaration on the Rights of Indigenous Peoples. Many of the rights declared in that instrument, particularly "the right not to be subjected to forced assimilation or destruction of their culture," reinforce the rights granted by the IPRA. Be that as it may, there are rights in that Declaration that are not yet afforded to our indigenous peoples. For example, the Declaration established the right of indigenous peoples to have their cultures, traditions, histories and aspirations "appropriately reflected in education and public information." The Declaration also calls on States not only to "take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity," but also to "encourage privately owned media to adequately reflect indigenous cultural diversity." We have yet to push flesh to these aspirations.

The histories and cultures of the indigenes all over the world are relevant to the evolution of Philippine law and culture and

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[1] Howard Dee, *Justice for Our Indigenous Filipinos*, 4 PHILJA JUDICIAL JOURNAL 13, 15 (2002).

are vital to the understanding of contemporary problems. It is through the IPRA that an attempt was made by our legislators to understand Filipino society not in terms of myths and biases but through common experiences in the course of history. The Philippines became a democracy a centennial ago but the decolonization process still continues. If the evolution of the Filipino people into a democratic society is to truly proceed democratically, that is, if the Filipinos as a whole are to participate fully in the task of continuing democratization, we must acknowledge the presence of indigenous and customary laws in the country and affirm their co-existence with the principal laws of the land.

Good day to all.

Supreme Court of the Philippines
Philippine Judicial Academy
in cooperation with the
Far Eastern University

present

The Third Distinguished Lecture Series of 2008

THE METES AND BOUNDS OF THE PHILIPPINE TERRITORY

by

Ambassador Lauro L. Baja, Jr.
Former Philippine Permanent Representative to the United Nations

Friday, June 27, 2008, 2:30 P.M.
FEU Auditorium
Second Floor Administration Building
Far Eastern University
Nicanor Reyes St., Manila

Program

Invocation
Honorable Arturo D. Brion
Associate Justice, Supreme Court

Philippine National Anthem

Greetings
Dean Miguel M. Carpio
Acting Vice President for Academic Affairs
Far Eastern University

Opening Remarks
Honorable Presbitero J. Velasco, Jr.
Associate Justice, Supreme Court

Musical Intermission
FEU Chorale

Introduction of the Lecturer
Honorable Renato C. Corona
Associate Justice, Supreme Court

LECTURE
Ambassador Lauro L. Baja, Jr.

Panel of Reactors

Honorable Florentino P. Feliciano
Retired Senior Justice
Supreme Court

represented by
Jay L. Batongbacal, Esq.

Honorable Estelito P. Mendoza
Former Minister of Justice and Solicitor General

Atty. Henry S. Bensurto, Jr.
Secretary General
Commission on Maritime and Ocean Affairs
Department of Foreign Affairs

Presentation of Plaques of Appreciation
by
Chief Justice Reynato S. Puno
Justice Antonio T. Carpio
Justice Ameurfina A. Melencio Herrera (Ret.)
Dean Miguel M. Carpio

Closing Remarks
Honorable Reynato S. Puno
Chief Justice

Supreme Court Hymn
FEU Hymn

Master of Ceremonies
Honorable Adolfo S. Azcuna
Associate Justice, Supreme Court

Opening Remarks*

*Justice Presbitero J. Velasco, Jr.***

Chief Justice Reynato S. Puno
Esteemed Colleagues from the High Court, both past and present
Madame Chancellor Ameurfina A. Melencio Herrera
Ambassador Lauro L. Baja
Distinguished Guests
Ladies and Gentlemen.

If there is one obvious thing we have in common, it is that we belong to, cherish, and serve the same country. To borrow from and paraphrase Seneca, we love the Philippines not because of its size or eminence, but because it is our own.

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* Opening Remarks delivered at the *Third Distinguished Lecture, Series of 2008,* held on June 27, 2008, at the Far Eastern University, Manila.

** Born on August 8, 1948, in Pasay City, Justice Presbitero J. Velasco, Jr. is a product of the public school system. He went to J. Sumulong Elementary School (First Honorable Mention) and the University of the Philippines (UP) Preparatory School, respectively, for elementary and high school. He obtained his Bachelor of Arts Degree in Political Science from UP, finishing the course in only three years, and went on to take up his Bachelor of Laws from the same university. At the UP College of Law, Justice Velasco was a member of the Order of the Purple Feather Honor Society and served on the Editorial Board of the Philippine Law Journal. He graduated eighth in the class of 1971 and placed sixth in the Bar exams that same year. He engaged in private law practice for 20 years before becoming a regular member of the Judicial and Bar

Friends, it is an honor and a great pleasure to welcome you to the *Third Distinguished Lecture of 2008.* This afternoon's lecture and discussion will focus on the country's national territory, or, as the program indicates, the metes and bounds of the Philippine territory. As political scientists and students of history and law would tell us, the national territory is more than over 7,000 islands scattered along the waters of the main Philippine islands of Luzon, Visayas, and Mindanao. It is a common belief that the figure goes up or down depending on the upward movement of the tide. And of course, when we speak of the national territory, the reference is not limited only to the land mass or the terrestrial domain of the country. For the maritime and aerial domains are integral components of a state's territory.

Council (JBC) in 1993. He served as Undersecretary of the Department of Justice from 1995 to April 1998.

He was concurrently Commissioner of the Housing and Land Use Regulatory Board. He was also Chairman of the Board of Pardons and Parole, Commissioner of the Commission on Settlement and Land Disputes, and Member of the Committee on Privatization.

In 1998, he was appointed Court of Appeals Justice and was ranked eighth in the disposition of cases when he was named Court Administrator in 2001. He also served the Integrated Bar of the Philippines (IBP) as its National President in 1987, as Commissioner of the IBP Committee on Bar Discipline, and as Honorary Chairman and Past National Co-Chairman of the IBP National Committee on Legal Aid. He was Member of the Board of Governors from 1985 to 1987 and Vice President for Southern Tagalog Region. He was also the Cavite IBP Chapter President for 1985 to 1987 and was the President of the Quezon City Capitol Jaycees from 1986 to 1987. It was during his term that the Capitol Jaycees was adjudged the "Most Outstanding JC Chapter in Asia-Pacific." In 1988, he was elected the National Executive Vice President (NEVP) of the Philippine Jaycees in charge of Metro Manila.

Lately, the issue of dominion over the Kalayaan Island Group (KIG) in the mineral-rich Spratlys off Palawan and the Scarborough Shoal in the vicinity of Zambales has again hogged the headlines, triggered by the controversy over the Joint Marine Seismic Undertaking, a tripartite agreement between the Philippines, China, and Vietnam for the conduct of seismic exploration at the KIG area. The virtually uninhabited Spratly chain of islands which abuts the Malampaya oil-producing field in Palawan is reported to be one of the largest continental shelves in the world. While the result of a China-sponsored study may perhaps be a bit exaggerated, the Spratly area, according to that study, is estimated to hold oil and gas deposits that are larger than Kuwait's present 13 billion tons reserves.

Section 1, Article I of the 1987 Constitution provides:

> The national territory comprises the Philippine archipelago, with all the islands and waters embraced therein, and all other territories over which the Philippines has sovereignty or jurisdiction, consisting of its terrestrial, fluvial and aerial domains including its territorial sea, the seabed, the subsoil, the insular shelves, and other submarine areas. The waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the internal waters of the Philippines.

One school views a constitutional provision defining the metes and bounds of the state's territory as a delimitation of its national territory. We cannot argue with that observation. But a constitution specifying the boundaries and areas of the national territory would certainly avoid conflicts to a certain degree, that

is – regarding areas over which there are no claims whatsoever by other countries. Precisely, a specification of one's territory is made to put the whole world on notice of the areas over which a country asserts title or ownership.

But there will be areas embraced in the basic law of the country over which there are conflicting claims, like Sabah, which the Philippines and Malaysia each views as her own.

If we recall history, Sabah was given as a gift by the Sultan of Brunei to the Sultan of Sulu, who, in turn, leased it to a German national named Overdeck and a British named Dent for an annual rental of US$5,300. The lessees, without the knowledge and consent of the Sultan of Sulu, sold their lease rights to the British Government. Thus, Sabah came under the possession, control and jurisdiction of Britain which annexed the area as its crown colony. In 1957, Sabah became a part of the Federation of Malaysia. This dispute over Sabah still remains unresolved to the present day.

Sabah may be encompassed in the territory "belonging to the Philippines by historic right or legal title" under the 1973 Constitution. That phrase was dropped from the 1987 definition. In its place was substituted the catch-all phrase "all other territories over which the Philippines has sovereignty or jurisdiction" which undoubtedly embraces those areas owned by our country by historic or legal right. This construction no doubt is of vital importance to our Sabah claim as it buttresses and supports our efforts to recover the disputed area. As aptly observed by Fr. Joaquin Bernas, S.J., discussing the evolution of the 1987 provision on national territory, the phrase "all other territories" covers areas linked to the Philippines in varying degrees of certainty and

firmness, and includes Sabah over which the Philippines had filed a formal claim.[1]

Lastly, the 1987 constitutional definition of the country's territory, although seemingly delimiting in operation, does not in any way prevent us from acquiring additional territory in the future through modes permissible under international law, such as exchange or purchase, assuming we have the bent, not to mention resources, to acquire additional territory.

As may be noted, the 1987 definition of national territory clearly points to the Philippines as an "archipelagic state." An archipelago, as its most basic, means a group of islands and interconnecting waters forming a territorial, political or economic whole. It may be noted too that the Philippines in the 1987 Constitution makes particular ownership claim over its internal waters – meaning the waters around, between, and connecting the islands of the archipelago, irrespective of their breadth and dimensions. The assertion over internal waters articulates the archipelagic doctrine of national territory.[2] As an aside, while the 24,000 islands of Sweden certainly outnumber our 7,100 islands, we can brag that our country is one of the largest archipelagos with an area of 300,440 square kilometers and discontinuous coastline of 300,500 kilometers. For sure, we should assert our dominion over this large expanse as a rich source of natural resources.

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1 Fr. Joaquin Bernas, S. J., The Constitution of the Republic of the Philippines, 1996 ed., p. 16.

2 Fr. Joaquin Bernas, S. J., The Constitution of the Republic of the Philippines, 2003 ed., pp. 10-11.

It ought to be stressed though that a constitution, being a municipal law, is binding only within the territorial limits of the state promulgating it. Accordingly, the definition of national territory set forth, and any sovereign claim over a territory made – in the Constitution or any local statute, for example PD No. 1596 which declared the KIG as part of Palawan – will bind internationally if accepted by the international circle or supported by proof that can stand internationally. Conversely, the silence of a constitution respecting the territorial extent of sovereignty does not divest such sovereignty of any portion of territory it is entitled to under international law.[3]

Beyond its land territory, all coastal states, like the Philippines, are now recognized to exercise sovereignty, subject to treaty obligations, over their territorial sea or waters.

The United Nations Convention on the Law of the Sea (UNCLOS), to which the Philippines had given its ratification together with over 100 other countries and which had already entered into force,[4] recognizes a 12 nautical mile limit measured from the baseline for the territorial sea which abandons the old cannon-shot rule of three nautical miles. The archipelagic baseline whence the breadth of the territorial sea of the Philippines is, or shall be determined, consists of straight lines joining the appropriate points of the outermost islands of the archipelago without departing from the general configuration of the archipelago. From an uninitiated point of view, given the deeply indented coastlines of the country, I would imagine that the different dots from which the lines shall be connected will be

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[3] *Id.* p. 3.

[4] On November 16, 1994.

found in the outmost points of the following provinces: Batanes in the North; Davao del Sur in the South; Pangasinan and Palawan in the western side; and Eastern Samar, Catanduanes, and Isabela in the east.

In addition to the territorial sea of 12 nautical miles, the UNCLOS also recognizes special rights over several maritime areas to be measured from the archipelagic baselines, notably over the contiguous zone, 24 miles; the exclusive economic zone, 200 nautical miles; and the extended continental shelf, up to 350 nautical miles. Our distinguished lecturer will discuss in some detail the UNCLOS provisions on these maritime areas.

Under the UNCLOS, archipelagic states are submitting to the UN a law delineating its post-UNCLOS archipelagic baselines before May 13, 2009. The process would certainly be a tricky and complicated task owing to the issue of whether the hotly contested KIG and the Scarborough Shoal should be considered as part of the main archipelago and included within baseline of the national territory. Judging from newspaper reports, individual members of Congress and Congress as a whole, on one hand, and Malacañang, on the other, appear to be divided over the Spratly-related disputes and their impact on the economic and security arrangements in Southeast Asia.

The sensitive Sabah issue and the conflicting and overlapping exclusive economic zones of neighboring countries are issues that still need solution.

In the end, however, we trust that the political leadership, *vis-à-vis* issues regarding the Philippine territory, shall act with the best interests of the country and the Filipino people in mind.

Today's lecture would try to address in some detail certain pressing concerns surrounding the metes and bounds of the Philippine territory and the impact of the UNCLOS on the country's maritime regimes. From a seasoned diplomat's point of view, we can of course expect some insights on what direction is most ideal for the country to take under the premises.

Thank you and again welcome.

THE PHILIPPINE NATIONAL TERRITORY*

Ambassador Lauro L. Baja, Jr.

Ambassador Lauro Liboon Baja, Jr. has over 40 years of distinguished diplomatic experience that includes his appointments as the Philippine Ambassador to Brazil and Italy, and his designation as Philippine Representative to the United Nations (2004) to oversee Manila's participation as a non-permanent member of the Security Council.

He led the Philippine Delegation in a historic two-year membership in the Security Council where he ably articulated Philippine positions on various issues brought before the most powerful organ of the UN. He served as president of the Security Council, first in June 2004 and in 2005, and was responsible for the historic Security Council Summit in September 2005 chaired by President Arroyo, the first Filipino and Asian head of state to preside over the Summit.

He was vice chairman of subsidiary bodies of the Security Council: the 1540 committee that seeks to prevent terrorists from acquiring and using weapons of mass destruction and the sanctions committees on Liberia and the Democratic Republic of Congo.

He was also vice chairman of the 1591 Committee tasked to monitor the implementation of the arms embargo, travel ban and assets freeze against Sudan.

He was also recently recognized by the NGO Group in the Security Council for his contribution to international peace and security and for enabling, for the first time, civil society and NGOs to participate in formal meetings of the Security Council.

He holds degrees in jurisprudence and law from the University of the Philippines and has taken a Foreign Service Course at the Oxford University.

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* Delivered at the *Third Distinguished Lecture, Series of 2008,* held on June 27, 2008, at the Far Eastern University, Manila.

I. Introduction

I am honored by the invitation of the Philippine Judicial Academy of the Supreme Court of the Philippines to participate in their Third Distinguished Lecture and discuss with you the topic *Metes and Bounds of Philippine Territory.* I am awed at the high level at which the Academy is operated and by its mission which in the words of the Chief Justice is "to deepen and broaden our understanding of the law by considering the realism and the pragmatism of contemporary principles and the theoretical and transcendental issues and that will complete our vision of what the law is and ought to be."

The subject is important as it is relevant. It is important to have an inventory of what we hold in common and know what we are and where we are as a nation. Knowing the metes and bounds of our national territory gives the nation a sense of self, and would help the Government and other countries especially in cases where there would be negotiations on overlapping maritime regimes.

II. Constitutional Provisions

The 1935, 1973, and 1987 Constitutions of the Philippines contain provisions on the national territory.

Under the 1935 Constitution, the Philippines comprises all territory ceded to the United States by the Treaty of Paris concluded between the US and Spain on December 10, 1998, the limits of which are set forth in Article III of said treaty, together with all the islands embraced in the treaty concluded between US and Spain on January 2, 1930, and all territory over which the

present Government of the Philippines Islands exercises jurisdiction. The 1935 Constitution is a colonial constitution, approved by the President of the United States on March 23, 1935.

Under the 1973 Constitution, the national territory comprises the Philippine archipelago, with all the islands and waters embraced therein, and all the other territories belonging to the Philippines by historic right or legal title, including the territorial sea, the airspace, the subsoil, the seabed, the insular shelves, and other submarine areas over which the Philippines has sovereignty or jurisdiction. The waters around, between and connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the internal waters of the Philippines.

The 1987 Constitution provides that the national territory comprises the Philippine archipelago, with all the islands and waters embraced therein, and all other territories over which the Philippines has sovereignty or jurisdiction, consisting of its terrestrial, fluvial and aerial domains including its territorial sea, the seabed, the subsoil, the insular shelves and other submarine areas. The waters around, between and connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the internal waters of the Philippines. No reference is made to the Treaty of Paris and related treaties in the 1973 and 1987 Constitutions.

The Philippine territory thus, falls into three groupings:

1. The Philippine archipelago;
2. Other territories over which the Philippine has sovereignty or jurisdiction; and
3. The Philippine waters, airspace and submarine areas.

III. The Philippine National Territory and United Nations Convention on the Law of the Sea

No international agreement has greater impact on Philippine National Territory than the United Nations Convention on the Law of the Sea (UNCLOS). After three years of preparatory committee work and nine years of sessions of the UN Conference on the Law of the Sea, UNCLOS was adopted on April 30, 1982. It was opened for signature at Montego Bay, Jamaica, where 119 States signed on December 10, 1982 the Convention, including the Philippines. The Convention entered into force on November 16, 1994, more than 12 years after its adoption. The Convention represents the codification and the comprehensive and progressive development of the international law of the sea. It is generally considered by the international community as the legally accepted norm for maritime conduct, a "constitution for the oceans" governing all ocean seas, exploitation of ocean resources, and the protection of the maritime environment. The Philippines ratified the Convention on May 8, 1984.

The UNCLOS establishes zones of national jurisdiction. There are seven types of waters with varying regimes recognized under the Convention, namely:

1. Internal or Domestic;
2. Archipelagic;
3. Territorial Sea;
4. Contiguous Zones;
5. 200-mile Exclusive Economic Zone;

6. Straits Used for International Navigation; and

7. High Seas.

There are certain aspects of the Convention which directly affect the Philippines. The first and foremost is Part IV of the Convention dealing with archipelagic states. The Philippines is the pioneer proponent of the archipelagic principle in the international forum. In the First UN Conference on the Law of the Sea in 1958 and the Second Conference in 1960, the Philippine delegation tried to push through the archipelagic principle, but in both conferences, the principle failed to be adopted. The third UN Conference finally incorporated the principle into the Convention.

IV. Archipelagic State

The Convention established the legal concept of the archipelago as an integrated unit in which the islands, waters, and other natural features form an integral, geographical, economic and political entity.

Before Part IV of the Convention, the Philippines was in legal effect dismembered, since international law recognized only a 3-mile territorial sea around every island so that in many parts of the Philippines, the waters between the islands beyond three miles from the shore of the opposite island were regarded as open sea or international waters.

With Part IV of the Convention, no longer will the various islands of the Philippines be regarded as separate units, each with its own maritime means and waters between them as distinct from the land territory. The archipelagic state, like the Philippines, is permitted to draw baselines around the archipelago, connecting

the outermost points of the outermost islands. All waters within the baselines, designated as archipelagic waters, are under the sovereignty of the archipelagic state regardless of their width and dimension. This national sovereignty exists also with respect to the airspace above the archipelagic waters and to the seabed and subsoil below them and to all the resources, living or nonliving.

Let me take up the matter of the Philippine maritime limits set by the Treaty of Paris and related treaties as they are affected by UNCLOS. We have a wider territorial sea under the Treaty of Paris and related treaties. Our problem with the Treaty of Paris is getting other nations to accept these limits. Even the US expressly opposed our claim, saying that Spain has ceded to US only the islands inside the described limits in the treaty and not the waters. The US contends that when she was exercising sovereignty in the Philippines, she limited herself for three miles around every island. Even Indonesia, also an archipelago, refused to support our claim to these "historic waters."

The Philippine Delegation to UNCLOS, thus, opted for acceptance of the Convention because we believed that the Convention as a whole would be more beneficial to the Filipino people. We have in mind the recognition of the archipelagic principle and the provisions of the exclusive economic zone. This option was endorsed by the different groups and subgroups created by the cabinet Committee on the Law of the Sea which was tasked to study the Convention prior to the Philippines' ratification.

V. The Philippines and the Exclusive Economic Zone

The exclusive economic zone (EEZ) is one of the new concepts in the Convention, as an additional maritime area of States. In

archipelagic states, it is a belt around the archipelago more than 200 nautical miles wide, measured from the archipelagic base lines. The Philippines has certain rights in this exclusive economic zone, namely:

1. Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources whether living or nonliving of the waters and the seabed and deep subsoil; and

2. Jurisdiction with regard to the establishment and use of artificial islands, installations and structures for maritime scientific research and protection and preservation of the maritime environment.

The EEZ of the Philippines measures about 395,400 square nautical miles. The area that we have been claiming as our historic territorial sea extending the limits of the Treaty of Paris measures 263,300 square nautical miles. The EEZ, therefore, is bigger than the territorial sea by 132,100 square nautical miles which is equivalent to about 45 million hectares where the Philippines will be entitled to all the resources. Moreover, with the adoption of the archipelagic principle, the Philippines gained 141,800 square nautical miles, or inside the baselines or a total gain of 93 million hectares.

It is also important to note the Philippines Declaration on the signing of the Convention on the Law of the Sea where the country manifests.

1. The signing of the Convention by the Government of the Republic of the Philippines shall not in any manner impair or prejudice the sovereign rights of the Republic of the Philippines under and arising from the Constitution of the Philippines;

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

3. Such signing shall not diminish or in any manner affect the rights and obligations of the contracting parties under the Mutual Defense Treaty between the Philippines and the United States of America on August 30, 1951, and its related interpretative instrument; nor those under any other pertinent bilateral or multilateral treaty agreement to which the Philippines is a party;

4. Such signing shall not in any manner impair or prejudice the sovereignty of the Republic of the Philippines over any territory over which it exercises sovereign authority, such as the Kalayaan Islands, and the waters appurtenant thereto;

5. The Convention shall not be construed as amending in any manner any pertinent laws and Presidential Decrees or Proclamations of the Republic of the Philippines; the Government of the Republic of the Philippines maintains and reserves the right and authority to make any amendments to such laws, decrees or proclamations pursuant to the provisions of the Philippine Constitution;

6. The provisions of the Convention on archipelagic passage through sea lanes do not nullify or impair the sovereignty of the Philippines as an archipelagic state over the sea

lanes and do not deprive it of authority to enact legislation, protect its sovereignty, independence, and security;

7. The concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines, and removes straits connecting these waters with the economic zone or high sea from the rights of foreign vessels to transit passage for international navigation;

8. The agreement of the Republic of the Philippines to the submission for peaceful resolution, under any of the procedures provided in the Convention, of disputes under Article 298 shall not be considered as a derogation of Philippine sovereignty.

The Declaration was made under Article 310 of the Conventions which allows three categories of declarations, namely:

1. General Declarations;

2. Interpretative Declarations; and

3. Declarations Relating to Settlement of Disputes.

According to the late Senator Arturo Tolentino, who headed the Philippine Delegation in all three UN conferences on the law of the sea, we filed this declaration to give notice to other countries signing the Convention that we have claims which may not be completely in harmony with the provision of the Convention in relation to our domestic legislation. The Declaration was circulated to all states which participated in the drafting of the Convention.

Concerns have been expressed on the nature of archipelagic waters in relation to our internal waters.

The sovereignty over archipelagic waters is subject to two kinds of passage by foreign ships. First, innocent passage and second, archipelagic sea lanes passage.

Innocent passage is well known in international law. It is passage that is not prejudicial to the peace, good order or security.

Archipelagic sea lanes passage means continuous and expeditious or unobtrusive navigation or overflight through an above sea lane that must be established by the archipelagic state between one part of the high seas or EEZ and another part of the high seas or EEZ.

Archipelagic sea lanes passage must be distinguished from transit passage envisioned in straits used for international navigation. The latter is imposed by the Convention; archipelagic sea lanes passages can be exercised only on such sea lanes that the archipelagic state would want to designate or establish. Our straits are entirely within our archipelagic waters and therefore cannot be said to be connecting our EEZ or high seas with another part of the high seas or EEZ.

It is also important to note that the Convention provides for solutions in case of overlapping boundaries in the territorial sea, EEZ, and the continental shelf.

In the case of the territorial seas that overlap, a median line shall be drawn and each party gets one-half of the overlapping area.

