ARTICLE

THE INTERACTION OF DOMESTIC AND INTERNATIONAL LAW: THE DOCTRINE OF INCORPORATION IN PHILIPPINE PRACTICE

Mark Richard D. Evidente

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THE INTERACTION OF DOMESTIC AND INTERNATIONAL LAW: THE DOCTRINE OF INCORPORATION IN PHILIPPINE PRACTICE[1]

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INTRODUCTION

It has been said that by virtue of the mere fact that the Philippines is a part of the community of nations, it holds itself bound by the principles of international law,[3] such that it is unnecessary for the Constitution to state "the Philippines adopts the generally accepted principles of international law."[4] The incorporation clause nevertheless exists and provides the explicit means by which international law becomes "part of the law of the land."[5]

The doctrine of incorporation implies that, with the rapid development of international law over the last few decades, domestic law is constantly enriched by a growing and comprehensive set of legal obligations from the international sphere. Coupled with the process by which treaties are ratified,[6] it would appear at first glance that the full spectrum of international law[7] enters into, and binds persons within, the national legal system. Indeed, this should provide rationale for the legal practitioner to expand his knowledge of international law, to no longer leave that field to the specialist. More importantly, the same practitioner must have a framework to analyze and determine which of the obligations under international

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[1] This paper was originally written during the academic year 2001-2002 as a requirement for the Supervised Legal Writing course for a degree in law at the University of the Philippines.

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[3] U.S. v. Guinto, G.R. No. 76607, February 26, 1990; Wylie v. Rarang, G.R. No. 74135, May 28, 1992; Holy See v. Rosario, G.R. No. 101949, December 1, 1994.

[4] U.S. v. Guinto, G.R. No. 76607, February 26, 1990. *See* also I. CRUZ, INTERNATIONAL LAW, 4-5 (1996), hereinafter CRUZ.

[5] "The Philippines renounces war as an instrument of national policy, *adopts the generally accepted principles of international law as part of the law of the land* and adheres to the policy of peace, equality, justice, freedom, cooperation and amity with all nations." CONST., article II, section 2. While the whole provision essentially states the fundamental doctrines of Philippine foreign relations, it is the clause herein italicized that is referred to as the incorporation clause.

[6] "No treaty or international agreement shall be valid unless concurred in by at least two-thirds of all the members of the Senate." CONST., articleVII, section 21.

[7] *See discussion on SOURCES OF LAW* infra.

law are or should be part of the domestic legal system. Armed with the knowledge and a framework with which to use that knowledge, he can become a more effective advocate before the courts, for his clients, and for society.

It is hoped that this paper may provide such a framework by distilling the essence of such a framework from a judicious examination of the decisions of the Philippine Supreme Court, tempered by an analysis of the experiences of other states and the opinions of authorities, both local and foreign.

I. THE INTERACTION OF INTERNATIONAL AND MUNICIPAL LAW

A. The Sources of International Law

The Statute of the International Court of Justice identifies the sources of international law, when it states:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. International custom, as evidence of a general practice accepted as law;
> c. The general principles of law recognized by civilized nations;
> d. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for determination of the rules of law. [8]

The corpus of international law is composed of conventions, custom, and the general principles of law. Judicial decisions and the writings of publicists, as can be seen by the wording of paragraph (d), are merely aids in determining the content of custom and principle.[9] It must be emphasized that these are merely sources – they are not the law in themselves. The mere statement of a provision in a treaty, or the invocation of a judicial decision, is insufficient to declare the law on the matter and to compel authorities to act accordingly. Rather, the law exists behind these sources such that in every dispute, it must be discerned and derived from an analysis of the various sources of law.[10]

In the international sphere, there are no institutions that make or interpret law in the same sense as the branches of governments do in domestic

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[8] Article 38.1.

[9] G. SCHWARZENBERGER, INTERNATIONAL LAW, 26-27 (1957).

[10] M. SHAW, INTERNATIONAL LAW, 55-56 (1997) [hereinafter SHAW].

jurisdictions,[11] where the law is clearly formulated by legislatures, carried out by an executive, and expounded upon by the courts. An advocate, however, accustomed to practicing in the domestic sphere would tend to look for a clear and objective formulation of the law, placing undue reliance on treaties to identify duties and rights while neglecting the other sources of law. His reliance thereon would be premised on the belief that a treaty is law *per se,* rather than as an expression of a contractual relationship which can be affected by obligations arising from custom or principle. It must be stressed that because all three are equally sources of law,[12] it is important for a lawyer to understand not only the role that each plays in the formation of international law but also how they become operative in domestic systems.

B. International Law and Domestic Law

The relationship of international and domestic law has been the subject of much debate, resulting in a division between what has been termed the monist and the dualist schools of thought.[13] This debate, however, is mainly an academic one as the practice of states acknowledges the existence of the two spheres of law, and recognizes that each sphere interacts with the other.

The Statute of the International Court of Justice[14] suggests that the decisions of domestic courts assist in the process of discovering the content of

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[11] SHAW at 58.

[12] While the provision was originally drafted with an intention that the sources of law be applied in a successive order, the International Court has noted that various obligations from different sources of law will be invoked in any dispute, such that the applicable rule of law will be distilled from them. *See* Nottebohm Case (Liechtenstein v. Guatemala) Judgment (Second Phase) (1955) I.C.J. Reports 4, 22. *See also* HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942, 606-607 (1943), hereinafter, HUDSON.

[13] I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 31-33 (1998); SHAW at 100-102. Dualism holds that domestic law and international law operate in two separate spheres, as the nature and object of the two are fundamentally different. One governs the relations of individuals among themselves and with their government, whereas the other governs the relations of states. A monist perspective on the other hand suggests a unity between the two spheres of law. One formulation of this position of singularity begins from the idea that, as states define their own existence from international law, then whatever authority they have in the domestic sphere can only be an authority that is derived from it, implying its primacy. Another formulation notes that as the behavior of a state is ultimately reducible to the behavior of individuals, then international law governs not only states but individuals as well, suggesting the existence of one comprehensive system of law without necessarily implying the supremacy of one over the other. For an extensive discussion of monist theories, *see* H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS (1950) and H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW, 554-559 (1967).

[14] "Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for determination of the rules of law." THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, article 38.1 (d). Note that the statute does not identify whether the tribunal making the decision should be international or domestic in character. Thus, while decisions of international tribunals would be considered as having greater weight in this function, domestic tribunals are recognized to have considerable influence as well.

international custom,[15] and in identifying the general principles of law.[16] Domestic jurisprudence fulfills this role for international custom in two ways: first, the decision may explicitly declare that a particular obligation arises from international custom; and second, such decisions, together with legislation and other legal acts of governmental authorities, can also demonstrate the practice of that particular state, which may eventually coalesce with that of other states to form the corpus of international custom.[17] On the other hand, the accumulation of judicial decisions of various states that recognize the existence of a domestic principle of law existing within their own systems would allow international tribunals to recognize such as a general principle 'recognized by civilized nations'.