In the case of overlapping EEZ and continental shelf, the issue of overlap will be effected by agreement among the parties concerned. Failing agreement, the parties should resort to the settlement of disputes provision of the Convention.

VI. Baselines

The importance of drawing baselines cannot be overemphasized. It is from these baselines that the regime of the territorial sea, the contiguous zone, the exclusive economic zone and to a certain degree the continental shelf is measured. The Philippines has its own baselines law, Republic Act No. 3048 and Republic Act No. 5446. They are not going to be disturbed at all but we may have to amend existing baselines which do not conform to the requirements of the Convention. The longest baseline can only be 100 nautical miles with some exception that would extend to 125 nautical miles, provided they do not exceed 3 percent of this total number of baselines. Therefore we have to adjust or do some installations to our baselines which exceed 100 miles. Our law cannot be automatically modified or repealed by the Convention. They can be modified or repealed only by our own domestic laws which we reserve the right to pass.

VII. The Kalayaan Group of Islands

Will the drawing of baselines to include the Kalayaan Group of Islands violate the UNCLOS? The Philippine Delegation believes that it will not as long as we do not exceed the maximum length of the lines. The lines do not have to be drawn from large islands as long as they are islands that are kept above the level of the water. These islands can be used as point for drawing baselines.

The Philippines has every logical reason to draw baselines that will include the Kalayaan Island Group (KIG). The Philippines exercises effective jurisdiction over it considering the establishment of a military garrison and local civil units there.

The islands are considered part and parcel of the Republic of the Philippines by virtue of Presidential Decree 1596 of 1978. The Decree was registered with the UN Secretariat on May 14, 1980.

The Kalayaan Island Group is part of the Spratly Group of Islands. As we know, China, Taiwan, and Vietnam claim the entire Spratlys. All claimants, except Brunei, occupy parts of the Spratlys. Kalayaan is a fifth class municipality of Palawan composed of seven islands, namely:

1. Pag-asu – 32.2 hectares
2. Likas – 18.6 hectares
3. Parola – 12.7 hectares
4. Lawak – 7.9 hectares
5. Kota – 6.45 hectares
6. Patag – 0.52 hectares
7. Panota – 0.44 hectares

The KIG adds to the Philippines exclusive economic zone, an area of 360, 850 square nautical miles.

That the Spratly Group of Islands, to which the KIG is a part, is claimed by other countries should reinforce rather than deter our determination to include the Kalayaan in drawing our baselines. The KIG is the most strategic area in our exclusive economic zone, significant in terms of food, energy, navigation, trade and security. It is our national heritage, as the book edited by Porfirio Aliño and Christine Quibilan aptly describes in detail the dynamics of the islands.

We must formulate policies and adopt measures which will not diminish that heritage. To exclude Kalayaan and just say we

are not abandoning our claim to the islands is empty rhetoric and does violence to common sense. An unlikely diplomatic fallout by including KIG in our baselines should not unduly worry the Philippines. Nor should we entertain the bogey of war erupting over this issue.

Notes *verbale* and *aide memoires* are SOP noises, required in international relations, especially among claimant countries. We should be doing the same. In foreign relations, silence is not golden all the time. Let us note that the signals which come from outside which gave the leadership of the country feet of clay in drawing our baselines are mere talking points, if reports are accurate.

Kalayaan and baselines are current challenges to Philippines Diplomacy. The Department of Foreign Affairs (DFA) should restore and renew being *primus inter pares* on foreign policy issues and be confident, consistent and committed in its advocacies of policies. There is a time for niceties and politesse and a time to be proactive, forceful, and aggressive in international relations. To be timid and pursue a serendipitous approach on Kalayaan and baselines can be perfect diplomatic storm of irrelevance for the Department. There is no greater tragedy for an institution than to find itself, too late, that it has become irrelevant because of inaction and/or timidity.

These thoughts should apply to our attitude towards the Tripartite Agreement for Joint Marine Seismic Undertaking (JMSU). The issue is *sub judice*. It is, however, relevant to note that the area of JMSU falls within our EEZ; that seismic activities are precursors of exploration and exploitation of natural resources; that the undertakings were signed by the oil authorities of the three countries, and that if reports are true, one of the parties

objected to let the undertaking lapse after three years. Previous attempts at joint exploration and development of the South China Sea failed because of no agreement on where it will be held. Let me just state that we may have unwittingly allowed ourselves to be led back to the status where we were before we negotiated the Declaration on the Conduct of Parties in the South China Sea. The Association of South East Asian Nations (ASEAN), led by the Philippines, has always taken pride in convincing China to discuss with ASEAN as a group the South China Sea as a regional and international issue instead of a bilateral issue among claimant countries. JMSU may have put us back to square one. The Philippines may have unwittingly contributed to ASEAN again being sucked into vortex of irrelevance.

VIII. Back to the Future

It is urgent for the Philippines insofar as the metes and bounds of its national territory is concerned to draw its baselines as an archipelagic state and consequently measure the extent of our continental shelf, bearing in mind the deadline on May 13, 2009. The continental shelf comprises the seabed and subsoil of the submarine area beyond the territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of 200 nautical miles from the baselines from which the territorial sea is measured when the outer edge of the continental margin does not extend up to that distance.

Time is the essence for us to submit our claim to our continental shelf as a natural prolongation of our law territory.

The proposal for a congressional commission on national territory which would be given until December 31 to submit a

report on national territory may be a bit late. Information and technical description on the limits of our continental shelf beyond 200 nautical miles (which limits we are claiming) should be submitted to the Commission on the Limits of the Continental Shelf. The Commission shall evaluate the submission and make recommendations to the coastal state on matters related to the establishment of the outer limits of their continental shelf. Considering the process involved, a submission by the Philippines even three months before its deadline may preempt favorable consideration. It is also too late in the day to debate whether we should be an archipelagic state or not, unless we intend to denounce UNCLOS.

It would be unrealistic to hope for a perfect definition of the national territory in the sense that it will be accepted by all. National governments invariably decide paramount issues not on idealistic considerations but on practical realities on the ground. The Philippines should be unyielding insofar as national interests are concerned. That is what the Philippine Delegation to UNCLOS did and that is what the Government should do so insofar as the metes and bounds of our territory are concerned.

In the life of all nations, there come moments that decide the direction of a country and reveal the character of its people. We are now of that moment. We bind the future by what we do or fail to do in the present. I believe that the learned men and women of the Philippine Judicial Academy can extricate the leadership of the country from the present policy blind spot on baselines and the continental shelf and rescue its leaders from inertia and inaction. This should promote national ocean consciousness and would be a great oblation to stability and security. It is time to give in to reason.

Reactions on the Metes and Bounds of the Philippine National Territory: An International Law and Policy Perspective*

*Jay L. Batongbacal, Esq.***

I. Introduction

Your Honors, distinguished guests, ladies and gentlemen, good afternoon. Forgive the "intrusion" of being a surprise speaker at this Distinguished Lecture, but I have been asked by the Honorable Justice Florentino P. Feliciano to speak on this topic, and I would not like to disappoint him. Thank you for your indulgence as I stand before you due to a fortunate coincidence. I have taken time away from my doctoral studies in Canada in order to accompany a senior member of the United Nations Commission on the Limits of the Continental Shelf to hold a scientific and technical workshop to assist the Philippines in preparing a submission for an extended continental shelf. As they are old

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* Delivered at the *Third Distinguished Lecture, Series of 2008,* held on June 27, 2008, at the Far Eastern University, Manila.

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friends, I had arranged for this senior member to meet with Justice Feliciano on the first day of our workshop, and it was during that meeting that he informed us of this Distinguished Lecture. Subsequently, I was asked to come to this symposium to deliver some remarks because since 1996, I have also been studying many aspects of international marine law, particularly concerning the Philippines and the International Law of the Sea.

At the outset, I would like to clarify that, contrary to what you may have read in the newspapers, **there is no deadline for submission to the United Nations of the metes and bounds of the national territory**. There is no treaty, convention, or other agreement stating this is to be done. What the May 13, 2009 deadline refers to is the submission of technical and scientific information on the outer limits of the **continental shelf beyond 200 nautical miles**, for countries intending to make such a claim, pursuant to Article 76 of the United Nations Convention on the Law of the Sea (UNCLOS).[1] The deadline is mentioned in Annex II of the UNCLOS, which was originally

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He has published many articles on marine policy issues both in the Philippines and internationally, and has worked as a consultant to government, non-government, and private sector organizations.

He is presently at work on his Ph.D., focusing on the subject of ocean energy development and social-ecological justice.

[1] United Nations Convention on the Law of the Sea. Montego Bay, Jamaica. December 10, 1982. 1833 UNTS 396.

set to 2004, or 10 years after the entry into force of UNCLOS in 1994. An extension was later agreed upon at the 11th Meeting of the State Parties in May 2001, by counting the 10-year period from the date of formal organization of the UN Commission on the Limits of the Continental Shelf on May 13, 1999.[2] The continental shelf beneath the sea, including the "extended" continental shelf beyond 200 nautical miles, strictly speaking, is **not** the outer limit of the national territory. In international law, "territory" refers specifically to **land** up to the low-water line, and the nature of any area beyond that is subject to rules of international law, especially as codified in UNCLOS.

II. A Crisis of Consistency and Confusion

The confusion over the nature of the 2009 deadline is emblematic of the general crisis of consistency and confusion that pervades Philippine territorial and jurisdictional law. The crisis of consistency refers to the fact that there is a fundamental inconsistency between the way Philippine national law has configured the national maritime territories and jurisdictions, and the way in which international law has defined the legitimate ways by which States may lay claim to maritime territories beyond their coasts. There is no question as to the terrestrial components of the national territory; but the inconsistency arises once we extend into the sea. In order to appreciate the stark difference, it is best to take a very graphic approach to analyzing how current Philippine legislation configures our maritime zones, and compare them with what is acceptable under international law.

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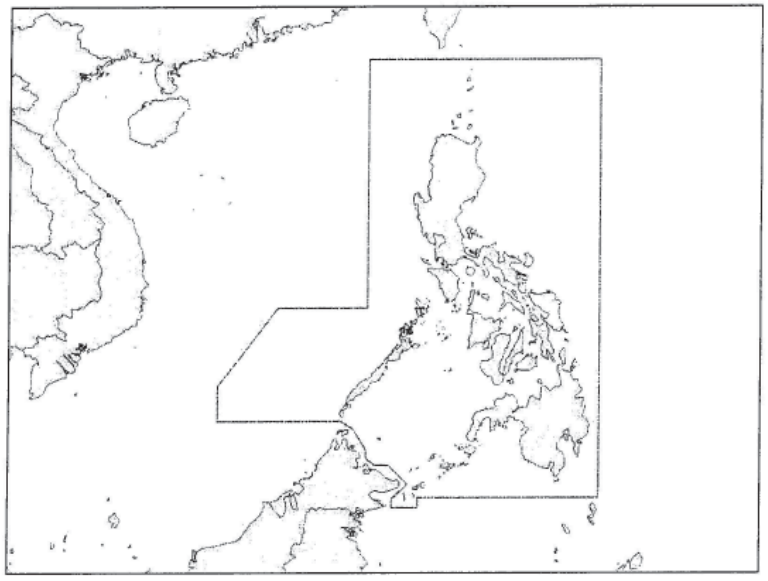
[2] United Nations. Report of the Eleventh Meeting of State Parties, Paragraph 81, UN Doc. SPLOS 173 (June 14, 2001).

Figure 1. Philippine national boundaries shown in official Philippine maps

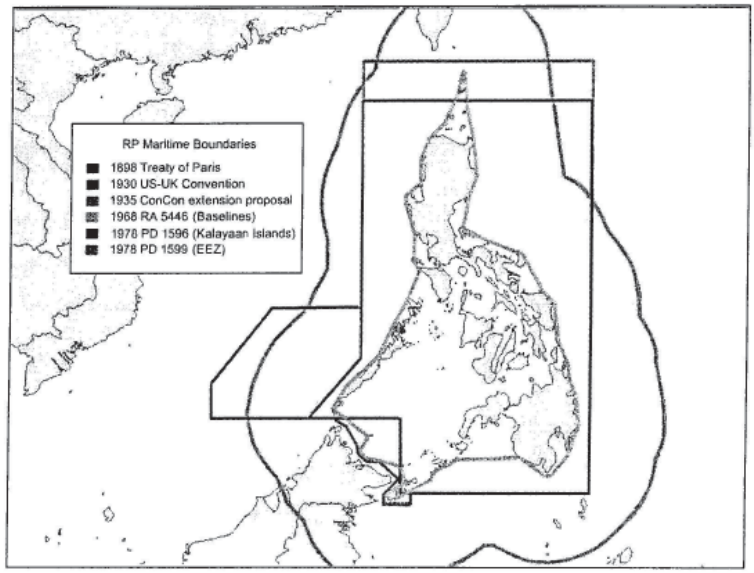


The so-called "international treaty limits" appear in official maps and charts issued by the Philippines to indicate the national territory,[3] and is shown in **Figure 1**. However, the apparent simplicity of the polygonal shape around the islands of the archipelago in official maps and charts conceal the multiple sources and legal bases of the lines that define it. **Figure 2** actually illustrates the different boundaries that are revealed by the different treaties and legislation that determine the configuration of our maritime jurisdictions. A more detailed exposition of the historical

[3] *See* for example, National Mapping and Resource Information Authority (NAMRIA), Nautical Chart No. 4200: The Republic of the Philippines. Taguig City: National Mapping and Resource Information Authority, 2006. Also NAMRIA, Philippine Map with the Kalayaan Island Group. Taguig City: NAMRIA, 2008.

development of Philippine maritime zone legislation has been done elsewhere.[4] What must be noted is that each of these treaties and laws create maritime spaces that are qualitatively different from each other in subtle ways, and the interaction between them results in an inconsistent patchwork of maritime jurisdictions.

Figure 2. Philippine maritime boundaries under current legislation



As shown in **Figure 2**, we first see the limits of the original Treaty of Paris of 1898 between the US and Spain,[5] which apparently omitted to enclose islands to the North and the

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[4] *See* J. Batongbacal, The Maritime Territories and Jurisdictions of the Philippines and the United Nations Convention on the Law of the Sea. 76 Philippine Law Journal 2, Quezon City, Philippines, December 2001, pp. 123-168.

[5] Treaty of Peace between the United States of America and the Kingdom of Spain, Paris, France, December 10, 1898, Article III.

Southwest areas of the country. It was because of this omission that a second treaty, the Treaty of Washington, was signed in 1900 to clarify that these islands that were not within the Treaty of Paris limits were also ceded to the US by Spain.[6] Then in 1930, the United States and the United Kingdom executed a Convention to further clarify the division of the islands between their respective colonies in the area off the northern coast of Borneo.[7] When the 1935 Constitutional Convention debated the article on the national territory, it was noted that the non-inclusion of parts of the Batanes Islands in the North were due to the technical description which located the line at the 20th parallel, however, it was described as running through the Bashi Channel which was located just above the 21st parallel. It was thus proposed to unilaterally extend the Northern boundary to this location in the article describing the national territory.[8] This was not adopted in the eventual wording of the 1935 Constitution, but has been implemented in all official maps and charts issued by the Philippines.[9] Not shown in **Figure 2** is the extent of the continental shelf claimed by the Philippines since 1949.[10]

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6 Sole Article, Treaty between the Kingdom of Spain and the United States of America for the Cession of Outlying Islands of the Philippines, Washington, D.C., November 7, 1900.

7 Convention between the United States of America and Great Britain Delimiting the Boundary between the Philippine Archipelago and the State of North Borneo, Washington, D.C., January 2, 1930, Article I.

8 RECORD of the Constitutional Convention, Volume II, Journal No. 21-40, in Lotilla, R.P. (Ed.) The Philippine National Territory, Manila: UP Institute of International Legal Studies and Foreign Service Institute, 1995, at pp. 168-258.

9 *See* NAMRIA 2006 and NAMRIA 2008, *supra note* 3.

10 Republic Act No. 387, The Petroleum Act of 1949, June 18, 1949, Section 3, and Proclamation No. 370, Declaring as Subject to the

In 1968, Republic Act No. 5446 was enacted to correct typographical errors in earlier legislation (Republic Act No. 3046 [1961]) to define the baselines of the Philippines.[11] These straight baselines were based on the rules in the *Anglo-Norwegian Fisheries Case* of the International Court of Justice, and asserted that all waters inside the baselines and between the islands were considered as *internal* waters, while all waters outside the baselines around the islands up to the limits described in the Treaty of Paris and Treaty of Washington were *territorial* waters."[12] In 1978, Presidential Decree No. 1596 declared the entire area of the Kalayaan Group of Islands to be under Philippine sovereignty and described this area in metes and bounds that attached to the treaty limits west of Palawan.[13] At the same time, however, Presidential Decree No. 1599 was issued declaring the Philippine Exclusive Economic Zone, which described a 200 nautical mile zone extending from the baselines under Republic Act No. 5446.[14]

The Philippines' maritime zone configuration resulting from the above laws is in stark contradiction to generally accepted norms

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Jurisdiction and Control of the Republic of the Philippines All Mineral and Other Natural Resources in the Continental Shelf of the Philippines, 1968. Neither instrument provides the geographic extent of the Philippine continental shelf.

11 Republic Act No. 5446, An Act to Amend Section I of Republic Act No. 3046, entitled "An Act to Define the Baselines of the Territorial Sea of the Philippines," September 18, 1968.

12 Section 2, RA No. 3046 (1961) in relation to Section I, RA No. 5446 (1968).

13 Presidential Decree No. 1596, Declaring Certain Areas Part of the Philippine Territory and Providing for Their Government and Administration, June 11, 1978.

14 Presidential Decree No. 1599, Establishing an Exclusive Economic Zone and for Other Purposes, June 11, 1978.

of international law on the nature and extent of coastal State jurisdiction over its maritime areas. The fundamental principle underlying maritime zones in international law is that State sovereignty and jurisdiction steadily diminishes, the further one is from the shore. From the low-water line, State sovereignty reduces to certain sovereign jurisdictions, and then to specific sovereign rights, until areas beyond national jurisdiction.

UNCLOS recognizes that coastal States are entitled to maritime zones on the basis of specified distances from the baselines. Within the baselines, States are entitled to internal waters, which normally encompass bays, estuaries, and mouths of rivers, but beyond those baselines, the zonal configurations apply. Thus, coastal States are entitled to a territorial sea of up to 12 nautical miles within which it may exercise full sovereignty,[15] a contiguous zone of 24 nautical miles wherein they exercise only certain jurisdictions,[16] and an exclusive economic zone of up to 200 nautical miles wherein they are entitled to only certain sovereign rights to the superjacent waters.[17] Beneath the waters, the seabed up to 200 nautical miles is considered as the continental shelf of the coastal state.[18] But depending on certain conditions and characteristics of the seabed, this continental shelf may extend beyond 200 nautical miles up to a maximum of 350 nautical miles.[19]

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[15] The only limitation to this sovereignty is that they must allow the innocent passage of ships through such waters. *See* Article 17, UNCLOS.

[16] UNCLOS, Art. 33.

[17] UNCLOS, Arts. 55 to 57.

[18] UNCLOS, Art. 76, par. I.

[19] UNCLOS, Art. 76, par. 4 to 6.

However, this steady reduction is not followed in Philippine law, and varies depending on the area, as indicated when one traces the degree of sovereignty and jurisdictions established by law in different directions from certain points in the Philippines. Philippine laws effectively create severe and illogical jurisdictional weaknesses between the shore and the outermost limits of its maritime zones. Reference to **Figure 2** makes it easier to appreciate these inconsistencies generated by our legislation. For one, we have territorial waters located outside the EEZ in the northeastern and northwestern corners of the treaty limits. Second, the westernmost area of the Kalayaan Group of lslands is supposed to be a zone of sovereignty,[20] which in effect makes it *internal,* not merely territorial waters, but it is located beyond the EEZ. Third, in other areas, from the baselines to 200 nautical miles, our waters are declared to be EEZs, no territorial water areas in between having been reserved from the effect of PD No. 1599. And to date, we have been unable to negotiate the EEZ boundaries between ourselves and our neighboring countries to the North and South, despite the mandate to do so,[21] likely because the median boundary will have to be located well inside the treaty limits in many places. These are the kind of inconsistencies that generate confusion in the policies and implementation of law by government agencies, and effectively paralyze us from taking effective action to exercise our sovereignty and jurisdiction against foreign vessels and activities in those questionable areas.

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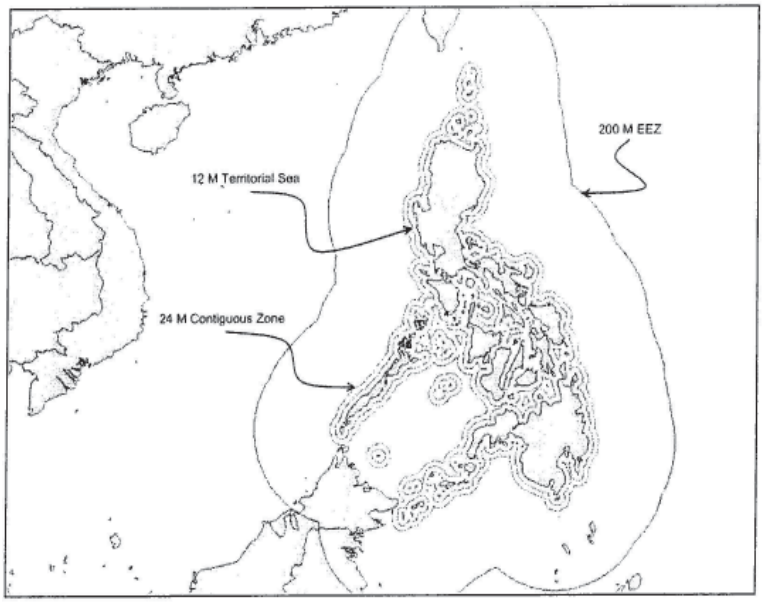
[20] Declaring Certain Areas Part of the Philippine Territory and Providing for Their Government and Administration, Presidential Decree No. 1596 (1978), Sec. 1.

[21] Establishing an Exclusive Economic Zone and for Other Purposes, Presidential Decree No. 1599 (1978), Sec. 1.

Since other States are not bound by our laws, they may only recognize maritime zones based on UNCLOS. Thus, as far as the international community is concerned, the Philippines' maritime zones are configured in the manner shown in **Figure 3**.

Figure 3. Philippine maritime zones currently acceptable to the international community



The Philippines first declared that its territorial waters extended up to the treaty limits in a ***Note Verbale*** to the UN Secretary General in 1958.[22] But the United States immediately and later repeatedly denied that it ever considered the treaty limits as territorial boundaries[23] and US state practice up to the end of the

[22] Permanent Mission of the Philippines to the United Nations. Note Verbale, January 20, 1956, in Lotilla 1995, at pp. 272-273.

[23] In Lotilla 1995, at p. 274.

Commonwealth period did adhere to only the then-common 3-mile limit for the territorial sea.[24] The phraseology of the 1898 Treaty of Paris and 1930 US-UK Convention themselves expressly refer only to the status of the islands,[25] and not the waters within or divided by the lines they described. The fact that the 1900 Treaty of Washington referred to islands outside of the treaty limits[26] is also consistent with the US position. Recalling the ancient principle that "the spring cannot rise higher than its source," then it is indeed impossible to anchor the Philippines' sovereignty and jurisdiction over the entire areas within the treaty limits upon presumed succession to the sovereignty and jurisdiction of the United States.

Note the huge difference between **Figure 3** and **Figure 1**. The difference illustrates the wide gap between what is prescribed in Philippine law, and that which is normally acceptable to the

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[24] R. Aquino, and C. Grino, Law of Natural Resources, Manila: E.F. David & Sons, 1957, at pp. 425-426.

[25] Article 3, Treaty of Paris, 1898 states that:

> Spain cedes to the United States the archipelago known as the Philippine Islands, and comprehending **the islands** lying within the following line x x x

while Article I, Convention between the US and Great Britain, 1930, states that:

> It is hereby agreed and declared that the line **separating the islands** belonging to the Philippine Archipelago on one hand and the islands belonging to the State of North Borneo which is under British protection on the other hand shall be and is hereby established as follows x x x.

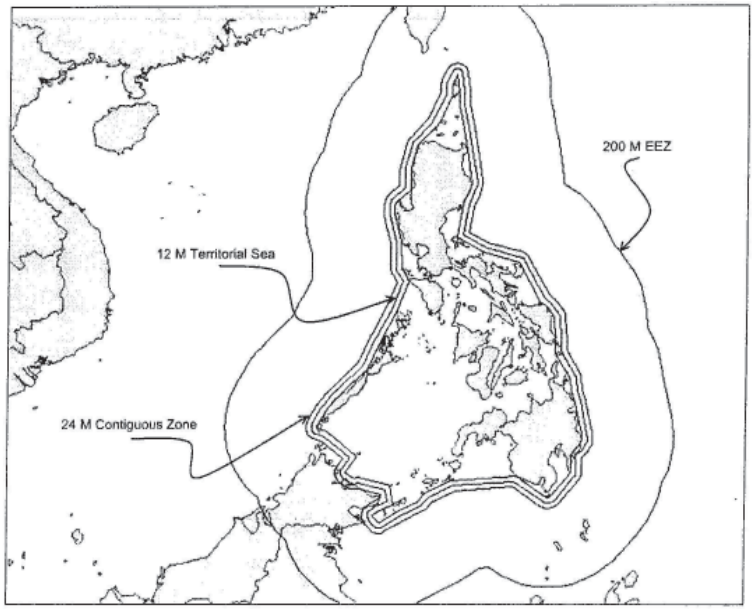
[26] Sole Article, Treaty of Washington, 1930.

international community. What should be of concern to us is that the international community's current perspective leaves large pockets of EEZs within the Philippines, between its component islands, the largest being the Sulu Sea. Within the EEZ, foreign States exercise high seas freedoms, while the Philippines only has certain sovereign rights.

This need not be the case, however. Under Part IV of the UNCLOS, the Philippines has the option of declaring itself to be an Archipelagic State. This allows the Philippines to eliminate the pockets of EEZs between its islands, and convert them into archipelagic waters that are recognized to be under its sovereignty.[27]

Figure 4 shows one possible configuration that this may take.

Figure 4. One possible implementation of UNCLOS Part IV



[27] UNCLOS, Art. 49.

The concept of the Archipelagic State and sovereignty over archipelagic waters is the result of the negotiations conducted by the Philippines along with Indonesia and a few other smaller island states during the UNCLOS conferences. The international community's recognition is part of a compromise, and in return for recognition over a much larger area of waters (which non-archipelagic States cannot be similarly entitled to), Archipelagic States must allow the innocent passage (in the same way that coastal States allow innocent passage through their territorial seas) and archipelagic sealanes passage of vessels through its waters.[28]

Archipelagic sealanes passage is a more liberal passage regime than innocent passage, but must be used only for the purpose of continuous, expeditious, and uninterrupted passage through the archipelago.[29] Doing anything more may subject the passing vessel to the archipelagic State's sovereignty and jurisdiction.

However, it must be emphasized that this is an **option**. Until we declare ourselves to be an Archipelagic State and implement Part IV through necessary legislation, then the international community is **not** obliged to recognize that we are such. It is for this reason that we still need to enact baseline legislation, in order to harmonize our national legislation with international law. Oliver Wendell Holmes once said that the law is about predicting the consequences of the actions of a "bad man."[30] In the case of the Law of the Sea, it is about the consequences of the actions of a "bad foreign vessel," that is, when such a vessel (not normally bound by national law outside that of its registry) undertakes an

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[28] UNCLOS, Arts. 52 to 53.

[29] UNCLOS, Art. 53, par. 3.

[30] Holmes, 0. W. The Path of the Law. 10 Harvard Law Review 457.

activity that is contrary to the sovereignty or jurisdiction of a nearby coastal State. Those consequences can only be legitimately determined in accordance with the rules under UNCLOS which prescribe the extent to which coastal States can exercise their sovereignty or jurisdiction depending on the distance of the incident from the coastal States shores. Implementation of the UNCLOS' provisions on Archipelagic States will therefore allow the Philippines to maximize its sovereignty and jurisdiction over the marine areas around its land territories, areas that would be greater than what we would normally be entitled to under international law as an ordinary coastal State.

III. Common Misconceptions about United Nations Convention on the Law of the Sea

Implementation of UNCLOS, however, has also been subject to massive confusion and misinformation, as indicated by the public debate over the various bills and options pending in Congress. A number of mistakes and misconceptions about the legal effects of UNCLOS implementation have been prominently raised in the media, arising from the lack of adequate knowledge and understanding of UNCLOS, its background, and the nature of international law in general. One of them is with respect to the 2009 deadline, already mentioned above.

The most serious misconception in the popular debate is that the enactment of archipelagic baselines, and particularly the enclosure of the Kalayaan Island Group within a single baseline system, is needed to "strengthen" sovereignty over them. This is entirely false. First, there is no need to enclose all the islands of an archipelago within a single set of archipelagic baselines in order

for it to be considered part of the Archipelagic State. Article 47 of UNCLOS expressly defines an archipelagic State to be "a State constituted wholly by one or more archipelagos and may include other islands." The legal principle involved here is that of **contiguity**, and it is clear in international law that territorial contiguity is not essential where the land is separated by the sea. Many non-archipelagic States like the United States, New Zealand, Australia, United Kingdom, Malaysia, Papua New Guinea, and others have separate territories that are not connected by a single set of baselines. In fact, in the case of the United States and Malaysia, between parts of their territories, there are territories of other States (Canada and Indonesia, respectively). Even our own national legislation adopts this exception to the principle, by providing in the Local Government Code that the territories of local governments comprised of two or more islands need **not** be contiguous.[31]

Second, the drawing of baselines under UNCLOS does not operate like the process for securing a Torrens Title. UNCLOS cannot be used to claim islands or any other land territories, because the fundamental principle underlying the maritime zones is that sovereignty and jurisdiction over the adjacent seas flow **from** the sovereignty over the land, **not** the other way around. "Water flows downstream," as an old axiom goes, and therefore the drawing of baselines follows **from** the exercise of sovereignty; conversely, sovereignty does not arise merely from the act of drawing of baselines.

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[31] *See* Sections 7, 386, 442, 450, and 461, Republic Act No. 7160, The Local Government Code of 1991, October 10, 1991.

Third, there is no need to "strengthen" sovereignty over the Kalayaan Island Group because we have already been exercising complete sovereignty over the area since the 1970s. It has been continuously occupied and administered as a municipality of Palawan, municipal elections are held annually for the area, and its surrounding waters have been subject to Philippine control of activities such as fishing, scientific research, and petroleum exploration. To state now that we still need to "strengthen" sovereignty may in fact be seen as a counterproductive admission against interest that the Philippines believes that its sovereignty is still imperfect and inchoate.

In connection with this, there are also those who assert that the conduct of the seismic surveys under the Joint Marine Seismic Undertaking (JMSU) somehow derogates or diminishes the Philippines' sovereignty over the Kalayaan Island Group. Since the issue is *sub judice,* I cannot comment upon this in great detail. But without dealing with the JMSU in particular, the question is whether seismic surveys, which is a scientific method of determining the nature and character of the seabed beneath, *per se,* diminish or affect Philippine sovereignty. For that matter, it could be considered whether scientific surveys conducted by foreign States affect the status of sovereignty. **Figure 5** is a collection of the tracklines of not only seismic, but also hydrographic, gravimetric, thermographic, chemical, and other scientific surveys conducted by foreign institutes and vessels within and around the Philippines. All the data from these surveys are freely accessible from the internet.[32] Aside from these, one must

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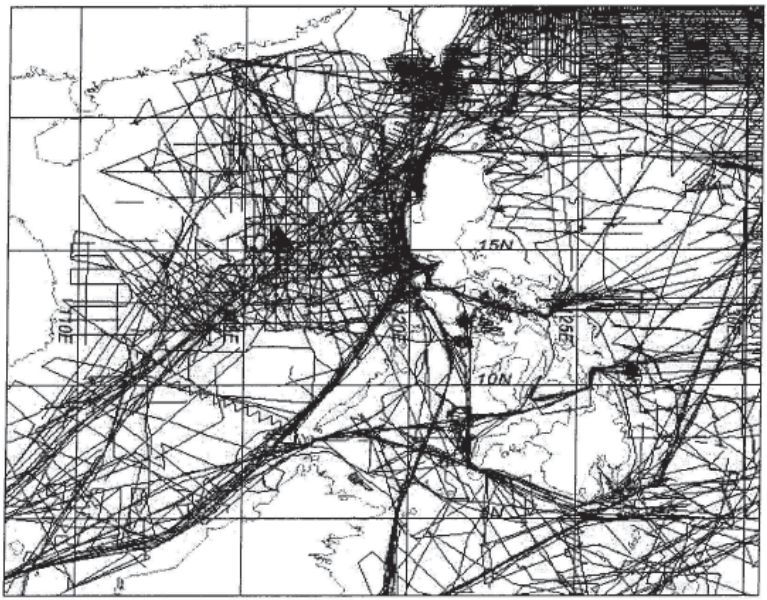
[32] *See* National Geophysical Data Center (NGDC), "Marine Geophysical Trackline Data," <http://www.ngdc.noaa.gov/mgg/geodas/trackline.html> (last accessed June 25, 2008).

Figure 5. International seismic and other scientific surveys in and around the Philippines



also consider the large number of seismic surveys conducted by foreign oil exploration companies contracted by the Department of Energy for decades, and whose records are kept confidentially by the DOE's Energy Data Center. These scientific surveys and petroleum exploration activities have been going on ever since the Philippines came under American rule. One could then ask whether the Philippines is substantially and concretely any less sovereign now, with the revelation of knowledge that these have been taking place all this time, than it was before. It is not merely the nature of an activity which must be considered when determining the effect on sovereignty, but also, and perhaps more importantly, its subsequent use.

There are also those who oppose the implementation of UNCLOS and establishment of archipelagic baselines for the

reason that to do so would "open" Philippine waters to foreign vessels, due to the commitment to allow innocent passage and archipelagic sealanes passage.[33] But this fear does not acknowledge the reality that historically, the Philippines has always allowed foreign vessels to pass through its waters. Even when it asserted the archipelagic principle back in 1956, the Philippines expressly provided that foreign vessels were allowed to exercise innocent passage throughout its waters, without clearly distinguishing the respective extents of the internal and territorial waters.[34] International publications touching on the sea routes through the seas around the Philippines have always shown well-known routes passing through its islands.[35]

That these navigational practices continue today can be proven. In 2004, the US National Center for Ecological Analysis and Synthesis determined prevailing global ship routes as a means to

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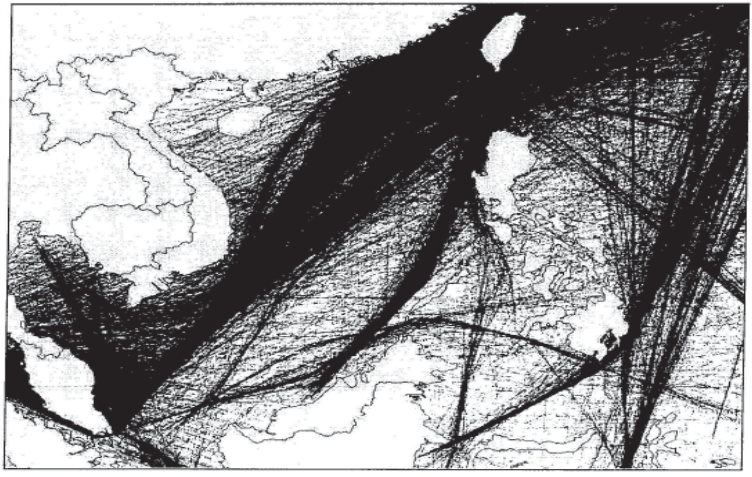
[33] *See* for example, M. Magallona, "The UNCLOS and Its Implications on the Territorial Sovereignty of the Philippines" in World Bulletin, Vol. 11, Nos. 1-2 (Jan-April 1995) UP Institute of International Legal Studies, UP Diliman, Quezon City (1995), pp. 50-76; M. Magallona, The Dismantling of the Philippine State and Its Impact on Civil Society," UP Institute of International Law Studies, 1996; and M. Defensor-Santiago, Sponsorship Speech for a Congressional Commission on National Territory, Philippine Senate, May 21, 2008.

[34] *See* Note Verbale, January 20, 1956, *supra* Note 22.

[35] *See* for example, J. Morgan, and M. Valencia, Eds., Atlas for Marine Policy in Southeast Asian Seas. Berkeley: University of California Press, 1984. Also L. T. Ghee, and M. Valencia, Eds., Conflict over Natural Resources in South-East Asia and the Pacific. Oxford, New York, and Toronto: Oxford University Press, 1990.

determining the ecological impact of world shipping.[36] To make this determination, it used position data from about 3,300 volunteer commercial vessels (about 11 percent of the global merchant fleet) of various types which contributed such data as part of sea surface information used for international weather monitoring and forecasting programs. These were comprised of ordinary cargo, passenger, and sometimes military vessels of different nationalities navigating through the seas as they normally do, and thus may be considered as a statistical sample of the ship routes used by the world fleet. The excerpt from this data shows the area of Philippines in **Figure 6**, and the tracks of hundreds of ships passing through and around its waters. It is an especially enlightening manifestation of the kind of vessel traffic that has been steaming through and around our jurisdictional waters for a long time.

Figure 6. International vessel tracks/routes in and around the Philippines recorded in 2004



[36] National Center for Ecological Analysis and Synthesis (NCEAS), "Data: Impacts," <http://www.nceas.ucsb.edu/GlobalMarine/impacts> (last accessed June 25, 2008).

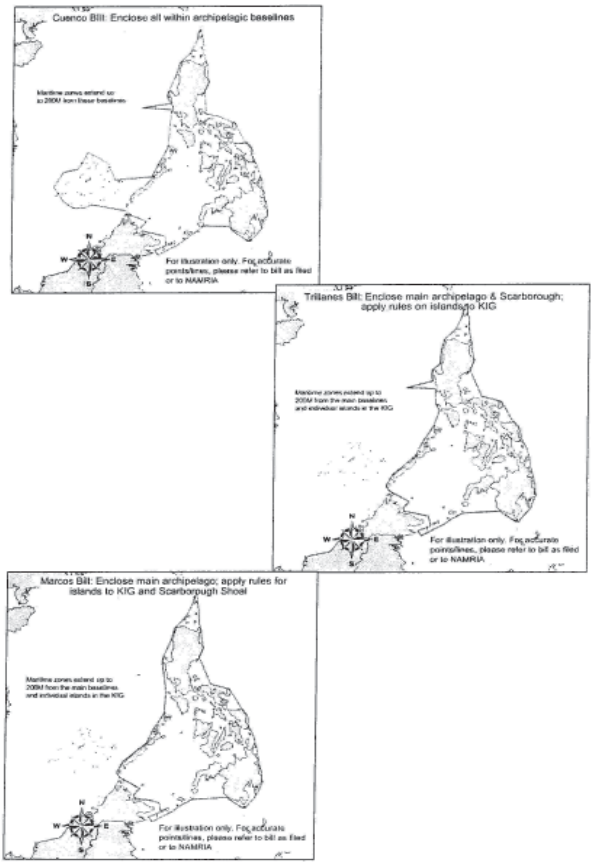
IV. Archipelagic Baselines and the Southeast Asian Region

The greatest challenge to Philippine implementation of UNCLOS through the enactment of archipelagic baselines, however, is not legal, but geopolitical. Depending on how conservatively or liberally we apply the rules in UNCLOS, we may project the maximum extent of our maritime zones much farther into the South China Sea than ever before or maintain the *status quo* (*See* **Figure 7**). Since our neighbors, particularly Vietnam, China, and Malaysia, also have their interests and prospective maritime zones within that area, they can be expected to act in such a way as to preserve their own interests. The fact that there are competing claims to territory, sovereignty, and jurisdiction over both island and marine areas within the South China Sea makes the problem even more complicated. Thus, it is not only a matter of being able to find a mutually acceptable median boundary between two States, which is difficult enough as it is, but resolving a wide range of complex issues, claims, and counterclaims between at least five States. In order to ensure that our interests are protected, acting within this context requires a very careful and well-thought strategy not only in law but in foreign policy and the conduct of our relations with neighboring States.

The popular clamor and support for the drawing of Philippine archipelagic baselines that enclose the main archipelago and the entire Kalayaan Island Group and Scarborough Shoal, indicated in Representative Cuenco's House Bill No. 3216 and Senator Pimentel's Senate Bill No. 2144, is a maximalist position that on the surface encloses the greatest geographic area. But it is based on a number of erroneous assumptions, such as that the action must

be taken before a deadline and that it "strengthens" Philippine sovereignty. Neither is correct. The option furthermore is no longer feasible, because it requires the building of new structures in the Kalayaan Island Group which is not permitted under the 2002 ASEAN-China Declaration of Conduct,[37] an agreement

Figure 7. Philippine archipelagic baseline options pending in Congress



[37] Declaration on the Conduct of Parties in the South China Sea. Phnom Penh. November 4, 2002. Available from ASEAN website <http://www.aseansec.org/13163.htm> (last accessed June 25, 2008).

the Philippines itself spearheaded to prevent further complicating the South China Sea disputes through the addition of artificial structures in the area. By pushing our potential maritime spaces further into the South China Sea than ever before, and enclosing islands that are claimed by other States, the Philippines also ensures that the new archipelagic baselines system will be subjected to diplomatic protests by the other States, which directly undermines any legal effect the baselines may have on foreign States. If the new Philippine baselines are protested, then the maritime zones they generate are again left in limbo and uncertainty, a situation no better than what we had before. Moreover, in the long term, politically and practically, the Philippines will find it extremely difficult to negotiate any peaceful settlement of the territorial issues since any compromise fixes our negotiating options to only one single position. Legislating the maximalist position will only complicate and prolong the territorial issues in the South China Sea, and not contribute toward their settlement.

The executive position which encloses only the main archipelago and leaves the Kalayaan lsland Group and Scarborough Shoal as separate islands is indeed a minimalist position, and minimizes changes to the *status quo*. But, it also has a better chance in international law. It avoids protests that would jeopardize the integrity of the baselines around the rest of the Philippine archipelago. It limits the effect of such protests to the islands themselves and thus permits the Philippines to exercise its sovereignty and jurisdiction over other areas unhindered. It also helps to rationalize and harmonize the configuration of the Philippine maritime zones with international law in a manner acceptable to the international community. Maintaining an island regime around the Kalayaan lsland Group also provides more flexibility in the long term to the Philippines in seeking the peaceful

solution of territorial issues because it can then develop more options for compromise without having to involve the status of the rest of the Philippine archipelago. And all these can be validly done without affecting the current status of Philippine sovereignty over the Kalayaan Island Group.

V. Conclusion

From an international law perspective, the key issue for the country is not how much maritime area will be enclosed, but which action is more likely to be considered valid. Maritime sovereignty and jurisdiction are not created by simply drawing on a map; they must also be recognized and accepted by other States, in addition to conforming to the rules and principles that have already been agreed upon in UNCLOS. If not, then they will be continually challenged and will never be settled. We shall never get any support for them, and much of what we think we can do may be nothing more than mere illusions. If we are to act in ways that affect other members of the international community, or if we want them to support our actions and strengthen our hand in the face of stronger competitors, we simply cannot continue merely asserting things without finding acceptance from the rest of the world.

But this is more than a question of international law. What makes it most challenging for us is the fact that our use and implementation of UNCLOS have unavoidable impacts on the maritime zones of all our neighboring countries, and have definite implications on the navigational interests of the rest of the world.

Enacting a new baselines law, whatever the final configuration, will shape the geopolitics of the Southeast Asian region for years to come, but not necessarily change the status of Philippine sovereignty over the KIG or Scarborough Shoal. Whether a new

law perpetuates or aggravates the regional issues to spur further contestation, or opens the door for cooperation and settlement, is the international responsibility that attaches to its enactment. We can choose to be a leader or a troublemaker; what happens in the region has impacts on the rest of the world. This is the broader national interest involved, and the true gravity of the act of establishing our baselines. We decide not only the future of our country, but that of Southeast Asia as well.

Reactions on Why There is an Immediate Need to Enact a Bill Amending Republic Act No. 3046, as Amended, to Conform to the Convention on the Law of the Sea*

*Atty. Estelito P. Mendoza***

I. Introduction

There should be no doubt about the Philippine territory.[1] It is our good fortune that the Philippines consists of islands in the middle of the sea. We have no land with borders adjacent to other countries; consequently, no border conflicts.[2]

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* Delivered at the *Third Distinguished Lecture, Series of 2008,* held on June 27, 2008, at the Far Eastern University, Manila.

** Former Minister of Justice and Solicitor General Estelito P. Mendoza was born on January 5, 1930, in Manila, Philippines. He obtained his Preparatory and Legal Education from the University of the Philippines in 1948, his Bachelor of Laws degree also from UP in 1952, and his Master of Laws degree from Harvard University in 1954.

1 *See* Article 1, 1935, 1973 and 1987 Constitutions.

2 Landlocked countries, of which there are 42 of the approximately 190 states, particularly have the problem.

While the territory of a state consists generally of land, including its internal waters, such as rivers and lakes; in our case, under the archipelagic principle which we have adopted,[3] and now explicitly recognized in Part IV of the Law of the Sea Convention (LOSC), the islands comprising the Philippine archipelago, together with the water between the islands, are an integrated whole which, with the Kalayaan Island Group, constitute our territory.

In the *Anglo-Norwegian Fisheries* case, decided in 1951 by the International Court of Justice (ICJ), recognition was given to "coastal" archipelagos which allowed the state to draw straight baselines around the outermost points of a coastal archipelago

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He was admitted to the Philippine Bar in 1953 and was in private law practice in 1952 until he joined the government in 1971 as Undersecretary of Justice. He continued to serve in various capacities: Solicitor General (1972-1986); Minister of Justice/ Attorney (1984-1986); Member, National Assembly (1978-1980; 1984-1985); and Provincial Governor of Pampanga (1980-1986).

He was also a Professorial Lecturer in Law at his alma mater, the University of the Philippines (1954-1973). While in government service, he also served as Chairman of the Sixth (legal) Committee, 31st Session (1976) of the UN General Assembly; Chairman of the Special Committee (of the UN) on the Charter of the United Nations and the Strengthening of the Role of the Organization (1980).

Attorney Mendoza is also a member of organizations such as: Phi Kappa Phi Honor Society, Phi Gamma Mu (for excellence in the social sciences); Upsilon Sigma Phi, Rotary Club of Manila, Philippine Bar Association, Integrated Bar of the Philippines, Manila Polo Club, Philippine Society of International Law, American Society of International Law, and the Harvard Club of the Philippines.

[3] Article I, 1973 and 1987 Constitutions; RA No. 3046.

and "tie" it to the mainland coast. This is what Norway had done. Although whether island archipelagos should enjoy a special regime was much debated upon in the 1980 Hague Conference and the 1958 Conference on the Law of the Sea, it was not until the 1982 Convention on the Law of the Sea[4] was there explicit recognition, in international law, of "island archipelagos,"[5] such as ours. As early as 1961, however, we had formally adopted the principle by enacting Republic Act No. 3046 entitled "An Act Defining the Baselines of the Territorial Sea of the Philippines."

But we do have common borders in regard maritime areas over which we are sovereign or have rights or jurisdiction. When the distance over water which separates us from another state is less than 400 nautical miles from our respective baselines, we have a common border as to our, and the other state's, exclusive economic zone. And, when the area within our exclusive economic zone does not overlap with the exclusive economic zone of another state, we would have a border separating our exclusive economic zone from the international seabed area, referred to in the LOSC, as the area "beyond the limits of national jurisdiction."[6]

While we would not have, therefore, any border or boundary conflicts on land, we may have maritime boundary conflicts as to overlapping maritime zones with neighboring states, like Malaysia and Indonesia, and possibly, with the international seabed area.

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4 The Law of the Sea Convention came into force on November 16,1994. Its text was adopted on April 30, 1982, by 130 votes to four, with 17 abstentions. As of June 2008, 155 states ratified, and acceded to the Convention.