On the other hand, international law can and does operate within each state's legal system, for which two approaches may be discerned: first, under a theory of transformation, international law cannot create invocable rights or duties within a state unless it has been changed by constitutionally prescribed processes into domestic law. Second, the theory of incorporation posits that international law automatically creates rights and duties without any need for such a process.[18] As an incident of its sovereignty, each state has the prerogative to define the manner by which international law enters the domestic sphere,[19] such that it can even adopt different approaches for each source of law,[20] despite the fact that it is often difficult to draw clear lines between the sources of law.[21] Also, states may provide that, when international law plays a role in the domestic system, it may be accorded a status of superiority, equality or inferiority to domestic law.[22]

C. The Injection of International Law into the Philippine Legal System

The Constitution of the Republic explicitly provides two mechanisms by which international law becomes domestic law, adopting both the transformation and incorporation doctrines. Through the ratification clause, treaties and international agreements become binding upon the Philippines only when it is

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[15] K. WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW, 144-148 (1993).

[16] BROWNLIE at 15-18.

[17] WOLFKE at 144-150.

[18] SHAW at 105.

[19] G. Fitzmaurice, *The General Principles of Law Considered from a Standpoint of the Rule of Law*, 92 RECUEIL DES COURS 70-80 (1957); J. van Panhuys, *Relations and Interactions between National and International Scenes of Law*, 112 RECUEIL DES COURS 78-79 (1964); H. Kelsen, *General Course in Public International Law*, 84 RECUEIL DES COURS 157-158 (1953).

[20] The United States and the United Kingdom, for instance, are said to incorporate customary international law, while requiring transformation for treaties and conventions.

[21] SHAW at 55-56.

[22] See the discussion of the application of international law in domestic systems in M. WHITEMAN, 1 DIGEST OF INTERNATIONAL LAW, 103-116 (1963).

ratified by the President and has been concurred in by the Senate.[23] Likewise, through the incorporation clause, the generally accepted principles of international law automatically become part of the law of the land.[24]

1. The Ratification Clause

The ratification clause states that:

> No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the members of the Senate.[25]

The ratification clause is important for two reasons: first, it identifies where the power to bind the Republic in international agreements is lodged; and second, it highlights the necessity of demonstrating the consent of a state to be bound by a treaty before it can be deemed bound to adhere to the obligations indicated therein.

On matters of foreign affairs, the Philippine legal system begins from the premise that the relations of states fall within the domain of executive prerogative.[26] As such, despite what the Constitution may seem to state, deeper analysis of the language of the clause would reveal that the power to enter into and ratify international agreements resides with the President.[27] As the Court has said, "in our jurisdiction, the power to ratify is vested in the President and not, as commonly believed, in the legislature. The role of the Senate is limited only to giving or withholding its consent, or concurrence, to the ratification"[28] and its concurrence is necessary only when the treaty is an "original agreement of a permanent nature, or which establishes national policy." Where the agreement merely implements a policy already established, Senate concurrence may be dispensed with.[29]

Furthermore, the terms of a treaty must be analyzed to determine the extent to which it becomes operational in the domestic sphere. If a treaty creates obligations only on the part of the state – an obligation to pass certain laws, for instance – the treaty is not self-executory and does not create demandable rights and obligations within the domestic system. The rights would be created by the

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[23] CONST., art. VII, sec. 21.

[24] CONST., art. II, sec. 2.

[25] CONST., art. VII, sec. 21.

[26] I. CRUZ, PHILIPPINE POLITICAL LAW, 223 (1995).

[27] Commissioner of Customs v. Eastern Sea Trading Corporation, 3 SCRA 351 (1961).

[28] Bagong Alyansang Makabayan v. Executive Secretary, G.R. No. 138570, October 10, 2000.

[29] J. BERNAS, THE 1987 CONSTITUTION OF THE PHILIPPINES: A COMMENTARY, 821 (1996). It is submitted that the line that separates agreements that require ratification and those that do not is the same line that would separate matters that require legislation and those that can be dealt with through mere executive or administrative issuances.

laws passed, and not by the treaty *per se.* On the other hand, when a treaty is worded in a manner that creates demandable rights and obligations for individuals, it is a self-executory treaty that could be invoked within the domestic system, provided it has been ratified and has entered into force according to the treaty's own provisions.[30]

A treaty that becomes effective within the Philippines acquires the same status as an enactment of the legislature.[31] On that premise, courts must exert all efforts to reconcile treaties with domestic law. When incompatibilities occur, courts have resorted to the principles of statutory construction to reconcile these,[32] guided by the fundamental respect the judiciary should accord the acts of a co-equal branch of government. Nevertheless, in order to address the most extreme of incompatibilities, the judiciary possesses the power to declare a treaty unconstitutional.[33]

2. The Incorporation Clause

The Constitution provides:

> The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land, and adheres to the policy of peace, equality, justice, freedom, cooperation and amity with all nations. [34]

The clause that the Philippines "adopts the generally accepted principles of international law as part of the law of the land" is the basis for incorporating international law into the domestic system.[35] One of the preeminent authorities on

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[30] *See* AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW THIRD: THE FOREIGN RELATIONS OF THE UNITED STATES, 57 (1998), hereinafter RESTATEMENT THIRD. *See* also Jose M. Roy III, *A Note on Incorporation: Creating Municipal Jurisprudence from International Law,* 46 ATENEO L.J. 636 (2001).

[31] It has also been suggested that a treaty should be published in the Official Gazette or in a newspaper of general circulation before it becomes effective, pursuant to Article 2 of the Civil Code and Executive Order No. 200. *See* M. DEFENSOR-SANTIAGO, INTERNATIONAL LAW, 32 (1999).

[32] Secretary of Justice v. Lantion, G.R. No. 139465, January 18, 2000; Ichong v. Hernandez G.R. No. L-7995, May 31, 1957; Gonzales vs. Hechanova, 9 SCRA 230 (1963); *In re* Garcia, 2 SCRA 984 (1961). *See also* J. SALONGA and P. YAP, PUBLIC INTERNATIONAL LAW, 13 (1992), hereinafter SALONGA and YAP; CRUZ at 4-8.

[33] "All cases involving the constitutionality of a treaty, international or executive agreement, or law, which shall be heard by the Court en banc ... shall be decided with the concurrence of a majority of the members who actually took part in the deliberations on the issues in the case and voted thereon." CONST., art. VIII, sec. 4 (2).

[34] CONST., art. II, sec. 2.