5 Part IV.

6 Article 1(i).

Allow me to comment on two points:

a. Whether there is a need to enact legislation amending RA No. 3046, as amended by RA No. 5446, so as to make the baselines of the Philippine archipelago conform to the Law of the Sea Convention, particularly its Article 47; and

b. Whether the baselines should now include as a single archipelago, the Philippine archipelago enclosed by the baselines in RA No. 3046, as amended, and the Kalayaan Group of Islands.[7]

I proceed from three premises, as follows:

a. On matters of sovereignty or jurisdiction over areas beyond the land territory of a State, such as the territorial sea and exclusive economic zone, the best, and perhaps the only assurance, that a state's sovereignty and jurisdiction over such areas will be respected by other states, is that its sovereignty and jurisdiction are in accord with international law. Only states with the power to enforce their sovereignty and jurisdiction over such areas, such as the United States, can assert claims not necessarily in accord with international law and enforce them;

b. The value of rules and principles of international law which vest rights over the sea and its resources adjacent to a territory to the exclusion of other states, principally the territorial sea, and now, the exclusive economic zone, **lies**

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7 Declaring Certain Areas Part of the Philippine Territory and Providing for Their Government and Administration, Presidential Decree No. 1596, enacted on June 11, 1978.

in their recognition and acceptance by the international community; and

c. We maintain our adherence to the 1982 Convention on the Law of the Sea.

II. The Need for Amending Republic Act No. 3046 is Immediate

While Article 46 of the LOSC defines an "archipelagic state" and an "archipelago," the status of an "archipelago" with the rights arising therefrom under Article 49, do not arise *ipso facto* from such fact.

Article 47 provides:

Art. 47. *Archipelagic Baselines.*

1. An archipelagic State **may draw straight archipelagic baselines** *(emphasis ours)* joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.
2. The length of such baselines shall not exceed 100 nautical miles, except that up to 3 percent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.
3. The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.

x x x x

While Article 49 provides:

> **ART. 49.** ***Legal status of archipelagic waters, of the air space over archipelagic waters and of their bed and subsoil.***
>
> 1. The sovereignty of an archipelagic State extends to the waters **enclosed by the archipelagic baselines drawn in accordance with Article 47**, described as archipelagic waters, regardless of their depth or distance from the coast.
> 2. This sovereignty extends to the air space over the archipelagic waters, as well as to their bed and subsoil, and the resources contained therein.
> 3. This sovereignty is exercised subject to this Part.
> 4. The regime of archipelagic sea lanes passage established in this Part shall not in other respects affect the status of the archipelagic waters, including the sea lanes, or the exercise by the archipelagic State of its sovereignty over such waters and their air space, bed, and subsoil and the resources contained therein.

Under the above provisions, the archipelagic state has the option of vesting in its "archipelago" the status of an "archipelago" under Part IV of the LOSC. That option is exercised by drawing the "straight baselines" provided in Article 47. If the archipelagic state does not draw the baselines provided in Article 47, then the islands comprising the archipelago will be regarded merely as "islands" under Article 121. The waters between the islands will not be regarded as "archipelagic waters" subject to sovereign rights of the archipelagic state under Article 49, but depending on the distance between the islands, will be regarded as

territorial sea or high seas. Should the islands be separated from each other by more than 24 nautical miles (each island generating a territorial sea of 12 nautical miles), other states would enjoy in the seas beyond the territorial sea of each island the "freedom of the high seas" provided in Article 87.

Article 48 of the LOSC provides as follows:

> **Art. 48.** ***Measurement of the breadth of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf.***
>
> The breadth of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf shall be measured from archipelagic baselines drawn in accordance with Article 47.

To establish the limits of our territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf, we need to have baselines drawn in accordance with Article 47. Without such baselines, the status of the Philippine archipelago as an "archipelago" under Article 46(b) of the LOSC and the exercise of resulting sovereign rights under Article 49 will be in question. Moreover, the limits of our territorial sea, contiguous zone, and exclusive economic zone may not be clearly defined. The need, therefore, to amend RA No. 3046, as amended, to conform to the requirements of the LOSC is evident and immediate. Unless we do so, we will not be assured of recognition by the international community of the status of the Philippine "archipelago" as an "archipelago," the enjoyment of the rights incident thereto provided in Article 49, and the definition of the limits of our territorial sea, contiguous zone and exclusive economic zone.

III. Whether the Baselines Should Now Include as a Single Archipelago, or the Philippine Archipelago Enclosed by the Baselines in Republic Act No. 3046, as Amended, and the Kalayaan Group of Islands

The Law of the Sea Convention recognizes "archipelagic states"[8] which means a "state constituted wholly by one or more archipelagos and may include other islands."[9] In order that we may have the status of an "archipelagic state," we may simply amend RA No. 3046 to conform to Article 47 of the LOSC, so that the "archipelago" enclosed by the baselines under RA No. 3046 will have the status of an "archipelago" and the Philippines as an "archipelagic state" under the LOSC.

Two ways of dealing with the problem are reflected in bills now pending enactment by the House of Representatives and the Senate, as follows:

(a) To maintain the "archipelago" enclosed by the baselines in RA No. 3046 but amending the baselines to conform to Article 47 and to consider the "Kalayaan Group of Islands" as "islands" under Article 121 of the Law of the Sea Convention, or

(b) To consider both the "archipelago" enclosed by the baselines in RA No. 3046, as amended, and the Kalayaan Group of Islands, as a **single archipelago** by drawing straight baselines connecting the outermost points of the

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8 Part IV.

9 Article 46(a).

outermost islands of both the Philippine archipelago and the Kalayaan Group of Islands.

I support the first alternative for the following reasons:

a. Article 46(b) defines an "archipelago" as follows:

ART. 46. *Use of terms.*

For the purpose of this Convention:

x x x x

b. *archipelago* means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.

There can be no question that the "Philippine archipelago," as we have always known it, and enclosed by the baselines in RA No. 3046, is an "archipelago" under the above definition. But whether that "archipelago" and the Kalayaan Group of Islands, **together**, constitute an "archipelago" is uncertain. It must be remembered that the "Kalayaan Group of Islands" came to be part of the Philippines only upon the enactment on June 11, 1978 of PD No. 1596. It has never, through the centuries of its existence, been regarded as part of the Philippine archipelago.

b. Under Article 47, it is in fact required, that the baselines "shall not depart to any appreciable extent from the general configuration of the archipelago." This makes more

emphatic that what are inclosed by the baselines is an "archipelago" with a configuration as such.

c. Technical studies have shown that there is no tie-point with low tide elevation (bare at low tide) that could connect the Kalayaan Group of Islands with the main archipelago.

d. Several, in fact a majority, of the basepoints are located in islands presently occupied by other countries (not the Philippines). It is absurd, indeed ridiculous, that basepoints of our arhipelagic baselines would be on islands occupied by other states, albeit without our consent.

With the above recognition that the baselines are in accord with Article 47 of the Law of the Sea Convention is a huge problem. They most certainly will be disputed by the countries who now occupy the majority of the islands in the Kalayaan Group. Should any part of the baselines, particularly those that connect the Kalayaan Group of Islands to the Philippine archipelago, be found not in accord with Article 47, it may nullify not only the baselines linking the Kalayaan Group of Islands to the main archipelago but the entire baselines enclosing the Philippines.

On the other hand, it is in our interest that we assure that the Philippine archipelago, as we have always known it, and enclosed by the baselines under RA No. 3046, as amended, is invulnerable to any question. That way, we are assured that the Philippine archipelago enclosed by the baselines under RA No. 3046, as amended, will have the recognition of the international community. To dissipate any apprehension that we have abandoned our sovereignty over the Kalayaan Group of Islands, we may explicitly acknowledge in whatever legislation is enacted that the

Kalayaan Group of Islands shall be regarded as a "regime of islands" under Article 121 of the Law of the Sea Convention.

We must face the reality that our sovereignty over the Kalayaan Group of Islands is disputed by neighboring states, principally China and Vietnam. Majority of the islands composing the Kalayaan Group of Islands are occupied by these countries.[10] Vietnam occupies the biggest number of islands. We must assure that whatever problem to which the Kalayaan Group of Islands is presently exposed will not affect the Philippine archipelago, as we have always known it, the principal territory comprising the Republic of the Philippines, enclosed by the baselines under RA No. 3046, as amended.

IV. Concluding Observations

The subject matter of this afternoon's lecture is "The Metes and Bounds of the Philippine Territory." Because our country is an archipelago or consists of islands, we do not have any land borders adjoining other states. If by "territory," therefore, "land" is contemplated, I venture to say that we hardly have any "Metes and Bounds" problem. But if by "territory" is contemplated which, in my view, it should, sovereignty or jurisdiction over maritime areas adjoining the land territory, we do have a problem of "Metes and Bounds."[11] The problem regrettably is principally attributable to our failure to amend RA No. 3046, as amended by RA No.

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[10] Based on information, as best as I am able to obtain, more than 20 islands are occupied by Vietnam, about 10 islands by China, 5 by Malaysia, 1 by Taiwan, and 9 by the Philippines.

[11] The DFA has advised that our neighboring countries, particularly Vietnam, Japan, China, Taiwan, Malaysia and Indonesia have by

5046, so that the baselines therein defined will conform to Article 47 of the LOSC. This requires technical expertise available from the National Mapping and Resource Information Authority (NAMRIA). Indeed, NAMRIA has already identified and proposed the amendments to assure compliance with Article 47 of the LOSC which are already reflected in bills pending in Congress. No valid reasons exist for our procrastination of many years.

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legislation drawn their baselines and that our exclusive economic zone overlaps with theirs. The archipelagic baselines would be critical in the negotiation and settlement of these overlapping maritime boundaries. The baselines constitute the reckoning point by which the outer limits of the Philippine maritime jurisdictions are initially determined. It is only upon the initial determination of the outer limits of the Philippine maritime jurisdictions that we would be able to *first*, determine the parameters of our negotiating position (e.g., maximum and minimum position); and *second,* to actually proceed with the negotiation and conclusion of maritime boundary delimitation agreements with the neighboring countries. As a matter of fact, the Republic of the Philippines-Indonesia Maritime Delimitation negotiations had to be suspended last December because the Philippines has yet to enact a baselines law in accordance with Article 47 of UNCLOS 111.

The Foundation of the State*

Chief Justice Reynato S. Puno

Around 200 B.C., in imperial China, Emperor Mo Tun established his kingdom. His powerful eastern neighbors tried to bully him by making some demands. They told Mo Tun: "We wish to obtain T'ou Ma's thousand-li horse," which was a stallion reputedly able to travel about three hundred miles without grass or water. Mo Tun consulted his advisers, who all disapproved. But Mo Tun gave in and said: "Why begrudge a horse to a neighbor?" So he sent the horse. Shortly after, they again demanded: "We wish one of your princesses." Mo Tun's advisers all angrily refused and prepared to go to war, but Mo Tun overruled them and said: "How can one begrudge his neighbor a young woman?" So he gave the young woman. Still later, they returned and said: "You have three hundred miles of unused land. Give them to us." Mo Tun again consulted his advisers. Majority agreed to cede the land, others did not. Mo Tun was enraged and said: *"Land is the foundation of the State. How could one give it away?"* All those who advised giving the land were beheaded.[1]

The maxim that land is the foundation of the State is as true today as it was in imperial China. Under international law, sovereignty itself, with its retinue of legal rights and duties, is

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* Closing Remarks delivered at the *Third Distinguished Lecture, Series of 2008,* held on June 27, 2008, at the Far Eastern University, Manila.

[1] Sun Tzu, The Art of War 67-68 (Samuel Griffith, Trans., 1971).

founded upon the fact of territory.[2] Also, the principle of respect for the territorial integrity of states is well established as one of the linchpins of the international system, as is the norm prohibiting interference in the internal affairs of other states.[3]

Few will disagree, therefore, that the metes and bounds of the Philippine Territory, as aptly discussed by our speakers, are important to discuss. But what gives special relevance to former Ambassador Lauro L. Baja, Jr.'s lecture today is its timeliness. We have only less than a year before the May 13, 2009 deadline set by the United Nations Convention on the Law of the Seas – or UNCLOS – to submit to the Commission on the Limits of the Continental Shelf the relevant data and information regarding the outer limits of our claim for an extended continental shelf.[4] Failure to meet this deadline may jeopardize our country's territorial claims, particularly our claim over the resource-rich Spratly Islands.[5]

It is important to remember that the delineation of Philippine territory is as much an international concern as it is our own. Six countries – the People's Republic of China, Taiwan, Vietnam, the Philippines, Malaysia, and Brunei – currently claim territorial sovereignty over the Spratly Islands. China, Taiwan, and Vietnam claim the entire group of islands; our Country and Malaysia claim

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2 Malcolm Shaw, International Law 409 (5th ed. 2003).

3 *Id.* at 410.

4 1982 United Nations Convention on the Law of the Sea, Art. 760 (7), in relation to Annex II, Art. 4.

5 *See* Vera Files, *Arroyo neglect, government in-fighting jeopardize RP's territorial claim,* Malaya, March 24, 2008.

a subgroup of islands. Brunei claims a semi-submerged reef.[6] China claims that it discovered, occupied, and used the Spratlys as fishing grounds as early as the second century B.C. Taiwan claims that after the Japanese invaded Hainan Island, the Paracel Islands, and the Spratly Islands in 1939, the Japanese placed the Spratlys under Taiwan's jurisdiction. Vietnam claims that it succeeded France's claim to the Spratlys when Vietnam was granted independence. Our country claims, first, that the islands were *terra nullius* (that is, land without an owner) when a Filipino, Tomas Cloma, discovered them in 1947; second, that the Spratly Islands were *terra nullius* following the San Francisco Peace Treaty, and, third, that the Spratly Islands lie within its archipelagic territory. Malaysia contends that the southern portion of the Islands is located in its continental shelf. Lastly, Brunei claims that Louisa Reef and Rifleman Bank, both located in the southern portion of the Spratlys, are an extension of its continental shelf.[7]

The delineation of Philippine territory is also as much a diplomatic issue as it is a legal one. Five of the claimant-countries have built military facilities and stationed troops to bolster their claims on the islands. China, which claims the whole South China Sea area, occupies seven islands and reefs, where it built several military-like structures and helicopter pads where 325 soldiers are stationed. Taiwan occupies one island with a helicopter pad and a 1,150-meter airstrip and has assigned 100 troops there. Vietnam occupies 20 islands, built a 600-meter runway and has stationed 600 troops there. Our country occupies eight islands, built a 1,300-

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6 Brian Murphy, *Dangerous Ground: The Spratly Islands and International Law,* 1 Ocean & Coastal L.J. 187, 195 (1995).

7 Lian Mito, *The Timor Gap Treaty as a Model for Joint Development in the Spratly Islands,* 13 Am. U. Int'l L. Rev. 727,737-746 (1998).

meter runway and has only 60 troops stationed there. Malaysia occupies four islands, built a 600-meter runway, dive resort and military installation, and has stationed 70 troops there.[8] Despite the claimant countries' expressed commitment to cooperation, diplomacy, and the employment of peaceful means to settle the dispute, tensions remain high and the potential for armed conflict exists.[9]

Why the Spratly Islands have become the most sought-after space in Asia is obvious. It is acknowledged by the international oil industry that the Spratlys may lie atop an "elephant" of petroleum, with potential to yield in excess of a billion barrels of oil and untold quantities of natural gas.[10] The UNCLOS gives to a state which has territorial sovereignty over an island or group of islands the exclusive right to exploit the resources of the sea bed surrounding it. The state holding territorial sovereignty over an island is allowed, under the UNCLOS, to establish a 12-mile territorial sea and a 200-mile Exclusive Economic Zone around the island.[11] There is also rich commercial fishing in the area.[12] In addition to its natural resources, the Spratlys' strategic location

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[8] *See* Alejandro Roces, *More on Spratlys,* Philippine Star, April 3, 2008.

[9] *See* Lian Mito, *The Timor Gap Treaty as a Model for Joint Development in the Spratly Islands,* 13 Am. U. Int'l L. Rev. 727, 728 (1998).

[10] Brian Murphy, *Dangerous Ground: The Spratly Islands and International Law,* 1 Ocean & Coastal L.J. 187, 188 (1995).

[11] *See Id.*, at 189.

[12] Raul Ilustre Goco, *Spratly Islands and Potential Legal Issues,* Philippine Star, March 29, 2008.

occupies a potential blocking position for ships transiting the South China Sea.[13]

How our government will handle the Kalayaan Islands dispute will bind not only the present generation but also every succeeding generation of Filipinos. If we fail to comply with the UN deadline, we stand to lose many of our rights under the UNCLOS. But mere compliance is not enough. We should guard archipelagic baselines drawn without considering the highest interests of our people. Similarly, we should guard against grossly disadvantageous agreements with the other claimant-countries which could deprive us of natural resources over which we enjoy the right to exclusive use under international law. We are all guardians of our geography; we should treat our territories in trust for the Filipino people. I thank Ambassador Baja and our resourse persons, Justice Florentino F. Feliciano, Solicitor General Estelito P. Mendoza, and Atty. Henry S. Bensurto, Jr. for their enlightening lectures and comments on the metes and bounds of the Philippine territory. I also thank the FEU by co-hosting this Third Distinguished Lecture of PHILJA.

Good day to all.

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[13] *See* Brian Murphy, *Dangerous Ground: The Spratly Islands and International Law,* 1 Ocean & Coastal L.J. 187, 189 (1995).

Supreme Court of the Philippines
Philippine Judicial Academy
in cooperation with the
International Committee of the Red Cross

ICRC

present

The Fourth Distinguished Lecture Series of 2008

THE DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW AND THE CONTINUED RELEVANCE OF CUSTOM

by

Dr. Jean–Marie Henckaerts
Head, Customary International Humanitarian Law Project
International Committee of the Red Cross

Wednesday, August 13, 2008, 2:30 P.M.
Court of Appeals Auditorium
Court of Appeals
Maria Orosa Street, Manila
and
Davao City, via Video Conferencing
(Royal Mandaya Hotel)

Program

Invocation
HONORABLE TERESITA J. LEONARDO-DE CASTRO
Associate Justice, Supreme Court

Philippine National Anthem
SUPREME COURT CHOIR

Greetings
HONORABLE CONRADO M. VASQUEZ, JR.
Presiding Justice, Court of Appeals

Opening Remarks
HONORABLE ANTONIO EDUARDO B. NACHURA
Associate Justice, Supreme Court

Message
MR. FELIPE DONOSO
Head of Delegation, International Committee of the Red Cross

Musical Intermission
SUPREME COURT CHOIR

Introduction of the Lecturer
HONORABLE MA. ALICIA AUSTRIA-MARTINEZ
Associate Justice, Supreme Court

LECTURE
DR. JEAN-MARIE HENCKAERTS

Panel of Reactors
HONORABLE ADOLFO S. AZCUNA
Associate Justice
Supreme Court

Honorable Leila M. De Lima
Chairperson
Commission on Human Rights

Presentation of Plaques of Appreciation to
Dr. Jean-Marie Henckaerts
by
Chief Justice Reynato S. Puno
Justice Antonio T. Carpio
Justice Ameurfina A. Melencio Herrera (Ret.)
Presiding Justice Conrado M. Vasquez, Jr.
Mr. Felipe Donoso

Closing Remarks
Honorable Reynato S. Puno
Chief Justice

Supreme Court Hymn
Court of Appeals Hymn

Master of Ceremonies
Honorable Leonardo A. Quisumbing
Senior Associate Justice
Supreme Court


International Committee of the Red Cross
Customary International
Humanitarian La
Issues on State and Comma
ponsibility
Supreme Court of the Philippines
Philippine Judicial Academy
International Committee of the Red Cross
ICRC
Customary International
Humanitarian Law (IHL):
Issues on State and Command Responsibility
Dr. Jean-Marie Henckaerts
Head, Customary International Humanitarian Law Project
International Committee of the Red Cross

GREETINGS*

*Presiding Justice Conrado M. Vasquez, Jr.***

The Honorable Chief Justice of the Supreme Court Reynato S. Puno
Our guest lecturer, Dr. Jean-Marie Henckaerts
the Honorable Associate Justices of the Supreme Court
Madame Justice Ameurfina Melencio Herrera, Chancellor of the Philippine Judicial Academy
Associate Justices of the Court of Appeals
Honorable Leila M. De Lima, Chairperson of the Commission on Human Rights
International Community of the Red Cross Representatives
Mr. Felipe Donoso, Head of Delegation, International Committee of the Red Cross
Distinguished Guests and Friends,

A very pleasant afternoon to all of you and welcome to this much-awaited lecture on "The Development of International Humanitarian Law and the Continued Relevance of Custom," the *Fourth Distinguished Lecture, Series of 2008,* conducted by the Supreme Court's Philippine Judicial Academy, in partnership with the Committee on Knowledge Sharing and Regional Cooperation, the Committee on Computerization and Library and the Program Management Office.

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* Delivered during the *Fourth Distinguished Lecture, Series of 2008,* held on August 13, 2008, at the Court of Appeals, Manila.

** Presiding Justice of the Court of Appeals.

We also extend the same heartfelt greetings to our other colleagues in the bench and bar in Davao City including their guests and friends, who are now simultaneously witnessing this event via video conference facilities.

All of us have been eagerly looking forward to further enriching our knowledge of the law on a subject matter which may perhaps still sound unfamiliar to most of us, yet, it is a topic so timely and relevant to the current political and social situation not only in the Philippines but also in other countries.

For us here in the Court of Appeals which auditorium has been chosen as venue of this very important lecture, we have long welcomed the physical hosting of this occasion and this opportunity to have our own members of the bench and bar feed their minds on this aspect of international law. We are also fortunate to have as our distinguished lecturer, Dr. Jean-Marie Henckaerts, an expert on the topic, who heads the Customary International Humanitarian Law Project of the International Committee of the Red Cross.

Again, we extend to all of you here and in Davao City our sincerest greetings for the day, with the hope that your attendance in the lecture this afternoon will be pleasant, enlightening, and educationally fruitful.

Thank you and good day.

THE DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW AND THE CONTINUED RELEVANCE OF CUSTOM*

Dr. Jean-Marie Henckaerts

Dr. Jean-Marie Henckaerts, a legal adviser in the ICRC Legal Division since October 1996, is currently head of the project on customary international humanitarian law, and co-author of the ICRC study on the subject. He was a member of the ICRC delegation to the Diplomatic Conference on a Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 1999). Before joining the ICRC, he was a postdoctoral research fellow at the University of Brussels (1993-1996) heading its Project on Strengthening Democracy in Societies in Transition, while serving as legal assessment commentator for the American Bar Association's Central and East European Law Initiative.

He obtained his Doctor of Juridical Science degree from the George Washington University Law School (1994); Master of Laws from the University of Georgia (1990); and Bachelor of Laws from the University of Brussels (1989).

He has taught at the University Centre for International Humanitarian Law in Geneva and at Boston University Brussels and Webster University Geneva. He has lectured at various international fora, and published books and numerous articles on his expertise.

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* Delivered during the *Fourth Distinguished Lecture, Series of 2008*, held on August 13, 2008, at the Court of Appeals, Manila.

Published in Howard M. Hensel (Ed.), *The Legitimate Use of Military Force: The Just War Tradition and the Customary Law of Armed Conflict* (Ashgate Publishing, Aldershot 2008), Chapter 5, pp. 117-133.

I. Introduction

The sources of international law are set out in Article 38 of the Statute of the International Court of Justice. This provision lists international conventions, international custom, and general principles of law as the main sources of international law in accordance with which the Court is to decide disputes submitted to it. It further stipulates that judicial decisions and the teachings of the most highly qualified publicists of the various nations are subsidiary means for the determination of rules of law. While international conventions – or treaties – establish rules "expressly recognized by the contesting States," international custom is defined in Article 38 as "evidence of a general practice accepted as law." Even though Article 38 of the Statute of the International Court of Justice does not provide for a hierarchy among the main sources of international law, there seems to be a common belief that treaties are the most important source of international law. Historically, however, customary international law has often preceded treaty law and has provided a reservoir of principles and concepts on which much of the codification of treaties is based.[1]

The history of the codification of international humanitarian law, resulting in a long series of treaties with a global scope, started in 1864 with the adoption of the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. This is less than 150 years ago and constitutes in the big scheme of human history a rather recent development. During the centuries preceding this first codification, rules regulating warfare

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[1] *See,* e.g., C.G. Weeramantry, "The Revival of Customary International Humanitarian Law," in Larry Maybee and Benarji Chakka (Eds.), *Custom as a Source of International Humanitarian Law*, ICRC, New Delhi, 2006, at 25.

did exist but up until then, these rules were based mainly on tradition and custom. It is fair to say, therefore, that humanitarian law started as a body of customary rules and remained so for centuries and that its codification is a much more recent phenomenon.

The main milestones in the codification of humanitarian law include:[2]

- 1864: First Geneva Convention protecting wounded and sick soldiers
- 1907: Hague Regulations governing the means and methods of hostilities
- 1925: Geneva Gas Protocol
- 1929: Two Geneva Conventions updating the protection of wounded and sick and adding rules on the treatment of prisoners of war
- 1949: Four Geneva Conventions updating the 1929 Conventions and adding rules on the protection of civilians and on armed conflicts "not of an international character" (common Article 3)
- 1954: Hague Convention and Protocols on the protection of cultural property and two Protocols
- 1972: Biological Weapons Convention
- 1977: Two Protocols Additional to the 1949 Geneva Conventions updating the rules on the conduct of hostilities and on the protection of war victims and providing the first international convention specifically

[2] For a more complete overview, *see* <http://www.icrc.org/ihl>.

applicable in non-international armed conflict (Additional Protocol II)

- 1980: Convention on Certain Conventional Weapons and five Protocols dealing with certain conventional weapons (e.g., land mines, booby traps, incendiary weapons, and blinding laser weapons)
- 1993: Chemical Weapons Convention
- 1997: Ottawa Convention banning anti-personnel landmines
- 1998: Statute of the International Criminal Court

Against the background of this wealth of treaty law providing a rather detailed codification of humanitarian law, one may forget that customary law actually lies at the basis of humanitarian law and continues to exist in parallel with these treaties. One of the difficulties with custom, obviously, is its proof. But this difficulty in no way diminishes the continued existence of custom, even in a highly codified field of international law such as international humanitarian law.

II. Impediments to the Application of International Humanitarian Treaty Law

Notwithstanding the high degree of codification of international humanitarian law, customary humanitarian law continues to be relevant because a number of impediments affects the application of treaty law in practice today. These impediments came to the forefront at the time of the conflicts in the former Yugoslavia and Rwanda in the first half of the 1990s. It explains why a study on customary international humanitarian law was commissioned at that time (see *infra*).

The three main impediments to the application of humanitarian treaty law today are that (1) ratification is required for treaties to apply and not all treaties are universally ratified; (2) the characterization of an armed conflict is required prior to determining which treaty law applies, and this is not always easy; and finally, but most importantly, (3) treaty law governing non-international armed conflicts is still rudimentary.

A. The Requirement of Ratification

The first impediment, the need for treaty ratification, does not affect the application of the four Geneva Conventions of 1949 since they have been universally ratified today. Nauru was the last State to ratify the Geneva Conventions and with the entry into force of the Geneva Conventions for Nauru on December 27, 2006, their applicability has truly become universal. The Conventions are binding on all States as a matter of treaty law, regardless of whether they are also part of customary international law.

The impediment of ratification is rather relevant for those treaties that are not universally ratified, such as the 1977 Protocols Additional to the Geneva Convention, the 1954 Hague Convention on the protection of cultural property in time of armed conflicts and its two Protocols and the 1980 Convention on Certain Conventional Weapons and its five Protocols.

For example, at the time of writing, March 1, 2007, the ratification record of some of the principal treaties of international humanitarian law was as follows:[3]

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[3] For a continuous update <http://www.icrc.org/ihl>.

- 1949: Four Geneva Conventions – 194 parties (universal ratification)
- 1954: Hague Convention – 116 parties
  - 1954: First Protocol – 93 parties
  - 1999: Second Protocol – 44 parties
- 1972: Biological Weapons Convention – 155 parties
- 1977: Additional Protocols
  - 1977: Additional Protocol I – 167 parties
  - 1977: Additional Protocol II – 163 parties
- 1980: Convention on Certain Conventional Weapons – 102 parties
  - 1980: Protocol I – 100 parties
  - 1980: Protocol II – 89 parties
  - 1996: Amended Protocol II – 87 parties
  - 1980: Protocol III – 94 parties
  - 1995: Protocol IV – 85 parties
  - 2003: Protocol V – 31 parties
- 1993: Chemical Weapons Convention – 181 parties
- 1997: Ottawa Convention – 153 parties
- 1998: Statute of the International Criminal Court – 104 parties

This means, for example, that although the Additional Protocols have been ratified by more than 160 States today, an impressive ratification record by any measure, an important

number of States still remain outside the framework of this treaty regime. This also implies that in different conflicts, different treaty regimes apply. This situation is not satisfactory from the perspective of the legal protection of war victims.

This also has an impact on coalition warfare where the different coalition partners have not subscribed to the same treaties. In such cases, only customary humanitarian law provides a common set of rules that is applicable to all coalition partners. Therefore, even if a State is a party to a particular treaty, it may still be relevant to know to what extent the treaty reflects customary law and is, as such, binding on coalition partners, even those which have not ratified that particular treaty.

B. The Need for Characterization of Armed Conflicts

The second impediment is that the characterization of an armed conflict is required in order to determine which treaty law applies. Depending on particular circumstances of an armed conflict, its characterization as international or non-international will inform the conclusion whether only common Article 3 or the entire body of Geneva Conventions applies, whether Additional Protocol I or Additional Protocol II applies and whether the grave breaches and serious violations of humanitarian law in Article 8(2)(a) and (b) of the Statute of the International Criminal Court are applicable or whether the serious violations of Article 8(2)(c) and (e) of the Statute are applicable. But the determination as to whether the conflict is international or non-international can be problematic in some cases. For example, the current conflicts going on in and around the Democratic Republic of the Congo or the conflicts in the former Yugoslavia are/were not easy to characterize as international or non-international because in reality they are/

were a mix of both. In these situations, the determination of the applicable treaty law may be difficult. To the extent that it is possible to characterize the various aspects of such mixed conflicts, the overlapping application of the treaty regimes applicable to international and to non-international armed conflicts to different parties engaged in the same armed conflict creates complicated legal constructions.

C. Rudimentary Treaty Law Governing Non-International Armed Conflicts

The third, and by far the most important, impediment to the application of humanitarian treaty law is that it offers only a rudimentary framework for the regulation of non-international armed conflicts, in particular with respect to the conduct of hostilities. Common Article 3 of the Geneva Conventions, the only provision of the Geneva Conventions that is formally applicable to non-international armed conflicts, does not as such deal with the conduct of hostilities. In addition, Additional Protocol II, to the extent that the State in question has ratified it, does not deal with the conduct of hostilities and a number of other issues in sufficient detail either. For example, unlike Additional Protocol I, Additional Protocol II does not provide for the obligation to distinguish between military objectives and civilian objects. As a result, it does not contain any protection for civilian objects in general, nor does it define civilian objects and military objectives. This is problematic in practice because even in non-international armed conflicts, armed forces (both State armed forces and armed opposition groups) will actually be required to limit their military operations to military objectives. Additional Protocol II lacks other key provisions on the conduct of hostilities as well, such as the prohibition and definition of

indiscriminate attacks and the obligation to take precautions in attack and against the effects of attack.

Detailed provisions on the conduct of hostilities can be found in Additional Protocol I but not in Additional Protocol II, even though the draft of the protocol did contain them. In fact, the original drafts of both protocols submitted to the conference by the ICRC were very similar.[4] Even during the diplomatic conference that led to the adoption of the Additional Protocols, Committee III which worked on the draft of Protocol II accepted a substantial number of the draft provisions submitted by the ICRC, often with consensus, sometimes with minor changes. But in the last weeks of a four-year long negotiation many parts of the Protocol were simply deleted. The main reason for this was that it transpired that consensus could be reached on a simplified text only. This simplification process consisted, in particular, of removing or revising all articles that referred to the "parties to the conflict." A good example of this diplomatic maneuver is the provision on dissemination in the Additional Protocols. Whereas Additional Protocol I imposes an obligation on all "High Contracting Parties" to disseminate the Conventions and the Protocol as widely as possible,[5] Additional Protocol II summarily requires that "[t]his Protocol shall be disseminated as widely as

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[4] ICRC, Draft Additional Protocols to the Geneva Conventions of August 12, 1949, Geneva, June 1973, published in Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977, Volume I.

[5] Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflict, Geneva, June 8, 1977, Article 83(1) [hereinafter Additional Protocol I].

possible" without specifying to whom this obligation is addressed.[6] At the time, States could not accept that "the parties to the conflict," including armed opposition groups, would have specific rights and obligations under international law, e.g., the obligation to disseminate humanitarian law. This reticence was inspired mainly by the reasoning of then newly independent States that recognition of such rights and obligations and, in general, a detailed regulation of non-international armed conflicts would encourage rebellion and secession threatening their frail sovereignty. However, recognition of rights and obligations of armed opposition groups under international law predated the Protocol by at least 30 years. Indeed, common Article 3 of the Geneva Conventions already imposed obligations on "each Party to the conflict" not of an international character and even encouraged the parties to "further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention" and so went further than Additional Protocol II. Common Article 3 specifies, on the other hand, that its application "shall not affect the legal status of the Parties to the conflict" as do a number of later treaties applicable to non-international armed conflict (see *infra*).

The simplification process of Additional Protocol II has, unfortunately, left the Protocol with an awkward structure. The basic rules on the distinction between military objectives and civilian objects and their definition are missing but detailed rules on specific objects, namely objects indispensable to the survival of the civilian population, works and installations containing dangerous forces and cultural objects and places of worship, were

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[6] *See* Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Geneva, June 8, 1977, Article 19 [hereinafter Additional Protocol II].

left in the Protocol.[7] These shortcomings in treaty law have somewhat been rectified in subsequent treaties applicable to non-international armed conflicts.

The first treaty to do so was the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices, as amended on May 3, 1996. Unlike the original Protocol, the amended Protocol was made applicable to non-international armed conflicts and includes a number of basic rules on the conduct of hostilities which are to be found in Additional Protocol I but which were deleted from the simplified text of Additional Protocol II. These include in particular:

- the prohibition to attack civilian objects[8]
- the definition of military objectives[9]
- the definition of civilians objects[10]
- the prohibition of indiscriminate use of weapons[11]

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7 *See* Additional Protocol II, *supra* note 6, Article 14 (objects indispensable to the survival of the civilian population), Article 15 (works and installations containing dangerous forces), and Article 16 (cultural objects and places of worship).

8 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, Geneva, October 10, 1980 [hereinafter CCW]; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices, as Amended, Geneva, May 3, 1996, Article 3(7) [hereinafter CCW, Amended Protocol II].

9 CCW, Amended Protocol II, *supra* note 8, Article 2(6).

10 CCW, Amended Protocol II, *supra* note 8, Article 2(7).

11 CCW, Amended Protocol II, *supra* note 8, Article 3(8).

- the definition of indiscriminate use of weapons[12]
- the principle of proportionality[13]
- the prohibition of so-called "area bombardments"[14]
- the obligation to take all feasible precautions to protect civilians[15]
- the obligation to give an effective advance warning, unless circumstances do not permit.[16]

Similar to common Article 3, the amended Protocol provides that its application "to parties to a conflict, which are not High Contracting Parties x x x shall not change their legal status or the legal status of a disputed territory, either explicitly or implicitly."[17]

Although the adoption of the Rome Statute of the International Criminal Court in 1998 constituted a giant step forward in the recognition of individual criminal responsibility for serious violations of international humanitarian law in non-international armed conflicts, it was a rather hesitant step in terms of the substantive law applicable in such conflicts. Indeed, the list of war crimes for non-international armed conflicts is considerably shorter than the list for international armed conflicts and omissions related to the conduct of hostilities include, in particular, attacks against civilian objects and attacks which cause

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12 CCW, Amended Protocol II, *supra* note 8, Article 3(8).

13 CCW, Amended Protocol II, *supra* note 8, Article 3(8)(c).

14 CCW, Amended Protocol II, *supra* note 8, Article 3(9).

15 CCW, Amended Protocol II, *supra* note 8, Article 3(10).

16 CCW, Amended Protocol II, *supra* note 8, Article 3(11).

17 CCW, Amended Protocol II, *supra* note 8, Article 1(6).

excessive incidental injury, loss of life or damage to civilians and civilian objects.[18] This is all the more surprising since the list of war crimes in non-international armed conflicts considers it a war crime to direct attacks against installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission "as long as they are entitled to the protection given to x x x *civilian objects* under the international law of armed conflict" and, thereby, recognizes the protection of civilian objects in such conflicts.[19] It can be argued that the war crime of destruction of the property of an adversary unless such destruction be imperatively demanded by the necessities of the conflict could cover cases of attacks against civilian objects.[20] It is also remarkable that while the advance in the substantive law on non-international armed conflicts was, as explained above, first made in the area of weapons, the Statute of the International Criminal Court does not explicitly criminalize any use of prohibited weapons in non-international armed conflicts.

A year later, in 1999, the second Protocol to the Hague Convention for the protection of cultural property was made applicable to non-international armed conflicts and again contained a number of provisions on the conduct of hostilities. These include:

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[18] These violations are listed as war crimes in international, but not in non-international armed conflicts. *See* Statute of the International Criminal Court, Rome, July 17, 1998, Article 8(2)(b)(ii) and (iv).

[19] Statute of the International Criminal Court, *supra* note 18, Article 8(2)(e)(iii).

[20] Statute of the International Criminal Court, *supra* note 18, Article 8(2)(e)(xii).

- the prohibition to attack civilian objects;[21]
- the definition of military objectives;[22]
- the obligation to take all feasible precautions in attack;[23]
- the obligation to give an effective advance warning whenever circumstances permit;[24] and
- the obligation to take all feasible precautions against the effects of hostilities.[25]

Finally, in December 2001, Article 1 of the Convention on Certain Conventional Weapons was modified to extend the scope of application of all then existing Protocols to non-international armed conflicts, as defined in common Article 3. As explained

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[21] Statute of the International Criminal Court, *supra* note 18, Article 6(a)(i) (*a contrario*).

[22] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, March 26, 1999, Article 1(f).

[23] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 22, Article 7 (containing a list of detailed precautionary measures very similar to those listed in Article 57(2) of Additional Protocol I).

[24] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 22, Article 6(d).

[25] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 22, Article 8 (containing a list of detailed precautionary measures very similar to those listed in Article 58(a) and (b) of Additional Protocol I).

above, until then only Amended Protocol II applied in non-international armed conflicts. Since then, Protocols I-IV have become applicable in non-international armed conflicts for those States having ratified the amendment of Article 1. This means that the provisions in the Protocols related to the conduct of hostilities which were hitherto limited to international armed conflict became applicable in non-international armed conflict as well. These include:

- the prohibition to attack civilian objects;[26]
- the definition of military objectives;[27]
- the definition of civilian objects;[28]
- the prohibition of indiscriminate use of weapons;[29]
- the definition of indiscriminate attacks;[30]
- the principle of proportionality;[31]

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[26] CCW, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, Geneva, October 10, 1980, Article 2(1) [hereinafter Protocol III].

[27] CCW, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices, Geneva, October 10, 1980, Article 2(4) [hereinafter Protocol II]; and Protocol III, *supra* note 26, Article 1(3).

[28] CCW, Protocol II, *supra* note 27, Article 2(5); and CCW, Protocol III, *supra* note 26, Article 1(4).

[29] CCW, Protocol II, *supra* note 27, Article 3(3).

[30] CCW, Protocol II, *supra* note 27, Article 3(3)(a)-(c).

[31] CCW, Protocol II, *supra* note 27, Article 3(3)(c).

– the obligation to take all feasible precautions to protect civilians;[32] and

– the obligation to give effective advance warning.[33]

It seems, therefore, that after the consolidation of many States that were newly independent in the 1970s, it was possible in the 1990s to gradually expand the scope of treaty law to non-international armed conflicts.

One notable exception is the prohibition to attack civilians which has been included *ab initio* in Additional Protocol II and in subsequent treaties.[34] Article 13 of Additional Protocol II provides that "the civilian population as such, as well as individual civilians, shall not be the object of attack x x x unless and for such time as they take a direct part in hostilities." Under the Statute of the International Criminal Court, "intentionally directing attacks against the civilian population as such or against individual civilians not taking a direct part of hostilities" constitutes a war crime in non-international armed conflict.[35] Unlike Additional Protocol I,[36] however, Additional Protocol II

[32] CCW, Protocol II, *supra* note 27, Article 3(4); CCW, Protocol III, *supra* note 26, Article 2(3); and CCW, Protocol on Explosive Remnants of War, Geneva, November 28, 2003, Articles 3-5.

[33] CCW, Protocol II, *supra* note 27, Articles 4(2)(b) and 5(2).

[34] Additional Protocol II, *supra* note 6, Article 13; CCW, Protocol II, *supra* note 27, Article 3(2); CCW, Amended Protocol II, *supra* note 8, Article 3(7); CCW Protocol III, *supra* note 26, Article 2(1); and Statute of the International Criminal Court, *supra* note 18, Article 8(2)(e)(i).

[35] Statute of the International Criminal Court, *supra* note 18, Article 8(2)(e)(i).

[36] *See* Additional Protocol I, *supra* note 5, Article 50.

does not contain a specific definition of the terms "civilian population" and "civilian." This is due to the fact that, to this day, practice in non-international armed conflicts is ambiguous as to whether, for the purposes of the conduct of hostilities, members of armed opposition groups are considered as members of armed forces or as civilians. In particular, it is not clear whether members of armed opposition groups are considered civilians who lose their protection from attack when directly participating in hostilities or whether members of such groups are considered to be liable to attack as such. This lack of clarity is also reflected in treaty law. As mentioned, Additional Protocol II does not contain a definition of civilians or of the civilian population even though these terms are used in several provisions.[37] Subsequent treaties, applicable in non-international armed conflicts, similarly use the terms civilians and civilian population without defining them.[38]

III. Need to Clarify the Content of Customary International Humanitarian Law

The brutal wars in the former Yugoslavia and Rwanda constituted moments of deep crisis for the credibility of international humanitarian law. The world witnessed the unfolding horrors in these conflicts but was unable to stop them and to enforce the

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[37] Additional Protocol II, *supra* note 6, Articles 13-15 and 17-18.

[38] *See,* e.g., CCW, Amended Protocol II, *supra* note 8, Article 3(7)–(11); CCW, Protocol III, *supra* note 26, Article 2; Ottawa Convention on the Prohibition of Anti-personnel Mines, Preamble; Statute of the International Criminal Court, *supra* note 18, Article 8(2)(e)(i), (iii) and (viii).

law. One of the cardinal principles of humanitarian law – the distinction between civilians and combatants and between civilian objects and military objectives – was repeatedly and willfully violated in these conflicts and this with apparent impunity. Something had to be done. To this effect, the Intergovernmental Group of Experts for the Protection of War Victims met in Geneva in January 1995 and adopted a series of recommendations aimed at enhancing respect for humanitarian law, in particular by means of preventive measures that would ensure better knowledge and more effective implementation of the law. Recommendation II of the Intergovernmental Group of Experts proposed that:

> The ICRC be invited to prepare, with the assistance of experts in IHL [international humanitarian law] representing various geographical regions and different legal systems, and in consultation with experts from governments and international organizations, a report on customary rules of IHL applicable in international and non-international armed conflicts, and to circulate the report to States and competent international bodies.[39]

In December 1995, the 26th International Conference of the Red Cross and Red Crescent, at which all States party to the Geneva Convention are present and have a vote, endorsed this recommendation and officially mandated the ICRC to prepare a report on customary rules of international humanitarian law applicable in international and non-international armed conflicts.[40]

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[39] Meeting of the Intergovernmental Group of Experts for the Protection of War Victims, Geneva, January 23-27, 1995, Recommendation II, *International Review of the Red Cross*, No. 310, 1996, p. 84.

[40] 26th International Conference of the Red Cross and Red Crescent, Geneva, December 3-7, 1995, Resolution 1, International

Nearly 10 years later, in 2005, after extensive research and widespread consultation of experts, this report, now referred to as the study on customary international humanitarian law, has been published.[41]

The Conference gave this mandate to the ICRC in particular in the light of the rudimentary nature of treaty law governing non-international armed conflicts. Indeed, both Yugoslavia and Rwanda had ratified Additional Protocol II when their armed conflicts broke out but, as explained above, the Protocol contains many gaps. Therefore, States wanted to know to what extent these gaps had been filled by customary international law. The mandate was thus a request to the ICRC to assist States in the difficult and time-consuming task of clarifying the content of customary international law.

As requested by the Conference, the ICRC circulated the study to States and competent bodies – each office of the Legal Advisor of Foreign Affairs of all States, all national societies of the Red Cross and Red Crescent, all national humanitarian law committees and numerous international organizations received a copy. The study is meant to be a tool at the disposal of lawyers, judges, and academics who in their daily work need to know the content of customary international humanitarian law. Given the difficulty in determining the content of customary international law and the time needed to collect and assess practice and *opinio juris*, it can be hoped that the study will achieve its aim.

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humanitarian law: From law to action; Report on the follow-up to the International Conference for the Protection of War Victims, *International Review of the Red Cross*, No. 310, 1996, p. 58.

41 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, 2 Volumes, Volume I: Rules, Volume II: Practice (2 Parts), Cambridge University Press, 2005.

IV. Practical Relevance of Customary International Humanitarian Law Today

In the light of the impediments to the application of humanitarian treaty law, customary humanitarian law continues to be of practical relevance in various ways. Below are few examples of recent reliance on customary humanitarian law and of areas of humanitarian law where customary law continues to be relevant.

A. Military Operations

Customary humanitarian law continues to be an important framework for the conduct of hostilities, including in very recent and current armed conflicts. This was the case, for example, during the US invasion of Afghanistan in 2001 and of Iraq in 2003 as neither Afghanistan, nor Iraq, nor the US are party to Additional Protocol I. A similar situation prevailed during the 2006 conflict between Israel and Lebanon, and particularly against Hezbollah forces, as well as during the intervention in early 2007 of Ethiopian and US forces in Somalia.

With respect to non-international armed conflict, customary humanitarian law provides an important framework in both States party to Additional Protocol II, such as Colombia, and *a fortiori* in those not party to Additional Protocol II, such as Sri Lanka.

In these conflicts, State armed forces and, where applicable, non-State armed groups, are bound to respect customary humanitarian law. Customary humanitarian law will be an important yardstick to be used by civil society in the States concerned, as well as by third States and international organizations in the exercise of their obligation to ensure respect for humanitarian law.

Finally, in coalition warfare, such as the current military operations of the US and its partners in Iraq and the operations of NATO member States in Afghanistan, as part of the International Security Assistance Force in Afghanistan (ISAF), customary humanitarian law represents common rules applicable to all coalition partners. This stands in contrast to treaty obligations which may vary greatly among coalition partners. Joint operations must therefore comply with those common rules, although individual partners may still have wider obligations under the respective treaties they have ratified.

B. Fact-Finding

Since customary international law continues to be one of the main legal frameworks in many armed conflicts, it is not surprising that fact-finding missions related thereto also operate within that framework. One example of this was the work of the International Commission of Inquiry on Darfur in 2004-2005.[42] As the Commission reviewed facts related to the conflict in Darfur at a time when Sudan was not yet a party to Additional Protocol II, customary international humanitarian law applicable in non-international armed conflicts was of particular relevance for the work of the Commission. More recent examples include the report of several special Rapporteurs of the UN Human Rights Council and the Representative of the Secretary-General on Internally Displaced Persons on their mission to Lebanon and Israel in the wake of the 2006 conflict.[43]

[42] *See* Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, pursuant to Security Council Resolution 1564 of September 18, 2004, Geneva, January 25, 2005.

[43] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston; the Special Rapporteur on the

C. Judicial and Arbitration Proceedings

1. National Judicial Proceedings

In many States, customary international law may be invoked directly before national courts and tribunals. Such is the case in Israel where the Supreme Court has on several occasions pronounced itself on the customary nature of rules of humanitarian law.[44] More recently, it has done so with reference to the ICRC study on the subject. For example, in a judgment of December 2005 on the so-called neighbor procedure used by the Israel Defence Forces (IDF) to capture persons, the Israeli Supreme Court referred with approval to the study's findings on the customary nature of the precautions to give effective, advance warning (Rule 20) and to remove civilians from the vicinity of military objectives (Rule 24) as well as the prohibition of human shields (Rule 97).[45] Similarly, in its judgment of December 2006

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right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt; the Representative of the Secretary-General on human rights of internally displaced persons, Walter Kälin; and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, Mission to Lebanon and Israel (September 7-14, 2006), UN Doc. A/HRC/2/7, October 2, 2006, para. 22 and following.