[35] Interestingly, the first and third clauses of article II, section 2 of the Constitution are already subsumed under the incorporation clause as both the prohibition on the use of war as an instrument of national policy and the duties of states to respect the sovereign equality of, and to cooperate with other states are established doctrines under customary international law.

international law, speaking of the British experience, was of the view that incorporation entails that "customary rules [of international law] are to be considered as part of the law of the land and enforced as such, with the qualification that they are incorporated only so far as is not inconsistent with Acts of Parliament or prior judicial decisions of final authority."[36]

In the Philippines, the Court seems to have adopted a similar formulation, taking the view that the "rules of international law form part of the law of the land and no further legislative action is needed to make such rules applicable in the domestic sphere."[37] The Court has gone on to say that, "Under this doctrine, as accepted by the majority of states, such principles are deemed incorporated in the law of every civilized state as a condition and consequence of its membership in the society of nations. Upon its admission to such a society, the state is automatically obligated to comply with these principles in its relations with other states."[38]

However, if one were to look closely at the definitions provided, it will be noted that: one, the first definition for the doctrine explicitly refers to **"customary rules of international law" whereas the other simply refers to "rules of international law." Two, the first suggests that international custom is subordinate to municipal legislation because the former is "incorporated only so far as is not inconsistent with Acts of Parliament or prior judicial decisions of final authority."** On the other hand, the second definition is silent on the matter.

The second observation can be readily dispensed with, as each state has the prerogative to define the operation of international law within its domestic jurisdiction, even if other states accord a position of inferiority to custom, the Philippines is entitled to treat it otherwise. The Supreme Court has indeed consistently held that international law, regardless of its source, acquires a standing equivalent to domestic legislation and inconsistencies between them are resolved by an application of basic principles of statutory construction.[39]

The first observation, however, presents a problem for which there are no ready answers. While it would appear that incorporation is a doctrine of such fundamental importance that it has been virtually unchanged through the

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[36] BROWNLIE, at 42, *citing* R. JENNINGS and A. WATTS, eds., I OPPENHEIM'S INTERNATIONAL LAW, 56-63 (1992); J.L. BRIERLY, THE LAW OF NATIONS, 86-88 (1963); The S.S. Lotus, PCIJ Ser. A, no. 10, p. 54 (1927), separate opinion of Judge Finlay.

[37] Secretary of Justice v. Lantion, (G.R. No. 139465, January 18, 2000); SALONGA and YAP at 12. *See also* CRUZ at 4-8.

[38] Wylie v. Rarang (G.R. No. 74135, May 28, 1992).

[39] Abbas v. Commission on Elections, (G.R. No. 89651, November 10, 1989).

succession of Philippine constitutions,[40] appearances can, after all, be quite deceiving. In the deliberations of each convention, very little in fact has been said about the incorporation clause itself; their discussions tend to focus on the other clauses surrounding it – the propriety of a renunciation of war, for instance, or in the selection of the appropriate truisms.[41] Incorporation is revealed to be a mere afterthought, rather than something of such primordial significance to Philippine international relations.

While the authors of Philippine constitutions have provided no theory behind the doctrine, such a theory can neither be readily derived from jurisprudence. The Supreme Court in practice simply invokes the incorporation clause then states the applicable rule of international law without elucidating on how the rule falls within the contemplation of the clause. The clause thus appears to be no more than a handy premise upon which any decision involving international law may rightly or wrongly be made. While it is conceded that each state has the prerogative to define the manner by which international law enters the domestic sphere, this cannot be an excuse for the lack of a theory on the matter; rather, it should precisely be the basis for one. While this lack may be attributed to various factors,[42] the practice of the Court wreinforces an unnecessary vacuum,, to the detriment of not only of the domestic legal process but that of the international system as well.

II. RATIONALIZING THE DOCTRINE

A. The Substance of the Law

If the 'generally accepted principles of international law are part of the law of the land,' what then are these principles?[43] While their identification is said to be the prerogative of the courts,[44] a framework must be developed to assist the courts in that process. In determining whether an obligation falls within the

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[40] "The Philippines renounces war as an instrument of national policy, and *adopts the generally accepted principles of international law as a part of the law of the Nation.*" CONST. (1935), article II, sec. 3. "The Philippines renounces war as an instrument of national policy, *adopts the generally accepted principles of international law as part of the law of the land*, and adheres to the policy of peace, equality, freedom, cooperation and amity with all nations." CONST. (1973), art. II, sec. 3.

[41] 4 REC. OF THE CONST. COMM 579, 581, 665, 674-5, 681, 737-8, 750-3, 769-72, 825 (1987).

[42] Two factors may be forwarded to explain this: one, it may simply be an unforeseen consequence of the rule of evidence under section 1, Rule 129 of the Rules of Court that the laws of nations are of mandatory judicial notice; or two, it may be a means to give the Court some flexibility in dealing with the politics of international relations.

[43] BERNAS at 55.

[44] *Id.*

contemplation of the incorporation clause, first, the proper source of international law should be identified, and second, the nature of the obligation must be ascertained.

1. The Source of Law

Local authorities do not agree on which of the sources of law are incorporated through the doctrine. Some take the view that only customary international law is embraced by it[45] while others suggest that both international custom and the general principles of law are deemed incorporated.[46] Moreover, the confusion is compounded by the fact that even in the deliberations of the Constitutional Commission, some asserted that both treaty and custom fall within the ambit of the provision.[47]

The Supreme Court, on the other hand, has itself invoked the incorporation doctrine for each of the three sources of international law. It has ruled in several instances that a treaty, under the doctrine of incorporation, forms 'part of the law of the land.'[48] It has also invoked the doctrine in matters under custom,[49] as well as for the application of certain principles of law.[50]

a. Customary International Law

The doctrine of incorporation as understood in Philippine jurisprudence begins from the premise that international law is incorporated into domestic legal systems because certain international obligations are a necessary consequence of a state's membership in the community of nations.[51] Indeed, this echoes the doctrine:

> The states are bound by general international law without and even against their will. Thus for instance, a new state, as soon as it comes into existence, has all the rights and duties stipulated by general international law, without

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[45] SALONGA and YAP at 12.

[46] M. MAGALLONA, AN INTRODUCTION TO INTERNATIONAL LAW IN RELATION TO PHILIPPINE LAW 44-45 (1997).

[47] 4 REC. OF THE CONST. COMM., 771-2 (1987). The statements therein however may be interpreted to refer merely to the status of international law within the domestic legal system and not necessarily to the content itself of international law that is incorporated by the doctrine. *See* discussion *infra.*

[48] Reyes v. Bagatsing, G.R. No. L-65366, November 9, 1983; Abbas v. Commission on Elections, G.R. No. 89651, November 10, 1989.

[49] *See* discussion on THE NATURE OF THE OBLIGATION, *infra.*

[50] In International School Alliance of Educators v. Quisumbing, G.R. No. 128845, June 1, 2000, the Court invoked equity as a principle of law that was part of international law.

[51] U.S. v. Guinto, G.R. No. 76607, February 26, 1990; The Holy See v. Rosario, G.R. No. 101949, December 1, 1994.

> any act of recognition of general international law on the part of this state being necessary... Just as the individual does not submit voluntarily to the law of the state which is binding upon him without and even against his will, a state does not submit voluntarily to international law... no state can withdraw from the international community or, what amounts to the same, from the international law constituting thus community; and as long as it is not a member of this community, that is to say, as long as international law does not apply to it, it is not a 'state'; it is legally nonexistent.[52]

Even those of the view emphasizing state consent in international law hold that, "it is sufficient to the argument that consent is given to international law as a system rather than to each and every relationship contained in it."[53]

Observing that international custom is a general practice of the states accepted as law,[54] then incident to its generality of acceptance, a certain fundamentality is implied such that incorporation, based on the above premise, certainly refers to international custom. Undeniably, the incorporation clause itself states that the principle of international law must be 'generally accepted' and, by definition, international custom is precisely that.