[44] *See*, e.g., Israel, The Supreme Court Sitting as the High Court of Justice, *Affo and others v. Commander of the IDF in the West Bank*, December 10, 1988, HCJ 785/87, HCJ 845/87, HCJ 27/88, 29 ILM 139 (1990) (concerning the customary nature of Article 49 of the Fourth Geneva Convention).

[45] Israel, The Supreme Court Sitting as the High Court of Justice, *Adalah and others v. GOC Central Command, IDF and others*, June 23, 2005, HCJ 3799/02, paras 20, 21 and 24.

on the policy of targeted killing, the Israeli Supreme Court referred with approval to the study's conclusions concerning the principle of distinction between civilians and combatants and between civilian objects and military objectives (Rules 1 and 7), the principle that civilians are protected against attack, unless and for such time as they take a direct part in hostilities (Rule 6), the prohibition of indiscriminate attacks (Rule 11) and the prohibition to cause excessive incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof (Rule 14).[46]

2. International Judicial Proceedings

At the international level, the International Criminal Tribunal for the former Yugoslavia (ICTY) increasingly operates on the basis of Article 3 of its Statute which gives the Tribunal jurisdiction over "violations of the laws or customs of war." Any conviction based on Article 3 of the Statute requires proof that the crime in question is part of customary international law, lest the principle of legality be violated (*nullum crimen, nulla poena sine lege previa*).[47] For example, in *Prosecutor v. Hadzihasanovic*, the appeals chamber of the Tribunal concluded that the prohibition of wanton destruction of cities, plunder of public or private property, attacks against cultural property, and more broadly, of attacks on civilian objects were customary norms whose violation,

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[46] Israel, The Supreme Court Sitting as the High Court of Justice, *The Public Committee against Torture in Israel and others v. The Government of Israel and others*, December 13, 2006, HCJ 769/02, paras 23, 29-30 and 41-42; see also references to the commentary of the Study in paras 33-34 and 40 and 46.

[47] *See* Theodor Meron, "The Revival of Customary Humanitarian Law," *American Journal of International Law*, Vol. 99, p. 817.

including in non-international armed conflict, entails individual criminal responsibility under customary international law. In doing so, it cited practice recorded in Volume II of the ICRC study on customary humanitarian law, rather than the black-letter rules in Volume I of the study.[48] Earlier in the same case, the appeals chamber had to determine whether it could apply the principles of command responsibility to war crimes committed in a non-international conflict. Since Additional Protocol II is silent on the matter of command responsibility, the appeals chamber examined whether command responsibility applied in non-international armed conflict on the basis of customary international law and concluded that it did.[49]

Another example of reliance on customary humanitarian law can be found in the case law of the Special Court for Sierra Leone which found that the recruitment of child soldiers was a war crime, including in non-international armed conflicts, under customary international law.[50]

3. International Arbitration

One notable example of the relevance of customary humanitarian law in arbitration proceedings is the work of the Ethiopia-Eritrea

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[48] ICTY, Appeals Chamber, *Prosecutor v. Hadzihasanovic and Kubura*, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal, IT-01-47-AR73.3, March 11, 2005, paras 29-30, 38 and 45-46.

[49] ICTY, Appeals Chamber, *Prosecutor v. Hadzihasanovic and Kubura*, Decision on Command Responsibility, IT-01-47-AR72, July 16, 2003, para. 31.

[50] Special Court for Sierra Leone, Appeals Chamber, *Prosecutor v. Sam Hinga Norman*, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), Case No. SCSL-2004-14-AR72(E), May 31, 2004.

Claims Commission. This Commission was set up after the end of the armed conflict between Ethiopia and Eritrea in 2000 to:

> decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for Its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.[51]

The relevance of customary humanitarian law for the work of the Commission is self-evident as neither the Geneva Conventions nor Additional Protocol I were applicable during the conflict as Eritrea had not ratified any of these treaties at the time. The Commission therefore decided early on that it would work on the assumption that the Geneva Conventions, as well as Additional Protocol I, represented customary international law. However, if either party to the arbitration proceedings wished to challenge these assumptions it would have the burden of proof with respect to the Geneva Conventions, whereas the Commission would have the burden of proof with respect to Additional Protocol I.[52]

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[51] Agreement between the Governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia, Algiers, December 12, 2000, Article 5(1).

[52] *See* Eritrea-Ethiopia Claims Commission, Partial Award, *Prisoners of War, Eritrea's Claim 17*, July 1, 2003, para. 41 and Partial Award, *Prisoners of War, Ethiopia's Claim* 4, para. 32 (concerning the Geneva Conventions); Eritrea-Ethiopia Claims Commission, Partial

Hence, in a Partial Award of December 19, 2005, relating to issues on the conduct of hostilities, the Commission confirmed the customary status of a number of provisions of Additional Protocol I.[53] The Commission concluded, for example, that it could use Article 54(2) of Additional Protocol I (concerning attacks against objects indispensable for the survival of the civilian population) to assess the legality of an aerial bombardment of a water sanitation plant near Asmara by the Ethiopian air force because that provision of Additional Protocol I reflected customary international law.[54]

D. Review of New Weapons, Means or Methods of Warfare

According to Article 36 of Additional Protocol I:

> In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

Award, *Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22,* April 28, 2004, para. 23 and Partial Award, *Central Front, Ethiopia's Claim 2,* para. 17 (concerning Additional Protocol I).

[53] Eritrea-Ethiopia Claims Commission, Partial Award, *Western Front, Aerial Bombardment and Related Claims*, December 19, 2005, para. 95 (finding Articles 48, 51(2), 51(4)-(5), 52, 57 and 58 of Additional Protocol I to be customary).

[54] Eritrea-Ethiopia Claims Commission, Partial Award, *Western Front, Aerial Bombardment and Related Claims*, December 19, 2005, paras 104-105 (finding Article 54(2) of Additional Protocol I to be customary).

This provision implies that States have to verify the legality of new weapons, means or methods of warfare, in accordance with the Protocol and with their other treaty obligations, as well as in accordance with their obligations under customary humanitarian law. That is why the guide to the legal review of new weapons, means and methods of warfare, published by the ICRC in 2006, proposed that the legal framework of rules to be applied to new weapons, means and methods of warfare, include prohibitions or restrictions on specific weapons and general prohibitions or restrictions on weapons, means and methods of warfare under customary international law.[55] In this respect, relevant prohibitions and restrictions can be found in the ICRC's study on customary international humanitarian law.[56]

Notwithstanding that it is only explicitly mentioned in Additional Protocol I, the obligation to submit new weapons, means or methods of warfare to a legal review is not only incumbent upon States party to Additional Protocol I. It seems self-evident that any State wishing to comply with its humanitarian law obligations has to proceed to such a review, for otherwise it cannot ensure respect for humanitarian law by its armed forces. Unfortunately, however, most States today, both States party to Additional Protocol I and States not party, still lack a mechanism for the legal review of new weapons, means, or methods of warfare.

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[55] *See A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977*, ICRC, January 2006, Revised November 2006, pp. 13-14 and 16.

[56] *See Customary International Humanitarian Law*, *supra* note 41, Rules 12-14, 44-45 and 70-86.

E. National Legislation

Pursuant to customary international law, States have an obligation to investigate war crimes allegedly committed by their nationals or armed forces, or on their territory and, if appropriate, prosecute the suspects.[57] In order to discharge this obligation, States will need a proper legislative framework concerning war crimes, regardless of whether or not they are party to treaties requiring the adoption of war crimes legislation, such as the Geneva Conventions and Additional Protocol I.[58]

In addition, under customary international law, States may vest universal jurisdiction in their national courts over war crimes.[59] As a result, if States do not wish to see their nationals prosecuted abroad but instead ask for their extradition to stand trial at home, they will have to show that they have proper war crimes legislation.

Finally, under the principle of complementarity, the International Criminal Court will only prosecute a suspect if the State concerned is either unable or unwilling to do so.[60] In order for a State to show that it is able to prosecute suspected war criminals, it will be required to have proper war crimes legislation.

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[57] *See Customary International Humanitarian Law*, *supra* note 41, Rule 158.

[58] *See* First Geneva Convention, Article 49; Second Geneva Convention, Article 50; Third Geneva Convention, Article 129; Fourth Geneva Convention, Article 146; Additional Protocol I, Article 85.

[59] *See Customary International Humanitarian Law*, *supra* note 41, Rule 157.

[60] Statute of the International Criminal Court, *supra* note 18, Article 17.

The fact that the Security Council can refer cases to the Court involving States which are not party to the Statute of the Court implies that all States are potentially concerned by the jurisdiction of the International Criminal Court. Therefore, all States should adopt national war crimes legislation, regardless of being a party to specific treaties, including the Statute of the International Criminal Court, or not.

V. Conclusion

The ever-increasing codification of humanitarian law, starting in 1864, means that this part of international law is today highly codified. Nevertheless, in the big picture of the history of mankind and of warfare, this codification is still a rather recent phenomenon. Customary rules have regulated warfare for centuries prior to the first codification and continue to do so today. Impediments to the application of the wealth of existing treaty law have contributed to a "revival" of customary humanitarian law. Hence, any description or analysis of humanitarian law that does not include an important section on customary humanitarian law will be considered deficient and, in the end, of limited practical value in today's world.

Command Responsibility: Quo Vadis?*

Chief Justice Reynato S. Puno

Command responsibility is an important legal tool for international criminal tribunals in trying high-ranking superiors for crimes committed by often unidentified subordinates.[1] As our distinguished speaker Dr. Jean-Marie Henckaerts has just demonstrated, the command responsibility doctrine—that military and other superiors may be held criminally responsible in respect of the acts of their subordinates—is well-established in conventional and customary international law.[2]

As stated by Chairperson Leila M. de Lima, the doctrine of command responsibility has echoes in the Articles of War. The principle is also echoed under Philippine law. Executive Order No. 226 dated February 15, 1995, entitled "Institutionalization of the Doctrine of 'Command Responsibility' in All Government Offices, Particularly at All Levels of Command in the Philippine National Police and Other Law Enforcement Agencies," holds

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* Closing Remarks delivered at the *Fourth Distinguished Lecture, Series of 2008*, held on August 13, 2008, at the Court of Appeals, Manila.

1 Joakim Dungel, *Command Responsibility in International Criminal Tribunals,* in A Conspiracy of Hope: Report on the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances (2007), 149.

2 *Id.* at 150, *citing Prosecutor v. Delalic et al.,* Case No. IT-96-21-A, Judgement, February 20, 2001, par. 195.

accountable for "neglect of duty," under the doctrine of "Command Responsibility," those government officials or supervisors, or officers of the Philippine National Police or of any other law enforcement agency, if they have knowledge that a crime or offense shall be committed, is being committed, or has been committed by their subordinates, or by others within their area of responsibility and, despite such knowledge, did not take preventive or corrective action either before, during, or immediately after its commission.[3]

Last year, the many extralegal killings and enforced disappearances of political activists and members of the media that have plagued our country since the start of the new millennium have caused a reexamination of the doctrine of command responsibility. Thus, in last year's national consultative summit on extrajudicial killings and enforced disappearances, Father Joaquin Bernas urged the government to devise ways of implementing the doctrine of command responsibility for the commission of humanitarian abuses.[4] Father Bernas recalled that during the deliberations of the 1986 Constitutional Commission, there was a proposal to adopt command responsibility as a constitutional principle. The proposal, however, met with vigorous objections on the ground of due process and the principle of *nullum crimen sine lege*. No law, no crime. Father Bernas suggested that these objections be studied in the light of the current state of domestic and international law.[5]

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[3] For further information <http://www.congress.gov.ph/download/researches/rrb_0307_3.PDF> (last accessed August 6, 2008).

[4] Fr. Joaquin Bernas, SJ, *Command Responsibility,* in A Conspiracy of Hope: Report on the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances (2007), 119.

[5] *Id.* at 122.

Another constitutional expert who spoke at the national consultative summit, Dean Pacifico Agabin, voiced out the view that the doctrine of command responsibility should be applied to as high up the chain of command as the President, who is the Commander in Chief of the armed forces.[6] Dean Agabin proposed, first, that the Supreme Court adopt the doctrine of command responsibility as enunciated in the Rome Statute; and, second, that the presumption of knowledge adopted by the President in Executive Order 226, Series of 1995, and by the Armed Forces of the Philippines should be included as a rebuttable presumption under Rule 131, Section 3 of the Rules of Court, in connection with Section 28(b)(i) of the Treaty of Rome, which requires that:

> the superior knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes.

He opined that if the recommendation were to be adopted, the President would be held accountable for the omission or inaction as Commander in Chief to take all necessary and reasonable measures within his or her power to prevent; or to repress the commission of irregularities and illegal acts, or to direct the commanding officers concerned to investigate and prosecute the perpetrators of the crimes. He concluded that this would create a legal duty on the part of the President, as Commander in Chief, to take necessary measures to prevent human rights violations or to punish the perpetrators. The Supreme Court,

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[6] Pacifico Agabin, *Accountability of the President Under the Command Responsibility Doctrine,* in A Conspiracy of Hope: Report on the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances (2007), 123.

however, avoided the issue when it issued the Rule on the Writ of Amparo. It opted to give Congress, instead, the first crack at determining the metes and bounds of command responsibility.

The Melo Commission, the independent commission created by President Gloria Macapagal-Arroyo to address media and activist killings, also recommended that the President propose legislation that would penalize superior government officials who encourage, incite, tolerate, or ignore any extrajudicial killing committed by their subordinates. The Commission suggested that the failure of such government officials to prevent an extrajudicial killing if they had a reasonable opportunity to do so, or their failure to investigate and punish their subordinates, or to otherwise take appropriate action to deter or prevent the commission of the crime or to punish their erring subordinates, should be criminalized. The Commission suggested that even "general information" like media reports that would place the superiors on notice of possible unlawful acts of their subordinates, should be sufficient to hold the superiors criminally liable if they failed to investigate and punish those subordinates.[7]

We have bills filed in the Senate and in the House of Representatives. Unfortunately, none of these bills have come into fruition. Evidently, these have failed to negotiate the various slippery slopes of command responsibility. Meanwhile, the killings and disappearances continue. Worse, a *de facto* war has been rekindled in the south between the government forces and the Moro Islamic Liberation Front, a war where several have died and thousands rendered homeless. But, while the guns are firing, the laws are silent.

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[7] Independent Commission to Address Media and Activist Killings Report, at p. 71 (The Melo Report).

In one of his most memorable passages, the late former United States Supreme Court Justice Oliver Wendell Holmes remarked:

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.[8]

Just as the Court's expanded powers under the 1987 Constitution were compelled by the human rights abuses of the martial law regime, so are the recent initiatives of the different departments of our government – like the new rules on the Writs of Amparo and Habeas Data – the products of the new forms of human rights abuses that stalk our country today. The suggestions from our different speakers, especially the views of our distinguished lecturer with respect to the doctrine of Command Responsibility – its application, scope, and limitations – should also be viewed through the lens that inspired them: the highest respect for the highest of rights—the right to life. We thank all of them for bringing to us the latest worldviews on command responsibility.

Thank you and good day.

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[8] <http://www.law.harvard.edu/library/collections/special/online-collections/common_law/index.php> (last accessed August 6, 2008).

Supreme Court of the Philippines

and the

Philippine Judicial Academy

present

The Fifth Distinguished Lecture Series of 2008

COMMAND RESPONSIBILITY: FROM INTERNATIONAL CRIMINAL TRIBUNALS TO NATIONAL JURISDICTIONS

by

Professor Fausto Pocar

President, International Criminal Tribunal for the Former Yugoslavia

Thursday, November 27, 2008, 2:30 P.M.
Court of Appeals Auditorium
Court of Appeals
Maria Orosa Street, Manila
and
Davao City, via video conferencing
(Royal Mandaya Hotel)

Program

Invocation
Honorable Conchita Carpio Morales
Associate Justice, Supreme Court

Philippine National Anthem
Supreme Court Choir

Greetings
Honorable Conrado M. Vasquez, Jr.
Presiding Justice, Court of Appeals

Opening Remarks
Honorable Antonio Eduardo B. Nachura
Associate Justice, Supreme Court

Musical Intermission
Supreme Court Choir

Introduction of the Lecturer
Honorable Leonardo A. Quisumbing
Associate Justice, Supreme Court

LECTURE
Professor Fausto Pocar

Panel of Reactors
Honorable Adolfo S. Azcuna
Associate Justice
Supreme Court

Honorable Leila M. De Lima
Chairperson
Commission on Human Rights

Presentation of Plaques of Appreciation
by
Chief Justice Reynato S. Puno
Justice Antonio T. Carpio
Presiding Justice Conrado M. Vasquez, Jr.
Justice Ameurfina A. Melencio Herrera (Ret.)

Closing Remarks
Honorable Reynato S. Puno
Chief Justice

Supreme Court Hymn
Court of Appeals Hymn

Master of Ceremonies
Dr. Purificacion V. Quisumbing
Chairperson
Department of International and Human Rights Law
Philippine Judicial Academy


Supreme Court of the Philippines
Philippine Judicial Academy
Distinguished Lecture on
"COMMAND RESPONSIBILITY:
from International Criminal Tribunals to
National Jurisdictions"
Friday, 27 November 2008, 2:30PM
Court of Appeals Auditorium
Court of Appeals, Manila
Hon. FAUSTO POCAR
Hon. ADOLFO S.
AZCUNA

Opening Remarks*

*Justice Antonio T. Carpio***

Chief Justice Reynato S. Puno
My esteemed colleagues in the Court
Appeal Judge Fausto Pocar
Chancellor Ameurfina A. Melencio Herrera
Excellencies of the Diplomatic Corps
Justices of the Court of Appeals, Sandiganbayan, and
Court of Tax Appeals
My co-workers in the Judiciary
Distinguished guests, friends,

Good afternoon.

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* Opening Remarks delivered at the *Fifth Distinguished Lecture, Series of 2008*, held on November 27, 2008, at the Court of Appeals Auditorium, Court of Appeals, Manila.

** Born in Davao City, Philippines, Justice Antonio T. Carpio was sworn in as member of the Supreme Court on October 26, 2001. He obtained his law degree from the College of Law of the University of the Philippines where he graduated valedictorian and cum laude in 1975. He placed sixth in the 1975 Bar Examinations. He earned his undergraduate degree in Economics from Ateneo de Manila University in 1970.

As a student, he was Chairman of the Editorial Board of the Philippine Law Journal of the U.P. College of Law and Editor in Chief of *The Guidon,* the school paper of Ateneo de Manila University. He was also Managing Editor of the *Philippine Collegian,* the school paper of the University of the Philippines.

On behalf of the Supreme Court, I warmly welcome everyone to this *Fifth Distinguished Lecture for 2008*. This lecture is jointly sponsored by the Supreme Court and the Philippine Judicial Academy. The *Distinguished Lecture Series of the Supreme Court* is the most prestigious law lecture in the Philippines. For this afternoon's lecture, which is the last lecture for this year, we have an internationally renowned legal scholar, Appeal Judge Fausto Pocar, who will enlighten us on the topic *Command Responsibility: From International Criminal Tribunals to National Jurisdictions*.

Fresh out of law school, Justice Carpio entered private practice until 1992. He was a Professorial Lecturer of the U.P. College of Law (1983-1992) when he was appointed Chief Presidential Legal Counsel, Office of the President of the Philippines.

Justice Carpio was a member of the Board of Regents of the University of the Philippines (1993-1998), and of the Technology Transfer Board of the Department of Industry (1978-1979). He served as Special Representative of the Department of Trade for textile negotiations (1980-1981); as President of the Integrated Bar of the Philippines Pasay-Makati Chapter (1985-1986), as Director of the U.P. Law Alumni Association (1984-1989), and as Director of the Philippine Bar Association (1989-1990).

For his "distinguished and exemplary service" to the Republic, Justice Carpio was awarded in 1998 the Presidential Medal of Merit by then President Fidel Ramos. In 1991, he received the Outstanding Achievement Award in Law from the Ateneo de Manila Alumni Association. In 2002, he was the recipient of the Distinguished Alumnus Award from the Ateneo de Davao Alumni Association. In 2009, he was conferred a Doctorate of Laws, *honoris causa*, by the Ateneo de Davao University.

Justice Carpio is the Chair of both the Second Division and the Senate Electoral Tribunal in the Supreme Court.

The topic is timely, both domestically and internationally. Domestically, the concept of command responsibility has slowly crept into the consciousness of the Filipino people because of the extralegal killings supposedly attributed to agents of the State. Command responsibility was one of the major topics discussed in the National Summit on extralegal killings initiated by Chief Justice Puno last July 2007.

Internationally, the creation of *ad hoc* international criminal tribunals in the wake of internal armed conflicts in countries like the former Yugoslavia and Rwanda has greatly developed and refined the concept of command responsibility, culminating in the adoption of the Rome Statute that created the International Criminal Court. The Philippines has not ratified the Rome Statute. However, our Constitution adopts customary international law as part of the law of the land. It is well recognized that the doctrine of command responsibility is part of customary international law.

The concept of command responsibility goes back deep into the mist of history. In the sixth century B.C., Sun Tzu wrote in *The Art of War* that the commander has the duty to ensure that his subordinates behave in a civilized manner during an armed conflict. The first trial based on this commander's duty took place in 1474 when one of the knights of Charles the Bold of Burgundy was convicted for failing in his duty as a knight to prevent soldiers under his command from committing war crimes.

The trial that gave rise to the first truly legal definition of command responsibility – called the Yamashita Standard – was held in the Philippines in the case of *In Re Yamashita*. General Yamashita was tried in Manila in 1945 by a military tribunal of five American generals. He was convicted, and hanged, for failing

to discharge his duty as commander – the duty to prevent his soldiers from committing atrocities against civilians in Luzon. The original records of the trial of Yamashita are still on file with our Supreme Court Library, which plans to digitize them for easier access by researchers.

This afternoon, we are delighted that no less than the former President of the International Criminal Tribunal for the Former Yugoslavia will bring us up to date on the latest developments on the doctrine of command responsibility.

I am sure you will all find this lecture fascinating and worthwhile. Thank you and good day.

COMMAND RESPONSIBILITY: FROM INTERNATIONAL CRIMINAL TRIBUNALS TO NATIONAL JURISDICTIONS*

Professor Fausto Pocar

Judge Fausto Pocar is a Professor of International Law at the University of Milan, where he had served as Dean of the Faculty of Political Sciences and as Vice Rector. He became a member of the International Criminal Tribunal for the former Yugoslavia in 2000, serving as Vice President (2003), and as President (2005-2008).

Since his appointment to the ICTY, he has served first as a Judge in a Trial Chamber, sitting on the first case of rape as a crime against humanity and later in the Appeals Chamber. He is also Appeals Chamber Judge of the International Criminal Tribunal for Rwanda, participating in the adoption of the final judgments in several ICTY and ICTR cases heard at The Hague and at Tanzania.

His 16-year experience in the UN (1984-2000) includes being rapporteur of the Human Rights Committee under the International Covenant on Civil and Political Rights, and being Special Representative of the UN High Commissioner for Human Rights for visits to Chechnya and the Russian Federation. He has also chaired the informal working group that drafted the Declaration on the rights of national or ethnic, religious or linguistic minorities adopted in 1992 by the General Assembly.

A prolific author of publications on International Law, he has also lectured at The Hague Academy of International Law.

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* Delivered at the *Fifth Distinguished Lecture, Series of 2008,* held on November 27, 2008, at the Court of Appeals Auditorium, Court of Appeals, Manila.

I. Introduction

First of all, I would like to thank you very much for your warm welcome and for having invited me to deliver this Distinguished Lecture.

The starting point of most of the international scholars' books and articles focusing on Command Responsibility (also defined as Superior Responsibility in the past decades, in order to account for its civilian nature) is usually exactly Manila, the very city where I have the honor to address you today. Indeed, the first world-famous judgment focusing on command responsibility was rendered in the trial against Tomoyuki Yamashita, the commanding general of the Japanese Army in the Philippines who was convicted and sentenced to death by a US military commission for the atrocities committed by the Japanese troops under his command. The case eventually reached the US Supreme Court, which upheld the conviction in a split decision over vigorous dissent.