The Supreme Court, while conceding its importance under the doctrine of incorporation, does not frequently discuss custom as a source of law itself; rather, it virtually accepts the declarations of authorities as to what the law is, and utilizes foreign judicial decisions with an approach almost of *stare decisis*.[55] While works of jurists and judicial decisions are a means of determining the law, they are merely a subsidiary means,[56] indicative of the existence of custom, but not, by themselves, declaratory of the law on the matter.[57] Determining the content of custom, however is matter that shall be dealt with more substantially later; at this point it shall suffice to say that an invocation of custom under the doctrine of incorporation is entirely appropriate.

b. General Principles of Law Recognized by Civilized Nations

The clause in the Statute allowing for the application of general principles of law was developed in order that the justice may nevertheless be achieved in the

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[52] KELSEN, PRINCIPLES OF INTERNATIONAL LAW 148-155 (1952).

[53] JAFFE, JUDICIAL ASPECTS OF FOREIGN RELATIONS 90 (1933).

[54] Statute of the International Court of Justice, Article 38.1 (b).

[55] Jose M. Roy, III, *A Note on Incorporation: Creating Municipal Jurisprudence from International Law*, 46 ATENEO L.J. 636-639 (2001).

[56] Statute of the International Court of Justice, Article 38.1 (d).

[57] HUDSON at 612-615.

settlement of disputes despite the insufficiency of positive law. As succinctly stated by one authority:

> First, in codifying rules concerning the application of the law, it is realized in many countries that positive law, even when this includes custom, is insufficient to cover the entire juridical life of the community in all its multifarious and ever-changing aspects. In order to avoid a possible denial of justice, many civil codes expressly provide that the judge, in the absence of express or analogous provisions of positive law, should apply either natural law, as do some earlier codes, or general principles of law, or rules of law which he would lay down himself if he were the legislator.
>
> Secondly, even where the codes did not expressly recognize the existence and applicability of natural law or general principles of law... in place of the theory of logical plenitude or self-sufficiency of positive law, the modern theory maintains that the positive law has always been and always should be guided, supplemented and perhaps even corrected by an unformulated law. The latter is not the product of philosophical speculation as it was in the past, but a real and living force in the life of the legal community. The judge is no longer regarded as an 'inanimate being' 'which speaks the words of the law' but as an intelligent collaborator of the legislator in the application of this living law.[58]

It therefore becomes unnecessary to refer to international law when the Philippine legal system already has these mechanisms to fill the gaps of positive law.[59] The Philippine legal system, as an heir to both the civil and common law traditions, partakes of two of the most comprehensive and dominant legal systems in the world today. Furthermore, it even allows for the limited operation of Islamic and indigenous law. Thus what 'principles of law recognized by civilized nations' that international tribunals may resort to are likely to be already part of the domestic system, or at least are ascertainable within it. It may therefore be said that the Philippines possesses a self-sufficient legal system and need not derive or extract these principles of law from the international sphere.

Nevertheless, in *International School Alliance of Educators v. Quisumbing*,[60] the Court referred to the principles of equity and non-discrimination as general principles of law recognized in international law and thus duly incorporated under the doctrine. This statement of principle generates some confusion, as it is

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[58] BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, 16-17 (1953).

[59] *See* CIVIL CODE, articles 9, 10, 19-24. *See* also Floresca v. Philex Mining Corporation, G.R. No. L-30642, April 30, 1985; *In re* Padilla, G.R. No. 48137, October 4, 1943.

[60] G.R. No. 128845, June 1, 2000.

incompatible with the theory behind the 'general principles of law' clause in the Statute of the International Court.

Assuming nevertheless that certain principles of law cannot be found in the domestic system, they cannot be incorporated directly from the international sphere. The principles are a source of law; they are not statements or formulations of international law itself. It must be emphasized that it was included in the Statute of the International Court "to authorize the Court to apply the general principles of municipal jurisprudence, in particular of private law, in so far as they are applicable to the relations of states."[61] Thus, an incorporation of the 'principles of law recognized by civilized nations' suggests a borrowing of such principles not from the corpus of international law, but from other domestic legal systems. This would thereby contradict the postulate that incorporation pertains 'generally accepted principles of international law.'

A distinction must further be emphasized between 'principles of law' and 'principles international of law'. The former has been already been discussed; the latter, on the other hand, refers to "international law as it is applied between all nations belonging to the community of nations."[62] The former thus exist in domestic systems; the latter exist, as custom, in the international sphere. While a principle of law in domestic systems may become a principle of international law under custom given sufficient state practice and *opinio juris,* it is only when it has become such that it can then be invoked through incorporation.

In practice, the International Court has refrained from applying 'principles of law' in the same sense as it was originally envisioned in the Statute. It has instead used legal principles that would otherwise already meet the requirements of a customary rule.[63] Thus, while it has even been suggested that the distinction between custom and principles of law is more academic than real,[64] the point, however, is that under the doctrine of incorporation, recourse to the 'general principles of law as recognized by civilized nations' is entirely unnecessary. Rather, logic would require that it be dispensed with and reliance be placed instead on custom.

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[61] OPPENHEIM, 94 RECUEIL DES COURS 29 (1958).

[62] S.S. Lotus, PCIJ Series A 10, p. 16-17.

[63] WOLFKE at 108, discussing a comment by the International Law Commission that "any principle of international law had its origin in custom, which was actually a repetition by States of acts covered by their municipal law." (1949) Y.B. OF THE INT'L LAW COMM. 206.

[64] *Ibid.*

c. International Conventions

Treaties are primarily contracts; as a source of law they indicate the consent of a state to be bound only as to particular parties and on matters indicated therein.[65] As such, they are distinguished from custom which, save for few exceptions, binds all states.[66] If it is then accepted that the premise for incorporation is that certain obligations are of a fundamental character that they are necessary incidents to membership in the community of nations,[67] then treaties by the particularity of obligations involved, should be excluded from the ambit of the doctrine.

The Supreme Court has nevertheless invoked a treaty in the same breath as the incorporation clause. For instance, in *Philip Morris, Inc. v. Court of Appeals*, in discussing the interplay of the 1965 Paris Convention and the Philippine Trademark Law:[68]

> Withal, the fact that international law has been made part of the law of the land does not by any means imply the primacy of international law over national law in the municipal sphere. Under the doctrine of f incorporatioas applied in most countries, rules of international law are given a standing equal, not superior, to national legislative enactments.

A closer examination of this case reveals that the Court invoked incorporation not as a process by which international law becomes part of the law of the land, but to describe the status of a treaty when, once ratified, it becomes binding in the domestic sphere.

Incorporation in Philippine practice can thus refer not only to a process, but also to describe a status. But this distinction must be clearly drawn; if it is eroded and obliterated by a succession of poorly crafted judicial decisions, incorporation may eventually be understood that treaties can automatically be part of domestic law, in clear violation of established doctrines.

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[65] "... the formation of international custom, and hence the validity of a customary rule, requires the existence of an already factually arranged area of cooperation between the states in the form of qualified practice or an at least tacit, presumed acceptance of such practice as an expression of a legal duty or right by the subjects concerned. On the other hand, the international conventional rule is created by an express active will to regulate a certain area of reality not yet arranged according to the needs and intentions of the parties." WOLFKE, at 96-97.

[66] BROWNLIE at 10.

[67] See U.S. v. Guinto, G.R. No. 76607, February 26, 1990; Wylie v. Rarang, G.R. No. 74135, May 28, 1992; Holy See v. Rosario, G.R. No. 101949, December 1, 1994.

[68] G.R. No. 91332, July 16, 1993.

It must be emphasized that the power to bind the Republic through international agreements is vested primarily with the President, subject only in certain cases to the concurrence of the Senate.[69] To allow the process of incorporation to apply to treaties would divest the President of such a fundamental executive power and, coupled with the power of the Court to interpret the law, may even amount to judicial ratification of treaties, in clear violation of among the most fundamental of Constitutional doctrines.

As the Constitution does not explicitly provide for the treatment of treaties,[70] the incorporation clause is erringly used to justify and explain the status of both custom and treaty. It may be necessary to amend the Constitution on this point; in its absence however, the Court may adopt either of two approaches to clarify the doctrine. One, it may begin to distinguish between incorporation as a process and incorporation **as a status, explaining that the former pertains particularly to international custom and the latter to international law as a whole. Two, it may instead ground the status of treaty on some other doctrines of constitutional law, or perhaps craft a new one based on a combination of the role of the executive in foreign affairs, the ratification clause and the Court's power of review over treaties.**

In *Reyes v. Bagatsing*,[71] another instance where treaty obligations are discussed in the context of incorporation, it was said that:

> **The Philippines is a signatory of the Vienna Convention on Diplomatic Relations adopted in 1961. It was concurred in by the then Philippine Senate on May 3, 1965 and the instrument of ratification was signed by the President on October 11, 1965, and was thereafter deposited with the Secretary General of the United Nations on**

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[69] CONST., art. VII, sec. 21.

[70] Interestingly, in the constitutions of the United States and of Spain, the status of treaties has received considerable treatment while remaining silent on the matter of custom. In the American system, the incorporation of custom was a matter of judicial pronouncement in Swift v. Tyson, 41 U.S. 1 (1842) and The Paquete Habana, 175 U.S. 677 (1900), but can be traced to British decisions beginning with Barbuit's Case, (1737) Cas. T. Talbot 281. Treaties, on the other hand, are accorded the status of federal law – supreme over state law, but subject to amendment and repeal by later federal laws. "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made or shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. CONST., article 6 (b). *See* also RESTATEMENT THIRD, at 41. In Spain, on the other hand, several provisions in its present constitution deal particularly with the relationship of treaties with domestic law, the most important of which states that "Validly concluded international treaties once officially published shall constitute part of the internal legal order. Their provisions may only be abolished, modified or suspended in the manner provided for in the treaties themselves or in accordance with general norms of international law." SPAN. CONST., Article 96 (1).

[71] G.R. No. L-65366, November 9, 1983.

> **November 15. As of that date then, it was binding on the Philippines. The second paragraph of its Article 22 reads: 'The receiving State is under a special duty to take appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.' The Constitution 'adopts the generally accepted principles of international law as part of the law of the land, . . .' To the extent that the Vienna Convention is a restatement of the generally accepted principles of international law, it should be a part of the law of the land.**

The Court, in that one statement that the Vienna Convention "is a restatement of the generally accepted principles of international law," impliedly stated that: first, that the customary law of diplomatic relations is a generally accepted principle of international law; and second, that the Convention, by purporting to codify customary law on the matter, is thus a restatement thereof.[72] The Convention was thus used herein merely as proof of international customary law, and as such, was deemed incorporated.

Further, in *Marcos v. Manglapus*:[73]

> **...the International Covenant on Civil and Political Rights treat[s] the right to freedom of movement and abode within the territory of a state, the right to leave a country, and the right to enter one's country as separate and distinct rights... The right to return to one's country is not among the rights specifically guaranteed in the Bill of Rights, which treats only of the liberty of abode and the right to travel, but it is our well-considered view that the right to return may be considered, as a generally accepted principle of international law and, under our Constitution, is part of the law of the land.**

Though International Covenant on Civil and Political Rights is invoked under the incorporation clause, it does not, unlike the Vienna Convention in *Reyes v. Bagatsing*, purport to codify customary law.[74] It is established, however, that treaties may not only codify custom but also create it.

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[72] Examining the preamble of the Convention, it states that "*Recalling* that consular relations have been established between peoples since ancient times... *Affirming* that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present convention..."

[73] G.R. No. 88211, September 15, 1989. *See* also Borovsky v. Commissioner, 90 Phil 107 (1951); Mejoff v. Director of Prisons, 90 Phil 70 (1951).

[74] *See* its preamble for instance: "*Considering* that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, *Recognizing* that these rights derive from the inherent dignity of the human person, *Recognizing* that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy

When treaties (i) are not dissolved by the fulfillment of the stated obligations, (ii) declare general norms of future conduct to be similarly observed by all parties, and (iii) are participated in by a very large number of states, they can have a strong 'law-creating effect' sufficient to create a customary rule that would bind even non-parties.[75] Given the fundamentally norm-creating character of the Covenant and its ratification by a large number of states,[76] its substance has gradually been absorbed into the body of international custom and its text can thus now be used as a means of identifying the content of custom.

Interestingly, one may pause and question why the Court does not simply invoke treaties as they are – obligations that derives their vitality from the fact of ratification – rather than resorting to the complexities of incorporation.[77] As we shall later see, to constantly refer to the latter in justifying the domestic application of treaties would create a problem when the obligation in question is neither generally accepted nor a principle of international law.

Further, in *Kuroda v. Jalandoni*:[78]

> Petitioner argues that respondent Military Commission has no jurisdiction to try petitioner for acts committed in violation of the Hague Convention and the Geneva Convention because the Philippines is not a signatory to the first and signed the second only in 1947. It cannot be denied that the rules and regulations of the Hague and Geneva conventions form part of and are wholly based on the generally accepted principles of international law. In fact, these rules and principles were accepted by the two belligerent nations, the United States and Japan, who were signatories to the two Conventions. Such rules and principles, therefore, form part of the law of our nation even if the Philippines was not a signatory to the conventions embodying them, for our Constitution has been deliberately general and extensive in its scope and is not confined to the recognition of rules and principles of international law as contained in treaties to which our government may have been or shall be a signatory.

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his civil and political rights, as well as his economic, social and cultural rights, *Considering* the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms, *Realizing* that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.." which declares the existence of new principles rather than merely states that it codifies existing law.

[75] BROWNLIE at 12. *See* also North Sea Continental Shelf Cases (1969) I.C.J. REP. 3; "Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such." Vienna Convention on the Law of Treaties, article 38.