The origins of the superior responsibility doctrine can be traced back to principles espoused much before that date, however, and they have their roots in the duties of military commanders to ensure discipline in their troops. Moreover, at least in the Western tradition, at least since the 17th Century, a rule is deemed to exist that public officials, up to the highest level of authority, must answer when they do not prevent certain illegal acts by their subordinates:

> *Ex neglectu tenentur reges ac magistratus qui ad inhibenda latrocinia et piraticam non adhibent ea quae possunt ac debent remedia.*[1]

[1] Hugo Grotius, *De iure belli ac pacis libri tres,* Book 2, Ch. XVII, para. 20 (1625), *See* also Ch. XXI, para. 2.

Contemporary imposition of an affirmative duty on military commanders to prevent war crimes is usually traced to the Hague Conventions of 1907, whereby it was stated that "laws, rights and duties of war" apply to armies, militias, and volunteer corps that are "commanded by a person responsible for his subordinates," and where it was affirmed are occupants of foreign territory, is required to "take all measures in his power to restore, and ensure, as far as possible, public order and safety."[2] However, it was not until the period after the Second World War that this doctrine was clearly linked to **criminal responsibility** and obtained a more precise meaning, which was further clarified by the jurisprudence of the *ad hoc* International Criminal Tribunal, and which ultimately served as the basis of Article 28 of the Rome Statute.

Together with the *Yamashita* case, of course, Nuremberg also gave its contribution to the evolution of the doctrine, notably with the *List and others* case (also known as *Hostages* case), and the *von Leeb and others* case (also known as *High Command* case). However, for some reasons, the *Yamashita* case is much more quoted and referred to than its Nuremberg analogues, probably because the criticism of the Yamashita decision was immediate and has not abated in the intervening half-century. Indeed, in many ways, the evolution of the doctrine of command responsibility has consisted of reactions and counter-reactions to the *Yamashita* case.

The military commission which judged Yamashita based his conviction on the fact that the atrocities committed by the Japanese army "were not sporadic in nature but in many cases were methodically supervised by Japanese officers and non-

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[2] Second Peace Conference of the Hague, Arts. 1 and 43.

commissioned officers" and that General Yamashita "failed to provide effective control over his troops as required by the circumstances." The criticism addressed toward the judgment focuses essentially on two points.

First, as to the *mens rea,* it has been argued that, while the evidence of widespread and vicious crimes by the Japanese forces was clear, there was no sufficient evidence of General Yamashita's **knowledge of, and involvement in** these crimes. Some critics, including Justice Rutledge in his dissent before the US Supreme Court, have said that the commission applied a standard tantamount to strict liability or guilt by association. Second, it has been claimed that the *Yamashita* case set a too low (and in any event totally unclear) standard, as to the level of effective control a commander must possess to be held liable pursuant to this doctrine. According to Justice Murphy's dissent, for example, Yamashita was unable to do anything to control his troops, owing to the chaotic circumstances of the battle and the fact that US military counter-offensive had effectively cut off his chain of command and communication. To require that he prevented and punished crimes in such a situation also amounted to effectively imposing on him something akin to strict liability.

It should be said immediately that the doctrine of superior responsibility has developed considerably since 1946. Each element of this form of liability has been deeply explored and clarified; the standards of both *mens rea* and effective control have been progressively refined; a rich body of case law has been produced and evidentiary requirements for holding a superior responsible have been abundantly tested in practice.

The work of the *ad hoc* international criminal tribunals have been crucial in drawing the trajectories of this evolution, together

with the contribution of scholars, and the commitment of the international community to provide a codification of the requirements for a superior to be held criminally responsible under the law of nations.

After analyzing the concept of superior responsibility under customary international law pursuant to International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) jurisprudence, I will deal with its incorporation in the Statute of the International Criminal Court. While there are a few differences between these instruments, I will not dwell on them too much, in order to be able to move some examples of how the theory has been incorporated into some domestic legal systems. In this respect, I will limit myself to a few chosen instances. Finally, I will explore how the doctrine has been applied in two national jurisdictions, very different one from the other.

II. Superior Responsibility in the Jurisprudence of the *ad hoc* Tribunals

Article 7(3) of the ICTY Statute – analogous to Article 6(3) of the ICTR Statute, reads:

> The fact that any of the acts referred to in Articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

The tribunal has therefore developed a rich jurisprudence for interpreting this provision – jurisprudence that is relevant as evidence of the present status of customary international law on this issue. I will leave aside the theoretical discussions on the nature of command responsibility and will instead focus on **its three elements** and its proof.

A. Superior-Subordinate Relationship and Effective Control

The existence of a superior-subordinate relationship is characterized by a hierarchical relationship, whether formally recognized within a domestic legal system *(de jure)* or not *(de facto)*.[3] What must be shown is that the superior had "effective control" based on a duty to exercise his or her authority "so as to prevent and repress the crimes committed" by their subordinates.[4]

To have "effective control," a superior must have more than mere influence.[5] What is required is the material ability within the existing superior-subordinate relationship, directly or indirectly,[6] to prevent, punish, or to initiate measures leading to proceedings against alleged perpetrators where appropriate.[7] Thus, mere formal *de jure* authority is not sufficient to establish the

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3 *Celebici* Appeals Judgement, paras. 193, 197, 303.

4 *Celebici* Appeals Judgement, para. 197, citing *Celebici* Trial Judgement, para. 377; *see* also *Celebici* Appeals Judgement, para. 240; *Aleksovski* Appeals Judgement, para. 76.

5 *Celebici* Appeals Judgement, para. 266.

6 *Celebici* Appeals Judgement, para. 252.

7 *Celebici* Appeals Judgement, paras. 192, 255-256; *Blaškic* Appeals Judgement, para. 69.

first tier of the rest.[8] Whereas the possession of *de jure* powers may certainly suggest a material ability to prevent or punish criminal acts of subordinates, it may be neither necessary nor sufficient to prove such ability.[9] The possession of *de jure* authority, without more, provides only some evidence of such effective control.[10]

In all circumstances, "it is appropriate to assess on a case-by-case basis the power of authority actually devolved on an accused,"[11] taking into account the cumulative effect of the accused's various functions.[12]

It could be said that a weakness of the present formulation of the doctrine of this element of superior responsibility is the requirement to prove beyond reasonable doubt that the superior had the material ability to prevent or punish the criminal conduct of its members. If the superior, in other words, consciously hires mercenaries or uses other paramilitary groups without effective subordination with his chain of command, he will not be responsible for superior responsibility (although he might of course be responsible under other forms of liability, such as instigating, aiding and abetting, or as a co-perpetrator x x x).[13]

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8 *Celebici* Appeals Judgement, para. 197.

9 *See Halilovic* Appeals Judgement, para. 85. *Cf. also Nahimana et al.* Appeal Judgement, paras. 625 and 787, fn. 1837.

10 *Oric* Appeals Judgement, para. 92.

11 *Bagilishema* Appeals Judgement, para. 51, endorsing the finding in the *Musema* Trial Judgement, para. 135.

12 *Stakic* Trial Judgement, para. 494.

13 *See,* in this respect, Hadzihasanovic Appeals Judgement, paras. 194-231.

B. Knowledge

As regards the mental element of superior responsibility, it must be established that the superior knew or had reason to know that his or her subordinate was about to commit or had committed a crime. As discussed above, *Yamashita* has been abandoned and nowadays, superior responsibility is not a form of strict liability.[14] It must be proved that the superior had:

1. actual knowledge, established through direct or circumstantial evidence, that his or her subordinates were about to commit, were committing, or had committed crimes within the jurisdiction of the Tribunal;[15] or
2. constructive knowledge, meaning that the superior had in his or her possession information that, in the specific circumstances of the case,[16] would at least put him or her

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[14] *Celebici* Appeals Judgement, para. 238-9; *Bagilishema* Appeals Judgement, para. 28.

[15] In the jurisprudence of the Tribunal, circumstantial evidence of "actual knowledge" has been found to include the number, type and scope of the illegal acts; the period over which the illegal acts occurred; the number and type of troops involved; the logistics involved, if any; the geographical location of the acts; the widespread occurrence of the acts; the speed of the operations; the *modus operandi* of similar illegal acts; the officers and staff involved; and the location of the superior at the time (*Celebici* Appeals Judgement, para. 386).

[16] *Celebici* Appeals Judgement, para. 239; *Bagilishema* Appeals Judgement, para. 37 ("the Trial Chamber established that Bagilishema neither knew nor possessed information which would have enabled him to conclude, in the circumstances at that time, that the murders had been committed or were about to be committed by his subordinates").

> on notice of the risk of such offenses and alert him or her to the need for additional investigation to determine whether such crimes were about to be committed, were being committed, or had been committed by his or her subordinates.[17] Information available to the superior need not be explicit or specific.[18]

C. Failure to Act

Finally, it must be established that the superior failed to take the necessary and reasonable measures to prevent future crimes or to punish past crimes of the subordinates.[19]

With regard to the meaning of "necessary and reasonable measures," "necessary" measures are the measures appropriate for the superior to discharge his obligation (showing that he genuinely tried to prevent or punish) and "reasonable" measures are those

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[17] *Celebici* Appeals Judgement, para. 241. "In possession of" means that the commander is not required to have actually acquainted himself with the information. *Celebici* Appeals Judgement, para. 239. Wilful blindness is clearly covered by this provision, since it presupposes that would put the accused on notice of the risk of offenses.

[18] *Celebici* Appeals Judgement, para. 238. The ICTR Appeals Chamber in *Bagilishema,* para. 42, cautioned that a distinction is necessary between knowledge of the *general situation that prevailed in the country at the time* (which would not be enough to raise the level of awareness to constructive knowledge) and the fact that the accused had in his possession *information which put him on notice* that his subordinates *might* commit crimes.

[19] *Blaškic* Appeals Judgement, para. 83.

reasonably falling within the material powers of the superior.[20] What constitutes "necessary and reasonable" measures to fulfill a commander's duty is not a matter of substantive law but of evidence.[21] Such measures are those that can be taken within the competence of a commander as evidenced by the degree of effective control he wields over his subordinates.[22] Both of these terms must be interpreted as being applicable under the prevailing circumstances, i.e., taking into account the specific circumstances of the case.

The superior's duty to prevent and punish his or her subordinates' crimes includes at least an obligation to investigate the crimes to establish the facts and to report them to competent authorities, if the superior does not have the power to sanction

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[20] *Halilovic* Appeals Judgement, para. 63, referring to: Article 86 of Additional Protocol I provides that superiors are responsible if, *inter alia,* "[t]hey did not take all feasible measures within their power to prevent or repress the breach"; in this respect, the ICRC Commentary explains that, for a superior to be found responsible, it must be demonstrated that the superior "did not take the *measures within his power* to prevent it" and elaborates that these measures be "feasible" measures, since it is not always possible to prevent a breach or punish the perpetrators" (ICRC Commentary, paras. 3543 and 3548, emphasis added); Article 87 adds the duty to "initiate such steps as are necessary to prevent such violations [x x x] and, where appropriate, to initiate disciplinary or penal action against violators thereof." *See* also *US v. Karl Brandt et al.,* in TWC, Vol. II, p. 212 ("The law of war imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command x x x").

[21] *Blaškic* Appeals Judgement, para. 72.

[22] *Blaškic* Appeals Judgement, para. 72.

him or herself.[23] The issuance of general guidelines of standing orders of a mere formal nature on the respect of human rights obligations clearly does not suffice to show that the necessary and reasonable measures have been taken.

III. Conclusions on ICTY and ICTR Jurisprudence Regarding Military Superior Responsibility

The *ad hoc* Tribunals have therefore adopted a rigorous approach in defining the requirements of command responsibility in order to keep the doctrine in line with the basic principles of individual criminal liability. These requirements are very difficult to establish beyond reasonable doubt.

The most part of convictions under the doctrine of command responsibility all concern military commanders, more precisely mid- or low-level commanders. These have generally been found guilty of war crimes, that is, the most traditional breaches of military commander's duty of supervision under international humanitarian law. Recent case law shows that command responsibility is not the most appropriate form of liability to deal with political or military leaders, that is, accused persons too remote from the direct perpetrators of international crimes.

However, the doctrine has been successful with respect to international crimes committed in typical military contexts, as

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[23] *Kordic* Trial Judgement, para. 446. *Blaškic* Trial Judgement, para. 335. However, the measures are "inextricably linked to the facts of each particular situation" and to the "type and nature of the effective control exercised by the accused over his subordinates." *Celebici* Appeals Judgement, para. 394.

for example during the conduct of hostilities, by small hierarchically organized structures.

IV. Extension of Command Responsibility to Civilian Superiors

With regard to military superiors, the source of superior responsibility is well entrenched in international customary law, as shown by a host of international instruments[24] and judicial determinations.[25] With regard to civilian superiors, *Celebici*

[24] *See*, among others, **Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of 1929** (Article 26: "The Commanders in Chief of belligerent armies shall arrange the details of carrying out the preceding articles as well as for cases not provided for in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention"); **Additional Protocol I of 1977** (Article 43(1): "armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates"); **Additional Protocol II of 1977** (Article 1: "armed forces and dissident armed forces or other organized armed groups which, under responsible command"). **The Commentary to the Two Additional Protocols of 1977 to the Geneva Conventions of 1949** states: "As there is no part of the army which is not subordinated to a military commander at whatever level, this [superior] responsibility applies from the highest to the lowest level of the hierarchy, from the Commander in Chief down to the common soldier who takes over as head of the platoon." *(ICRC Commentary on the Additional Protocols,* para. 3553).

[25] With specific reference to an "organized armed force," the Appeals Chamber has stated: "It is evident that there cannot be an organized military force save on the basis of responsible command. It is also

Appeals Chamber stated that while the *nature* of civilian and military authority might be different,[26] "the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a *degree* of control over their subordinates which is similar to that of military commanders."[27]

The difficulty with civilian authorities is that, in general, they do not have the powers and responsibility to prevent and punish crimes by their own subordinates, which is the foundation of command responsibility in the first place. These powers to prevent

reasonable to hold that it is responsible command which leads to command responsibility," *Hadzihasanovic* Jurisdiction Decision, para. 16.

[26] *Celebici* Appeals Judgement, para. 256; see also *Bagilishema* Appeals Judgement, paras. 49-56. With regard to the duties binding different kinds of civilian authorities, *see* for example, the cases of: Yuicki Sakamoto (in Law Reports, Vol. IV, p. 86), Mucic (in *Celebici* Trial Judgement, paras. 737-67;1240; 1250), Krnojelac (in *Krnojelac* Trial Judgement, paras. 316-320, affirmed on appeal, para. 63) on the duty of commanding officers or wardens of prison camps; Roechling and others, (in TWC, Vol. 14, pp. 1061, 1067-1071, 1088) on the duty of persons holding prominent posts both in public bodies and at the head of plants employing forced labor (leading to conviction); Kuniaki Koiso and Hideki Tojo, **Prime Ministers and/or War Ministers on the duty of such ministers to control military operations**, in *The Tokyo Judgement,* Vol. I, pp. 452-453; 461-463, (leading to conviction for war crimes); Koki Hirota, Mamoru Shigemitsu and Shigenori Togo, **Foreign Ministers**, on the duty to take steps to prevent criminal conduct within the Cabinet of Ministries as members of the government, in The Tokyo Judgement, Vol. I, pp. 446-448; 457-458; 461 (leading to conviction for war crimes except in the case of Togo).

[27] *Celebici* Appeals Judgement, paras. 197 and 256.

or punish, flowing from the general duties to provide instructions and control subordinates, are implied in a military structure. Thus, when the evidence shows that the superior-subordinate relationship is of the military nature envisaged by the laws of armed conflict, there is a presumption that the functions of the superior include that of controlling the subordinates, as well as preventing or punishing unlawful behavior. However, since the same presumption does not apply to a civilian superior-subordinate relationship (especially a *de facto* one), prosecuting authorities will have to show that this type of power existed when it is seeking to establish superior responsibility for a civilian. This is rather easily done in cases of police or of prison wardens, who are not military people but enjoy powers and responsibilities very similar to those of a military command structure. It might be more difficult in other situations.

V. Superior Responsibility in the Rome Statute of the ICC

The difference is quite clear in Article 28 of the Rome Statute, which clearly distinguishes between the command responsibility of military commanders, addressed in paragraph (a); and the responsibility of non-military superiors, or civilian superiors, considered in paragraph (b).

> (a) A **military commander or person effectively acting as a military commander** shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person **either knew or, owing to the circumstances at the time, should have known** that the forces were committing or about to commit crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to **superior and subordinate relationships not described in paragraph (a)**, a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior **either knew, or consciously disregarded information which clearly indicated, that** the subordinates were committing or about to commit such crimes;

(ii) **The crimes concerned activities that were within the effective responsibility and control of the superior;** and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

As it is clear from the above, the main differences of treatment between military and non-military superiors under the ICC regime are two:

First, it would seem that Article 28(a) imposes individual responsibility on military commanders for crimes committed by forces under their effective command and control if they 'either knew or x x x should have known that the forces were committing or about to commit such crimes.' The main advantage of such an approach is that it serves as a deterrent, giving incentive to a commander to be aware of what his subordinates are doing. A more lenient standard would allow superiors if they negligently failed to carry out their duty to institute a proper reporting system and never received reports of the subordinates' actions. On the contrary, for non-military superiors, they must have known or have consciously disregarded knowledge of the crimes. Such a standard, which provides more leeway for non-military superiors, is probably premised on the circumstances that civilian superiors do not usually have a strict reporting mechanism at their disposal, nor a duty to use it. Therefore, in order for liability not to become strict (or objective) liability, such superiors must be shown to have consciously disregarded knowledge of the crimes. Of course, most of this will hinge upon how these provisions will *in concreto* be interpreted by the International Criminal Court.

The second difference is that, owing to the peculiar situation of civilian superiors (who do not have duties and obligations stemming from customary international law), it is necessary to prove that the crimes in question concerned activities that were within the effective responsibility and control of the superior. This is of course necessary to avoid charging, for example, politicians for any crime occurring under their watch, regardless

of whether they were in a position of actual authority in relation to the perpetrators.

VI. The Implementation of Article 28 of the ICC Statute in Domestic Legislations

According to Article 5 of the ICC Statute, the core crimes "within the jurisdiction of the court" are genocide, crimes against humanity, war crimes, and, once defined, aggression. Auxiliary offenses directed against the administration of justice are contained in Article 70 of the ICC Statute.

While no direct obligation of States to *create* international crimes in their domestic legal order is contained in the ICC Statute, the principle of complementarity, on which the Rome Statute is built, clearly presupposes that States exercise their own jurisdiction over persons alleged to have committed the most serious international crimes. Article 17(a)(b) of the Rome Statute provides in fact that the ICC shall determine that a case is inadmissible, when it is being investigated or prosecuted by a State *which has jurisdiction over it,* unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.

These provisions are clearly drafted on the assumption that States would have incorporated international offenses in their domestic codes. The sixth paragraph of the preamble to the ICC Statute states that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes." Such exercise of criminal jurisdiction of States obviously presupposes that international crimes *exist* in the domestic legal orders, or implies that States, if they have not already done so, *create or incorporate* offenses such as genocide, crimes against

humanity and war crimes in their domestic legal order. Thus, the ICC will have jurisdiction over crimes.

But, is it sufficient that national legislations incorporate the four categories of crimes listed in Article 5 of the ICC Statute, in order to ensure that domestic systems adequately reflect substantive international criminal law, as codified in the Rome Statute? Would it be enough for the complementarity standard to be satisfied?

As is well known, in most of the criminal law systems of the world (although more clearly in the civil law systems), criminal law is usually composed of two sections: the so called "general part" including principles, norms on the applicable law, definitions of the general requirements of the *actus reus* and *mens rea,* forms of liability, regulation on the system of sanctions, and so on x x x ; and the so called "special part" including the specific offenses which each State's legislator intended to criminalize. Of course, the border between a criminal and non-criminal conduct depends not only upon the number and nature of offenses included in the special part, but also on the features of the general part.

Thus, a **domestic judicial system probably would not pass the text of complementarity** (in the event the need would arise), if national criminal law would **include defenses** expressly rejected by the Rome State, such as the obedience to superior orders; nor a domestic judicial system would pass the complementarity text if it would declare applicable the **statute of limitation** to genocide, or to crimes against humanity, provided that the prosecution of these crimes, in the light of their exceptional gravity, is not affected nor in any way limited because of the time passed since the moment they were committed; the same result would be produced by a national legislation

admitting that the regime of **immunities** apply to a head of state, for example, accused of one of the crimes listed in Article 5 of the ICC Statute – provided that, under customary international law, as endorsed by the Rome Statute, immunities may not be opposed by individuals accused of crimes.

Having traced the general coordinates of our reasoning, the specific question we aim to answer is: how does Article 28 of the ICC Statute—and its discipline of superior responsibility—interact with the principle of complementarity? Is it necessary for each State party to reproduce the specific contents of Article 28 in its own national legislation?

As it often happens, the answer to this complex question is "it depends." It notably depends from the pre-existing contents of domestic criminal law systems. **The principle of complementarity, in fact, merely requires a result**; it does not prescribe the instruments through which the result is to be reached. The goal is to make sure that domestic judicial system would be adequate to prosecute international criminals in the same cases over which the ICC could exercise its jurisdiction.

Thus, national courts of State parties need to be provided by the legislature with the legal instruments necessary to attribute criminal responsibility to both military and civilian superiors for the failure to prevent and punish crimes committed by their subordinates, according to the standards enshrined in Article 28 of the ICC Statute. Conversely, **it is up to the States' discretion the evaluation whether this goal is to be pursued by reproducing the full wording of Article 28 of the ICC Statute in the domestic legislation;** or whether it is enough to rely, for example, on a general norm providing that all omissions are punishable if they resulted in the commission

of that crime; or, further, whether a multitude of specific offenses listed in national criminal codes, when considered cumulatively, are sufficient to "cover" the area occupied by superior responsibility in the framework of the Rome Statute.

An overview of the steps undertaken by some State parties in order to implement Article 28 will provide a clear idea of the variety of the possible solutions. The different attitude of common law and civil law systems will be clear.

VII. Certain Solutions Adopted to Implement Article 28 of the ICC Statute in National Legislations

A. Common Law Countries: Australia, New Zealand, Canada, and UK

The common law countries' approach to the implementation of the Rome Statute is such that, usually, implementation acts do not incorporate the general principles of law set out in the Rome Statute – for instances, defenses and forms of secondary liability. This is primarily because there is generally little difference between them and the corresponding provisions in common law countries' existing legal systems; and it is considered that it would be better for national courts to deal with what is already familiar to them. A common exception to this trend is the issue of superior responsibility, which is often given specific mention in Implementation Acts, in the light of the circumstance that superior responsibility was usually unknown in various domestic legislations.

Some countries have chosen the most straightforward solution to deal with superior responsibility, adopting *verbatim* the

definition provided in Article 28 of the Rome Statute. This is the case of **Australia** and **New Zealand,** for example, which passed their Implementation Acts, respectively, in 2002 and 2000.

Conversely, the need for consistency with other domestic principles of criminal law has led the United Kingdom and Canada to depart, in some points, from the provision of the Rome Statute. The main concern expressed by the legislators of these two countries, in the respective implementation acts, related to the possibility of considering a superior as a direct participant in the subordinate's crime, when he or she did not possess intent or knowledge.

Thus, as to the **United Kingdom,** in the International Criminal Court Act 2001, entered into force in September 2001, the scope of command responsibility is clearly based on the Rome Statute, but with some exceptions. In particular, the Act provides that when commanders or other superiors do not, according to national principles of criminal law, have the requisite knowledge or intent for primary responsibility for an offense, they should be regarded as "aiding, abetting, counseling or procuring" the crime's commission. In other words, if the superior's *mens rea* only amounts to negligence, superior responsibility does not apply, and recourse is to be made to other forms of liability, if applicable.

Similarly, for the **Canadian** legislature, it was a problematic issue to consider the commander as a participant to the subordinate's offense for his or her failure to exercise proper control, especially in those cases where the superior merely "should have known" of the subordinate crimes. The Canadian difficulty arose from a decision of the Canada's Supreme Court, known as *R.V. Vaillancourt,* which struck down the so called "felony murder" provisions. These provisions (familiar in many common-

law countries) dictated that a person who knowingly engaged in a violent crime can be liable for murder if an accomplice commits such a murder in the course of that felony. The Supreme Court held that, because murder is a very serious crime with a serious stigma attaching to it, the accused must have subjective foresight of death to be convicted of murder, and constructive liability should never be allowed.