[76] As of February 8, 2002, 148 states have become parties to the Covenant.

[77] MAGALLONA at 47.

[78] 83 Phil 171.

The Court in *Kuroda* states that certain rules and principles are 'part of the law of our nation,' yet fails to say what these rules are or how they may be identified. Because of this, *Kuroda* can even be erroneously read to mean treaties can become law without ratification or signature.[79] Deeper analysis of the *Kuroda* decision would however reveal an interweaving of the two functions of treaties described earlier.

A loose reading of their preambles indicates the international community's intent to codify and define the preexisting customary laws of war, such that *Kuroda* invokes the treaties not as treaties *per se* but as proof of the existence of custom.[80] In the 1907 Hague Convention,[81] it states for instance:

> Thinking it important, with this object, to revise the general laws and customs of war, either with a view to defining them with greater precision or to confining them within such limits as would mitigate their severity as far as possible...

On the other hand, in the 1929 Geneva Convention:

> ... desirous of developing the principles which inspired the international conventions of The Hague, in particular the Convention relative to the laws and customs of war and the Regulations annexed thereto... [82]

Even assuming that the treaties were not codifications of customary laws of war, they nevertheless have a law-creating character, such that the general and declaratory nature of the obligations therein created new custom, binding even on non-parties.[83] Perhaps this is what the Court sought to refer to, while being unable to find the words to express itself.

The process of using treaties in identifying customary obligations is not objectionable *per se* – it arises perhaps from the mindset requiring some certain, objective formulation of a rule of conduct either in statutes or jurisprudence.[84] **In any case, it appears that the doctrine of incorporation is used either as a status or as a process.** While all international law is to be treated *in pari passu* with

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[79] One may note, however, that the Court in *Kuroda* discussed the principle of state succession, such that upon acquiring independence, the Philippines succeeded to the treaty obligations of the United States.

[80] *See also* BROWNLIE at 30. The Court instead could have used the doctrine of state succession to treaties in that these treaties, having been entered into by the United States when it was occupying the Philippines, are binding upon the Philippines when it attained independence.

[81] Preamble, paragraph 3.

[82] Preamble, paragraph 3.

[83] BROWNLIE at 12.

[84] *See* ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT, 17 (1994).

domestic law, only custom should be deemed incorporated under the doctrine. Incorporation does not comprehend treaties; they must first be ratified, or can only be used as a reference when they create or declare custom. Incorporation likewise does not comprehend general principles of law *per se*; they are merely sources of international law and not international law itself. They cannot be invoked as principles of law *per se* but only when it has entered into the corpus of international custom can it then be invoked as such.

2. The Nature of the Obligation

The foregoing explains that not all sources of international law should be considered as falling under the operation of the incorporation doctrine; rather, the requirement of general acceptance implies that only international customary law should be brought into the domestic sphere through incorporation. The fact, however, that the clause refers only to 'principles of international law' may or may not be interpreted to mean only custom of a particular fundamentality should operate automatically within the domestic arena for, as said by the International Court of Justice, "principles of law... include rules of international law in whose case the use of the term 'principles' may be justified because of their more general and more fundamental character."[85] The fact that the doctrine refers to 'principles' requires that only norms be incorporated, as distinguished from particular rules, which are not.[86]

Authorities and international organizations have attempted to define certain principles as fundamental to the international order.[87] However, such

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[85] Gulf of Maine, (1984) I.C.J. REP., 290-291.

[86] MAGALLONA at 45.

[87] In commenting on 'principles of international law,' one eminent publicist suggests that it must be "on a relatively high level of abstraction" from the actual rules, and he proceeds to identify seven fundamental principles – sovereignty, recognition, consent, good faith, self-defense, international responsibility, and freedom of the seas. See G. SCHWARZENBERGER, THE INDUCTIVE APPROACH TO INTERNATIONAL LAW, 85-107 (1965). Likewise, the 'Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the UN Charter' adopted unanimously by the UN General Assembly on October 24, 1970 likewise mentions seven principles and elaborates considerably on each:

1. The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations;
2. The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered;
3. The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter;
4. The duty of States to cooperate with one another in accordance with the Charter;
5. The principle of equal rights and self-determination of peoples;

principles these tend to be either too abstract for any practical purpose, or are already echoed in the truisms scattered throughout the Constitution. While it can be accepted that the incorporation clause demands a certain fundamentality of obligations, drawing a line between norms and rules can be difficult at best.

In Philippine practice, one particular case highlights this difficulty. In *Agustin v. Edu*,[88] the Supreme Court said:

> The conclusion reached by this Court that this petition must be dismissed is reinforced by this consideration. The petition itself quoted these two whereas clauses of the assailed Letter of Instruction: '[Whereas], the hazards posed by such obstructions to traffic have been recognized by International bodies concerned with traffic safety, the 1968 Vienna Convention on Road Signs and Signals and the United Nations; [Whereas], the said Vienna Convention, which was ratified by the Philippine Government under P.D. No. 207, recommended the enactment of local legislation for the installation of road safety signs and devices...' *It cannot be disputed then that this Declaration of Principle found in the Constitution possesses relevance: 'The Philippines... adopts the generally accepted principles of international law as part of the law of the land...' The 1968 Vienna Convention on Road Signs and Signals is impressed with such a character.* It is not for this country to repudiate a commitment to which it had pledged its word. The concept of *pacta sunt servanda* stands in the way of such an attitude, which is, moreover, at war with the principle of international morality.

The Court stated that the 1968 Vienna Convention on Road Signs and Signals is impressed with the character of a 'generally accepted principle of international law.' It did not refer to *pacta sunt servanda* as the principle in question; it clearly referred to the treaty itself. Because the Court it did not refer to the treaty being part of the law of the land, it did not speak of incorporation as a status. It spoke of the treaty as a 'generally accepted principle' and only through its character as a 'principle' was it then considered as part of the law of the land. It was the treaty itself, based on the words used by the Court, which was incorporated. Perhaps it was considered as incorporated because it had been ratified, but then to do so one again confuses the processes of transformation and incorporation.

Whether any state adopts a particular symbol as a traffic sign cannot, by any stretch of imagination, be considered a norm of behavior. The relevant norm would simply be that states should adopt a system of signs to promote safety and

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6. The principle of the sovereign equality of States; and
7. The principle that States shall fulfill in good faith the obligations assumed by them in accordance with the Charter.

[88] G.R. No. L-49112, February 2, 1979.

efficiency in a traffic system. The content of that system would, however, be clearly a matter for rules. Norms consist of what states should do; the question of how these norms are to be attained or implemented is a matter of particular rules.

Agustin v. Edu highlights the fundamental vagueness concerning the doctrine of incorporation. It confuses the processes of ratification and incorporation, or at least fails to appreciate the difference between incorporation as a status and as a process. Consequently, it does not distinguish between the sources of international law and how they pertain to particular processes by which they become part of domestic law. It further complicates the matter by failing to differentiate norms from rules, and that only the former should be deemed incorporated.