Thus, it was doubtful whether it would be permissible under Canadian law to punish an individual for the very serious crimes under ICC jurisdiction, if the person was not a party and in fact did not even know about the crime (but merely should have known). The solution adopted by lawmakers, in order not to contradict the Canadian Supreme Court and at the same time ensure that Canada could prosecute commanders in such situations, was to create a wholly new crime of "breach of command responsibility." Thus, a commander would *not* be charged with the crimes of the subordinates, where he or she was not a party and did not have subjective knowledge. Instead, the commander would be convicted of a different conduct, consisting in breaching of command responsibilities to prevent and repress the commission of serious international crimes. The crime of breach of command responsibility provides for penalties up to life imprisonment, so the result can still be just as severe as for the other basic crimes.

B. Some Civil Law Countries: The German and Dutch Examples

The German legislator clearly seems to have used, as a starting point for implanting Article 28 of the Rome Statute in the Code of Crimes Against International Law of 2002 (Code), the sophisticated analysis carried out by the German criminal law

scholars on superior responsibility. Two main dogmatic criticisms have been repetitively expressed by the German criminal lawyers.

1. To start with, it has been pointed to the logical dilemma caused by the doctrine of superior responsibility, which suggests that **negligent** behavior of superiors would be sufficient to convict them for the crime of genocide, an offense which however requires the perpetrator to possess the **specific intent** to destroy a group. German scholars argue that, with the "should have known" standard of Article 28(A)(i) of the ICC Statute, the high *mens rea* requirement of genocide might be circumvented. Some extend this criticism even to crimes against humanity, which require that next to knowledge of the particular crime, also awareness about its commission as "part of a widespread or systematic attack."

2. Further, the vast majority of German scholars find fault in that Article 28 of the ICC Statute fails to differentiate between two partly overlapping concepts. First, the concept of participation of the superior in the crime if the subordinates, which requires (according to German elaboration) at least knowledge by the superior. Secondly, the concept of superiors' breach of **duty to supervise** the subordinates. **In the theoretical coordinates proper of German criminal law, such a duty may be violated intentionally, knowingly, but also because of mere negligence. However, in such a situation the superior would not be criminally liable for participation in the serious international crimes of subordinates, but only for the distinct offense of breach of duty to supervise.** This latter

offense is considered to be characterized by a different (and lesser) dimension of wrongdoing.

In order to implement the Rome Statute, while not departing from the principles of national legal tradition, the German legislator therefore divided the notion of superior responsibility, as applied at the international level, in three different elements, addressed in three different provisions.

a) Section 4 of the Code only covers the superiors' intentional, willful, or at least knowingly "failure to prevent" imminent crimes of subordinates. In such situations, superior is considered to be a main **co-perpetrator** to the crimes of the subordinate. Thus, this disposition, in connection with the appropriate offense, ensures that the convicted individual receives the same sentence as the direct perpetrator of a war crime, crime against humanity, or genocide.

b) Section 13 of the Code addresses instead the situation of superiors who **negligently** fail to prevent crimes of the subordinates. As opposed to the international failure to prevent, a negligent superior is convicted in this case of a wholly separate offense than a direct perpetrator, and with the possibility of being imposed a significantly lesser sentence. This solution, according to the German doctrine, permits to remain consistent with the principle of personal guilt, which prescribes that each perpetrator should only be convicted of conducts he can be individually and specifically attributed to, namely the breach of the duty to supervise. Interestingly, the advantage of this duty-to-supervise concept is that it applies regardless whether the superiors are military

commanders or civilians. Thus, while Article 28 of the ICC Statute, because of a political compromise, introduces the negligence standard only for military commanders and exempt civilian superiors of **any** liability, the German legislation goes further. Military superiors are liable if the imminent commission of the crime was "discernable," while civilians are liable only if the crime was "discernible without more." Therefore, while the Rome Statute differentiates between the *mens rea* levels of negligence and awareness, the German code differentiates **within** negligence.

c) As to the so-called "failure to report," recourse was taken by the German legislator to already existing offenses, which are both independent from the subordinates' crimes, and do not base on a breach of superior duties (paragraphs 258 and 258a of the ordinary German Penal Code). These **obstruction of justice**-provisions only apply to intentional, willful, or knowingly made violations. This standard remarkably differs from the ICC one, which provides liability even for negligent commanders who fail to report crimes.

Finally, and remarkably, Germany has not embraced establishing a mode of liability to hold commanders responsible for the "failure to punish." This has been interpreted by international scholars as a conscious political decision of the German legislator that a failure to observe the duty to punish should not incur any penal sanction, at least if a proper report was submitted to the disciplinary authorities. This interpretation concurs with German legal tradition, considering that the German Military Penal Code does not contain a provision penalizing the

violation of the duty to punish, and that the German Military Manual, while creating a duty to punish, provides for prosecution only if the supervisor had given an illegal order, but not for his omission to repress the crimes committed by the subordinates.

Interestingly also, several other civil law countries failed to include the superior's failure to punish subordinates' crimes in their domestic legislations: this is the case of **Belgium, Sweden and France.** Conversely, as we have seen, most of the common-law countries which incorporated provisions of superior responsibility tend to include the concept of the failure to punish.

An exception to the civil law countries' trend is represented by the **Dutch approach** to the implementation of the Rome Statute. Since 1952, the Netherlands already included in the War Crimes Act, a provision concerning responsibility of military commanders. This provision, however, was merely aimed to make punishable the superior who **intentionally permits** the commission of a war crime by a subordinate under his command. At the same time, already since the 1950s, the criminal responsibility of civil superiors had been recognized in Dutch case law, in particular in corporate criminal law. However, in none of these two cases, the responsibility of the superior was extended to encompass the duty to punish, nor negligence offenses. With the International Criminal Act of 2002, the Netherlands proceeded to extend the scope of superior responsibility in two directions: first, in order to cover international crimes other than war crimes; second, expanding the scope of this mode of liability in order to mirror Article 28 of the Rome Statute, thus criminalizing the superior's negligence in taking measures either to prevent or to punish the commission of an international crime by a subordinate.

These are just few examples of implementing legislation and of the problems faced when adapting the domestic legal system to international obligations on the basis of customary and treaty law. Of course, it is absolutely necessary to consider how these provisions actually work in practice in order to assess their effectiveness.

VIII. The Use of the Doctrine of Superior Responsibility in National Courts: Two Examples

A. Bosnia-Herzegovina

As you may know, as part of its Completion Strategy to conclude its activities within a few years, the ICTY has been busy, *inter alia,* transferring cases related to lower- and middle-level accused to domestic institutions in the region of the former Yugoslavia. This was done on the premise that these countries are once again proving to be able to deal with such sensitive and complex cases. However, before transferring such cases, the ICTY needs to make sure that the State in question is willing and adequately prepared to accept such a case (Rule 11*bis*). In order to be considered adequately prepared, for example, Bosnia-Herzegovina has modified its criminal code, so as to include, *inter alia*, superior responsibility.

The War Crimes Chamber of Bosnia and Herzegovina is a domestic court, albeit with an important international component and backing, and therefore any indictment based on superior responsibility must be written into the domestic legal code. Currently, section 180(2) of the BH criminal code has established superior responsibility in their jurisdiction. This particular definition was taken wholly from the ICTY Statute.

The War Crimes Chamber has addressed superior responsibility in a number of cases, most recently the Milenko Trifunovic case last July. However, I will focus on an earlier case, the case of Rasevic and Todovic. In these proceedings, the Court extensively cited the *Celebici* case and other formative cases in ICTY jurisprudence. Although the War Crimes Chamber is not bound by ICTY jurisprudence, it endorsed its rationale and saw no reason to substantially depart from it. Furthermore, through its adoption of the Additional Protocol I to the 1949 Geneva Conventions, the War Crimes Chamber held that superior responsibility as defined by the ICTY is firmly established in international customary law, thus applicable to any case brought before it.

The indictment covered a period of two and a half years, in which Rasevic and Todovic were in high positions of authority at the Foca prison complex, called Kazneno-Popravni (KP) Dom. During this period, two prisoners were documented to have been beaten and at least 18 were killed. The head of KP Dom, Milorad Krnojelac, was tried at the ICTY.

For Todovic, the War Crimes Chamber held that he was the *de facto* Deputy Warden of KP Dom for nine months in 1992 until he became the *de jure* Deputy Warden for another eight months. In Rasevic's case, the Chamber found that he was the *de jure* Commander of the Guards from April 1992 until October 1994. In these positions, Todovic and Rasevic were responsible for the actions of their subordinates, the prison guards. Both were held liable because they did not act to prevent inhuman acts towards a detainee, for failing to punish the guards for the murders of 18 people, and for the beating of another detainee.

To investigate the superior-subordinate relationship, the War Crimes Chamber carefully examined the Book of Rules for KP Dom, noting the sections which indicated the hierarchical structure of the prison, organizational materials, and duties of the Warden and Deputy Warden. This indicated a *de jure* formal hierarchical structure of KP Dom. However, this was not all that was required to prove the superior-subordinate relationship. The court also considered evidence that the two accused had effective control of their subordinates, meaning that they had the material ability to prevent and punish the commission of serious crimes.

The second element of superior responsibility is that the accused knew or had reason to know that crimes were going to be committed or had already been committed by a subordinate.

The War Crimes Chamber held that both accused would have heard the sounds of the beating and seen the physical effects on the detainee, would have known about the pattern of torture and would have known – due to their duties – about missing people. The constructive knowldege test was therefore met with respect to beatings and murders.

The last element of superior responsibility is that the superior failed to take reasonable and necessary measures to prevent the commission of the crime or to punish the subordinate afterwards. At the KP Dom, the War Crimes Chamber held that the accused never told the guards to disobey the illegal orders of the interrogators, which would have prevented the crime. Additionally, the doctrine requires that orders to prevent must not be "empty," in that they must be followed with real disciplinary measures. Moreover, both accused were held liable because they failed to refer the criminal conduct of the guards to their superior for appropriate punishment.

The War Crimes Chamber is a good example of the successful result of a symbiotic relationship between an international tribunal and courts in domestic jurisdictions. Naturally, the tribunals do not have the capacity to prosecute every individual engaged in crime on such a massive scale. The prosecution based on superior responsibility in Bosnia and Herzegovina correctly applies international law, furthers the doctrine in domestic jurisdictions, and allows for justice for war crimes on a local scale.

B. United States of America

Interestingly, a series of actions in the U.S. **civil courts** under the Alien Torts Claim Act of 1789 (ATCA)[28] and the Torture Victim Protection Act of 1991 (TVPA),[29] have addressed the issue of superior responsibility for acts of torture and extrajudicial killing, which the defendant "authorized, tolerated, or knowingly ignored."

In allowing private individuals (and private individuals only), both aliens and U.S. citizens, to bring actions under the ACTA and the TVPA, the drafters intended these instruments to function as a part of a dual criminal/civil approach to addressing violations of international law.

In order to define the tort and assert jurisdiction, the US civil courts have significantly relied on the international criminal law standards, although not recognizing in them any binding value. For example, in ***Ford v. Garcia***, the civil court opined that Article 28 of the ICC Statute provides "relevant authority"

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[28] 28 U.S.C. § 1350.

[29] Pub. L. No. 102'256, 106 Stat. 73 (1992) (codified at 28 U.S. C. § 1350 note (1994).

and the ICTY and ICTR case law provides "insights" into the required elements of command responsibility.[30] In certain instances, U.S. civil law courts have chosen to depart from the existing case law. However, differences in the applicable law are to be regarded as both logical and desirable, considering that the underlying focus of tort law and criminal law differ fundamentally. Criminal proceedings concentrate on the personal liability of the accused, in order to verify the need to apply a sanction aimed to serve the purposes of retribution, general and special prevention; conversely, civil proceedings focus upon the determination of damage suffered by the victims, in order to ensure them adequte reparations. Moreover, the civil and criminal law processes are fundamentally different in terms of evidentiary requirements: criminal processes require that the responsibility of the accused is established beyond reasonable doubt, whereas the lesser standard of "more probable than not" applies in civil proceedings.

In the light of these considerations, it is particularly interesting to take notice of the fact that U.S. civil courts have confirmed that some of the strict requirements for holding a superior responsible under international criminal law also apply in the framework of tort law. This is true, for example, for the "effective control" element, which has been transposed in the U.S. tort law without nearly any modifications.

In ***Ford v. Garcia***, the appellants sought to recover damages for claims of torture and murder against two El Salvadorian generals. Three nuns and one layperson, all Americans engaged in missionary and relief work in El Salvador, were abducted, tortured, and murdered in December 1980 by five members of the Salvadorian National Guard. The plaintiffs requested civil

[30] *Ford v. Garcia*, 289 F.3d 1283, 1286 (11th Cir. 2002).

damages from the generals, based on their supposed effective control of the National Guard. At trial, appellants offered evidence of the great number of atrocities committed against civilians at the hands of the Salvadoran military in the nine months preceding the churchwomen's deaths. The generals conceded that they were aware of a pattern of human rights abuses in El Salvador during their tenures as Minister of Defense and Director of the National Guard, but argued that they did not have the ability to control their troops during this period. The Court of first instance endorsed this thesis. As a matter of law, it referred to the existing ICTY and ICTR jurisprudence and held that the test for effective command (to be contained in the jury directions) was whether the commander had "the legal authority and the practical ability" to control his subordinates.

The plaintiffs appealed the decision on the basis that the effect of this formulation was to place an improper burden on the plaintiff to establish that the commanders not only possessed *de jure* command over their subordinates, but also possessed *de facto* control. The 11th Circuit Court of Appeals upheld the jury directions, thus confirming that effective control must be established in a manner similar to the approach taken by the ICTY and the ICTR, explored above.

IX. Conclusions

In the light of the foregoing, and despite the uncertainties existing between the approaches taken by the ICTY and ICTR, on the one side, and ICC, on the other, it can be safely assumed that superior responsibility for military people and for civilians who exercise a similar degree of authority, is a doctrine firmly established in customary international law. All countries are therefore required

to implement into their own domestic systems the precepts of international law applicable to this theory in order to ensure that individuals are punished according to these standards. In view of a possible ratification by the Philippines of the ICC Statute, I encourage to open a frank debate on the implications of such a momentous step on the international obligations of this country and its effective discharging.

However, for the moment, I intend to stop here and thank you very much for your attention.

Reactions on Command Responsibility: From International Criminal Tribunals to National Jurisdictions*

*Justice Adolfo S. Azcuna***

This is one of the best of the Distinguished lectures.

It is thorough, scholarly, based on experience, and it answers the many questions in our minds over the very important subject of command responsibility.

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* Reaction delivered at the *Fifth Distinguished Lecture, Series of 2008*, held on November 27, 2008, at the Court of Appeals Auditorium, Court of Appeals, Manila.

** Justice Adolfo S. Azcuna was born in Katipunan, Zamboanga del Norte, on February 16, 1939, the son of Felipe B. Azcuna and Carmen S. Sevilla. He received the degree of Bachelor of Arts, with academic honors, at the Ateneo de Manila in 1959 and the degree of Bachelor of Laws, *cum laude*, at the same institution in 1962. He was admitted to the Philippine Bar in 1963, placing fourth in the 1962 bar examinations. He forthwith embarked on a government career as Assistant Private Secretary of then Presiding Justice Jose P. Bengzon of the Court of Appeals in 1963 and, thereafter, upon the appointment of the latter to the Supreme Court in 1964, as his Private Secretary.

Justice Azcuna taught International Law at his *alma mater*, Ateneo de Manila, from 1967 to 1986. In 1982, he completed post-graduate studies in International Law and Jurisprudence at the Salzburg University in Austria.

I focus on the last paragraph of the paper/lecture: that, without doubt, the Principle of Command Responsibility is now part of customary international law.

First, what is that doctrine? How is it formulated?

While it started here in the Philippines in the *Yamashita* case, it has undergone transformations and changes in all its elements, i.e., *mens rea* and the material element of control. While, in

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Representing Zamboanga del Norte, he was elected as member of the 1971 Constitutional Convention. Subsequently, he was appointed as a member of the 1986 Constitutional Commission. He held several government posts during the term of President Corazon C. Aquino, first as Presidential Legal Counsel, then as Press Secretary and subsequently as Presidential Spokesman. In 1991, he was appointed Chairman of the Philippine National Bank. On October 17, 2002, he was appointed Associate Justice of the Supreme Court by President Gloria Macapagal-Arroyo.

Justice Azcuna's major publications include "International Sales of Goods," "Transnational Law Practice," "International Law Teaching in the Philippines," "Doing Business in the Philippines," "Foreign Judgment [Monetary] Enforcements in the Philippines," "Piercing the Veil of Corporate Entity: From Willets to Santos," "ASEAN Conflict of Law," "The Supreme Court and Public International Law," and "International Humanitarian Law: A Field Guide to the Basics."

Justice Azcuna is married to Maria Asuncion Aunario, Dean of Arts and Sciences of St. Scholastica's College. They have four children: Anna Maria, Ma. Beatriz, Ma. Margarita and Miguel Enrique.

Justice Azcuna presently chairs the Committee on Computerization and Library and the Subcommittee on the Revision of Rules on Civil Procedure. He also co-chairs the Committee on Gender Responsiveness in the Judiciary with Justice Conchita Carpio Morales.

Yamashita, the *mens rea* element was practically a strict liability standard, it has now evolved into the formulation of the ICTY "knew or should have known" while the material element requires *de facto* control and not simply *de jure*. The statute of Rome's Article 28 formulation differs slightly in that it refers in the material element to a different standard for civilian superiors, i.e., knowledge or *conscious disregard of information*. And while effective command is presumed from a military structure, in a civilian situation it has to be proved.

Next, I am drawn to the portion on the impact of the doctrine on domestic jurisdiction. As I see it, this doctrine is binding on us as part of customary international law.

However, since the principles of *nulla poena sine lege* applies, Philippine courts cannot convict a defendant for the offense of command responsibility, or breach thereof, for lack of corresponding penalty, and can only apply the penalties under common crimes.

There is, therefore, need to adopt legislation to define the crime and provide for its penalty.

Learning from the International Criminal Tribunal for Yugoslavia*

Chief Justice Reynato S. Puno

Many crimes are seldom isolated acts of individual offenders. Often, they are committed as a part of large-scale atrocities that can only be carried out by a plurality of organized perpetrators. In these cases, it may be very difficult to ascribe individual criminal liability to specific members of the criminal group, particularly those who hold positions of leadership. Command responsibility has been one of the legal notions developed to address this problem.

Of late, this doctrine of command responsibility has been brought to the fore of Philippine legal thought. Just last year, the many extralegal killings and enforced disappearances that have plagued our country since the start of the new millennium – particularly those involving political activists and members of the media – led to a reexamination of the doctrine of command responsibility. Thus, in last year's national consultative summit on extrajudicial killings and enforced disappearances, Father Joaquin Bernas urged the government to devise ways of implementing the doctrine of command responsibility in such

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* Closing Remarks delivered at the *Fifth Distinguished Lecture, Series of 2008*, held on November 27, 2008, at the Court of Appeals Auditorium, Court of Appeals, Manila.

incidents of humanitarian abuse.[1] He recalled that during the deliberations of the 1986 Constitutional Commission, there was a proposal to adopt command responsibility as a constitutional principle. The proposal, however, met with vigorous objections on the ground of due process and the principle of *nullum crimen sine lege.* No law, no crime. Father Bernas suggested that these objections be studied in the light of the current state of domestic and international law.[2]

Another constitutional expert who spoke at the national consultative summit, Dean Pacifico Agabin, voiced out the view that the doctrine of command responsibility should be applied to as high up the chain of command as the President, who is the Commander in Chief of the armed forces.[3] Dean Agabin proposed that the Supreme Court adopt the doctrine of command responsibility as enunciated in the Rome Statute.

The Melo Commission, the independent commission created by President Gloria Macapagal-Arroyo to address media and activist killings, also recommended that the President propose legislation that would penalize superior government officials who encourage, incite, tolerate, or ignore any extrajudicial killing committed by their subordinates. The Commission suggested that the failure of those government officials to prevent an extrajudicial killing if they had a reasonable opportunity to do so, or their

1 Fr. Joaquin Bernas, SJ, *Command Responsibility,* A Conspiracy of Hope: Report on the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances (2007) 119.

2 *Id.* at 122.

3 Pacifico Agabin, *Accountability of the President Under the Command Responsibility Doctrine,* in A Conspiracy of Hope: Report on the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances (2007)123.

failure to investigate and punish their erring subordinates, or to otherwise take appropriate action to deter or prevent the commission of the crime, should be criminalized.

In addition, there have been bills filed in the Senate and the House of Representatives, none of which have come into fruition. Evidently, these bills have failed to negotiate the various slippery slopes of command responsibility.

The lecture of our distinguished guest today, the Honorable Fausto Pocar, will help us greatly in our efforts to shape our law on command responsibility. There is much that we can draw from the experience of the International Criminal Tribunal for Yugoslavia (ICTY) with this doctrine, much that we can learn from its well-reasoned decisions.

For example, the standard definition of command responsibility is unclear on whether the doctrine is a means of indirectly holding a superior responsible for the criminal acts carried out by subordinates, or if the superior is criminally liable for personal misconduct for not having prevented such crimes or for not having punished those responsible.[4] The ICTY clarified the matter in the Halilovic trial. That tribunal ruled:

> [C]ommand responsibility is responsibility for an omission. The commander is responsible for the failure to perform an act required by international law. This omission is culpable because international law imposes an affirmative duty on superiors to prevent and punish crimes committed by their subordinates.[5]

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4 Beatrice Bonafe, *Finding a Proper Role for Command Responsibility,* 5 J. Int'l Crim. Just. 599, 603 (2007).

5 Judgment, Halilovic (IT-01-48-T), Trial Chamber, November 16, 2005, §54.

Thus, pursuant to this ruling, under the doctrine of command responsibility, superiors are not just indirectly liable for the crimes of their subordinates. Command responsibility is not a form of vicarious liability. Superiors are held accountable on their own account for the breach of a precise duty of supervision arising from their position of authority and control over their subordinates.[6]

The ICTY has also listed three essential elements of command responsibility for the doctrine to apply. The first is that a superior-subordinate relationship exists; the second, the superior knew or had reason to know that the criminal act was about to be or had been committed; and the third, the superior failed to take necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[7]

The ICTY has also reconsidered its own doctrines. At first, the ICTY deemed it possible to convict the accused under both "direct" and "command" responsibility. If a choice had to be made, then either the direct participation in the offense or the command position therein was taken into account as an aggravating factor. The ICTY, however, soon clarified its approach and considered it inappropriate to convict under both direct and command responsibility. Now, the consistent case law of the ICTY asserts a clear preference for direct criminal responsibility. Initially, some trial judgments held that not only was it impossible to convict the accused of the same facts under both direct and command

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6 Beatrice Bonafe, *Finding a Proper Role for Command Responsibility,* 5 J. Int'l Crim. Just. 599, 603-604 (2007).

7 *Id.* at 604-605, *citing* Judgment, Delalic and others (IT-96-21-T), Trial Chamber, November 16, 1998, §346.

responsibility, but also that certain forms of direct liability should be preferred. Then the Appeals Chamber in the Blaskic appeal finally settled the matter: those accused who would be found guilty under both direct and command responsibility should be convicted of direct responsibility, taking the command position into account as an aggravating factor.[8]

The doctrine of command responsibility has been the object of both great expectations and much criticism. On the one hand, it is perceived as an indispensable tool for ascribing criminal responsibility to military and political leaders for international crimes committed on the collective and state level. On the other hand, the doctrine has sometimes been perceived as a way to improperly expand the scope of individual criminal responsibility.[9] Both of these extremes have been a product of the ambiguity that often inheres in historically weighted doctrines like command responsibility. As our distinguished guest has shown, the ICTY has clarified some of these ambiguities. Perhaps, by considering the lessons that the experience of the ICTY can teach us, we can finally agree upon our own understanding of the doctrine of command responsibility.

Thank you, Judge Pocar, for the enlightenment. Thank you all for attending this distinguished lecture, the last for the year 2008.

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[8] *Id.* at 612-613.

[9] *Id.* at 599, 617.