Looking beyond *Agustin v. Edu*, however, the Supreme Court invokes custom through incorporation on either the necessary incidents of statehood, or the fundamentals for the relations of states. In the first group, in relation to each of the elements of statehood, it has discussed sovereignty and immunity;[89] human rights,[90] citizenship[91] and the regulation of aliens;[92] the nature of government;[93] territory and jurisdiction.[94] In the second group, it has considered the law of treaties and *pacta sunt servanda*;[95] the law of war[96] and its consequences;[97] immunity of states,[98]

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[89] Laurel v. Misa, G.R. No. L-409, January 30, 1947; Sanders v. Veridiano, 162 SCRA 88 (1988); U.S. v. Guinto, G.R. No. 76607, February 26, 1990; Shauf v. Court of Appeals, G.R. No. 90314, November 27, 1990; Wylie v. Rarang, G.R. No. 74135, May 28, 1992; U.S. v. Reyes, G.R. No. 79253, March 1, 1993; JUSMAG Philippines v. National Labor Relations Commission, G.R. No. 108813, December 15, 1994.

[90] Borovsky v. Commissioner of Immigration, 90 Phil 107 (1949); Mejoff v. Director of Prisons, 90 Phil 70 (1949); Chriskoff v. Commissioner of Immigration, 90 Phil 256 (1949); Andreu v. Commissioner, 90 Phil 347 (1949); Reyes v. Bagatsing, 125 SCRA 553 (1983); Marcos v. Manglapus, 177 SCRA 668 (1989); Echagaray v. Secretary of Justice, G.R. No. 132601, October 12, 1998; Cruz v. Secretary of Environment and Natural Resources, G.R. No. 135385, December 6, 2000.

[91] Laurel v. Misa, G.R. No. L-409, January 30, 1947; Palanca v. Republic, G.R. no. L-301, April 7, 1948; Frivaldo v. Commission on Elections, G.R. No. 87193, June 23, 1989.

[92] Forbes v. Chuoco Tiaco, G.R. No. 6157, July 30, 1910; Roa v. Collector of Customs, G.R. No. 7011, October 30, 1912; *In re* McChulloch, G.R. No. 13862, April 16, 1918; Borovsky v. Commissioner of Immigration, 90 Phil 107 (1949); Mejoff v. Director of Prisons, 90 Phil 70 (1949); Chriskoff v. Commissioner of Immigration, 90 Phil 256 (1949); Andreu v. Commissioner, 90 Phil 347 (1949).

[93] Co Kim Cham v. Valdez Tan Keh, 75 Phil 113 (1945).

[94] *In re* Patterson, G.R. No. 536, January 23, 1902; People v. Wong Cheng, G.R. No. 18924, October 19, 1922; Hongkong and Shanghai Banking Corp. v. Sherman, G.R. No. 72494, August 11, 1989.

[95] La Chemise Lacoste v. Fernandez, 129 SCRA 373 (1984); Commissioner of Internal Revenue v. Robertson, G.R. Nos. L-70116-19, August 12, 1986; Philip Morris, Inc. v. Court of Appeals, G.R. No. 91332, July 16, 1993; Tañada v. Angara, 272 SCRA 18; Secretary of Justice v. Lantion, G.R. No. 139465, January 18, 2000.

[96] U.S. v. Guzman, G.R. No. 590, October 10, 1902; Duarte v. Dade, G.R. No. 10858, October 20, 1915; Kuroda v. Jalandoni, 83 Phil 171 (1949); Noceda v. Escobar, 87 Phil 204 (1950).

[97] Soriano v. Sternberg, G.R. No. 15628, November 18, 1920; Laurel v. Misa, G.R. No. L-409, January 30, 1947; Co Kim Cham v. Valdez Tan Keh, 75 Phil 113 (1945); Montebon v. Director of Prisons, 78 Phil 427 (1947); Alcantara v. Director of Prisons, 75 Phil 494 (1945); Etorma v. Ravelo, 78 Phil 145 (1947).

diplomats,[99] state agents[100] and international organizations;[101] and the law of the sea.[102] In practice, therefore, the Supreme Court has incorporated a broad, if not the full, spectrum of customary international law. And perhaps, it is not in error to do so. For even in international decisions, it seems that the phrase 'principles of international law' is used to refer to international custom, and that the very nature of custom provides the requisite fundamentality. **It would appear that, after observing state practice and *opinio juris,* the relevant customary obligation is then formulated by a court or tribunal as a norm of conduct, with such formulation then being referred to as a 'principle of international law.'**[103]

The process of incorporation should be deemed to include international customary law. Despite the considerable number of Supreme Court decisions that involve international law, there nevertheless is an insufficiency in elucidating upon this doctrine. This insufficiency perhaps arises from the deficiencies in the procedural approach of the Court. The following analysis of how international law is invoked before our courts may shed some light on the matter.

B. The Method of Discovering the Law

1. The Philippine Practice

That the 'law of nations' is a matter of mandatory judicial notice is one of the most basic rules of evidence;[104] its treatment as such is a natural corollary of both ratification and incorporation. Once international law becomes operative

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[98] Sanders v. Veridiano, 162 SCRA 88 (1988); U.S. v. Guinto, G.R. No. 76607, February 26, 1990; Shauf v. Court of Appeals, G.R. No. 90314, November 27, 1990; Wylie v. Rarang, G.R. No. 74135, May 28, 1992; U.S. v. Reyes, G.R. No. 79253, March 1, 1993; JUSMAG Philippines v. National Labor Relations Commission, G.R. No. 108813, December 15, 1994; Holy See v. Rosario, G.R. No. 101949, December 1, 1994.

[99] Roman Catholic Archbishop v. Municipality of Placer, G.R. No. 3490, September 23, 1908; Schneckenberger v. Moran, G.R. No. 44896, July 31, 1936; Reyes v. Bagatsing, 125 SCRA 553 (1983).

[100] Raquiza v. Bradford, 75 Phil 50 (1945); Tubb v. Griess, 78 Phil 249 (1947); Dizon v. Phil. Ryukyus Command, 81 Phil 286 (1948).

[101] International Catholic Migration Commission v. Calleja, G.R. No. 85750, September 28, 1990; Southeast Asian Fisheries Development Center v. National Labor Relations Commission, G.R. No. 86773, February 14, 1992; Southeast Asian Fisheries Development Center v. Acosta, G.R. Nos. 97468-70, September 2, 1993; Lasco v. United Nations Revolving Fund for Natural Resource Exploitation, G.R. No. 109095-107, February 23, 1995; Callado v. International Rice Research Institute, G.R. No. 106483, May 22, 1995; Ebro v. National Labor Relations Commission, G.R. No. 110187, September 4, 1996.

[102] Mestres v. Director of Lands, G.R. No. 6866, August 31, 1912; Erlanger & Galinger v. The Swedish East Asiatic Co., Ltd., G.R. No. 10051, March 9, 1916; People v. Wong Cheng, G.R. No. 18924, October 19, 1922; Kisajiro Okamoto v. Collector of Customs, G.R. No. 39969, July 11, 1934.

[103] *See* Fisheries Case (United Kingdom v. Norway), Judgment, (1951) I.C.J. Reports 116, 142. *See* also HUDSON at 610-612.

[104] REVISED RULES OF COURT, Rule 129, section 1.

within the domestic system through these processes, courts should then in theory be properly informed as to the current state of law and cannot deny its application in disputes before them. The Court has even stated that international law need not be proved before the courts,[105] and the perfunctory manner by which the Court invokes the incorporation doctrine and then states the applicable rule of international law tends to create and strengthen this mindset.[106] Such an approach however does not take into consideration the nature of international law.

Certain traditions within domestic legal systems result in an increasing tendency to erroneously invoke treaties under the doctrine of incorporation, or to exclusively resort to them in proving a customary obligation. It cannot be overemphasized, however, that the Statute of the International Court itself refers to treaties, custom and general principles of law not as the law itself, but merely as *sources* of the law.[107] The importance of this is brought to the fore in this excerpt:

> When the law on any given point in, for example, the English legal system is sought, it is usually not too difficult a process. One looks to see whether the matter is covered by an Act of Parliament and, if it is, the law reports are consulted as to how it has been interpreted by the courts. If the particular point is not specifically referred to in a statute, court cases will be examined to elicit the required information. In other words, there is a definite method of discovering what the law is. In addition to verifying the contents of the rules, this method also demonstrates how the law is created, namely, by parliamentary legislation or judicial case law...
>
> The contrast is very striking when one considers the situation in international law. The lack of a legislature, executive and structure of the courts within international law has been noted... there is no single body able to create laws on the world scene binding upon everyone, nor a proper system of courts with compulsory jurisdiction to interpret and extend the law. One is therefore faced with the problem of discovering where the law is to be found and how one can tell whether a particular proposition amounts to a legal rule. This perplexity is reinforced because of the anarchic nature of world affairs and the clash of competing sovereignties. *Nevertheless, international law does exist and is ascertainable. There are 'sources' available from which the rules may be extracted and tested.*[108]

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[105] Puma Sportschufabriken Rudolf Dassler, K.G. v. Intermediate Appellate Court, G.R. No. 75067, February 26, 1988.

[106] It must be stressed that this 'perfunctory manner' of invoking the doctrine then the rule without elucidation is something that has appeared in perhaps only the last three or four decades. It is conceded that the relevant jurisprudence of the American and immediate post-war periods was considerably more well-conceived and elaborated upon. It is to be lamented, however, that when the development of international law picked up its pace, the Supreme Court appears lacking in virility.

[107] *See* Statute of the International Court of Justice, article 38.1.

[108] SHAW, at 58.

Because international law is derived from certain sources, whether any particular postulate is a rule of law can in fact be the subject of much debate, depending on the set of premises one begins with. Coupled with the rapid changes in world affairs, it would be difficult for a judge to have sufficient knowledge, much less expertise, of the current state of international law beyond all but the most fundamental of precepts.

When the Court fails to elaborate on how an alleged international obligation is indeed law, it falls short of its duties, not only under our constitutional framework,[109] but also as an integral part of the international community. As judicial decisions even by domestic courts have shaped international law,[110] then if the Supreme Court were to elaborate upon whether or not a particular obligation does in fact exist under international law, then its decisions can seep into the international sphere and contribute to the development of law. Abbreviated discussions, however, by the Court will achieve little in this aspect.

2. The Method of Related Jurisdictions

The Philippine treatment of international law borrows largely from the experience of the United States, with the exception that evidence is clearly allowed to prove the existence of relevant international law:

> The determination or interpretation of international law or agreements is a question of law and is appropriate for judicial notice in the Courts of the United States without pleading or proof.
>
> Courts may, in their discretion consider any relevant material or source, including expert testimony, in resolving questions of international law.[111]

These doctrines of law arise from *The Paquete Habana* case where the U.S. Supreme Court held that "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[112] The natural consequence of placing such a duty upon the courts is to allow the reception of expert testimony as to the applicable international law.[113]

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[109] CONST., Article VIII, section 14.

[110] Statute of the International Court of Justice, article 38.1 (d).

[111] RESTATEMENT THIRD at 60.

[112] 175 U.S. 677, 700 (1900).

[113] RESTATEMENT THIRD at 62, *citing* U.S. v. Maine, 420 U.S. 515 (1975); Texas v. Louisiana, 426 U.S. 465 (1976).

The United States in turn draws its legal framework from the United Kingdom, where the doctrine of incorporation was first declared in 1735 in *The Barbuit's Case* that "the law of nations in its fullest extent forms part of the law of England."[114] But the process by which their courts determine the law was declared in *Chung Chi Cheung*:[115]

> The Courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.

As one authority has commented:

> This statement harks back to the problem of evidence of relevant rules and is by no means incompatible with the doctrine of incorporation. In litigation... the courts have adopted the practical approach, which is to find the relevant rule on the basis of all the available evidence and not to be disconcerted by the general issue of incorporation.[116]

Considering that the Philippines traces its practice of the incorporation clause to American doctrines, which are in turn based on British practice, it is instructive to note that the rule on judicial notice does not bar the introduction of evidence on whether an alleged norm is part of international law. Even if not pleaded or proved by the parties, the court can and should invoke international law when it is relevant to the resolution of a dispute. When the parties raise it as an issue, however, the court must allow the parties to be heard to prove the existence of international obligations. In any case, the court need not be limited to the evidence that the parties have adduced and it should in fact endeavor to discover the relevant rule independently of the parties.

If a court were to pass upon the evidence of the existence of relevant international obligations, then its deliberation on the matter would then form part of the decision. Through this, it would be able to clarify the doctrines of law concerning incorporation, as well as provide greater material that would allow other courts, whether of other states or of international organizations, to learn from the Philippine experience, thus contributing to the development of international law as a whole.

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[114] Cas. T. Talbot, 281.

[115] 1939 A.C. 160.

[116] BROWNLIE, at 46; BRIERLY at 88. *See* also The Cristina (1938) A.C. 485; International Tin Council Appeals, 3 All E.R. 257 (1988).

CONCLUSION

It is necessary for courts to distinguish between the two processes by which international law becomes part of 'the law of the land.' The processes of ratification and incorporation must be defined and differentiated; otherwise, jurisprudence will increasingly tend to encourage the belief that certain treaties as such can become part of domestic law without ratification. Such a misconception must be clarified as it usurps the presidential prerogative pertaining to treaties and thus violates the separation of powers so essential to our system of government.

Subsequent to the delineation, courts must then begin to explain the two aspects of the incorporation clause – the first which treats all international law, regardless of source, as of equal standing with domestic legislation; and the second, which brings customary international law directly into the domestic system without transformation on the part of the other branches of government.

Lastly, courts must allow the parties to prove whether an alleged norm of conduct is part of the body of general international customary norms and to deliberate upon this is its decisions. It must avoid retreating to the doctrine of judicial notice and should instead participate actively in contributing to the development of international law with its own incisive and insightful decisions.

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