

## LEGAL CHALLENGES OF GLOBALIZATION\*

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### INTRODUCTION

#### *Globalization and the Vanishing Independent State*

By now, the word “globalization” is as worn out with use as an old vinyl record. Everyone is using it, whether talking about goods, services, information or technology. Even in the sphere of the law, globalization has in recent times taken center stage. But what indeed is this phenomenon called “globalization”?

I remember coming across a story on the Internet about how the death of Princess Diana could be used to illustrate globalization. Here was an English Princess who, with her Egyptian boyfriend, died in a French tunnel while riding a German car driven by a Belgian chauffeur drunk on Scottish whiskey, while being hounded by Italian Paparazzi on Japanese motorcycles. American doctors attempted to save them using Brazilian medicine. Millions of Internet surfers were able to read this story on one of the IBM clones that use Taiwanese-made chips, and Korean-made monitors, assembled by Bangladeshi workers in a Singapore plant, then transported by lorries driven by Indians. Tragic, in that it really happened; funny, in some ways, but not entirely false or misleading.

Globalization is loosely defined as “integration and democratization of the world’s culture, economy and infrastructure through

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transnational investment, rapid proliferation of communication and information technologies, and the impact of free-market forces on local, regional and national economies.”<sup>1</sup>

From this definition, one can instantly discern a heightened “connection”, or networking, if you will, among nations and people through trade, travel, and information exchange. It is an inter-connection that has, in fact, existed for many centuries, but the invention of machines has greatly accelerated the pace of development in these three areas.

By the turn of the first millennium, the seeds of globalization had already taken root in the eastern hemisphere, particularly in the lands bordering the Indian Ocean and the South China Sea. These were the most dynamic regions in the world at the time, and trade was the primary motivation of the advanced Asian cultures in reaching out to unknown territories. Western civilization, by contrast, was still in its seminal phase. Interaction with the traders was the spark they needed to catch up. It took more than half a millennium, however, before the great thinkers of Europe began to recognize transplanted eastern wisdom. The Renaissance eventually ushered in rapid development in keeping with the growing population. Explorers from the great western powers of the time – England, Spain, Portugal, France, the Netherlands – reached the remote corners of the Earth, purposely or at times, fortuitously, bringing with them not just goods for trading, but also religions and ideologies for mental subjugation, hand in hand with superior military equipment for physical conquest. Yet, despite the shadow cast by such show of force, it cannot be denied that the seeds of globalization, as earlier defined, were starting to take root.

The 20<sup>th</sup> century saw the heightened globalization of services and information. Spurred by the earlier Industrial Revolution and the opening of the frontiers of the United States of America, the West began to overtake the eastern powers which had been mired in their own concepts of tried and tested greatness vis-à-vis what they perceived to be the modern ways of “hairy barbarians.” By the end of the Second World War, the West was dictating the course of world trade, including the way nations ought to behave in conducting it.

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<sup>1</sup> “Globalization,” Microsoft Encarta Reference Library 2003.

It was also in the 20<sup>th</sup> century where several new developments quickened the pace of globalization and strengthened the economic links among countries. One of the most important changes was the diminished transportation costs, made possible by the availability of less expensive oil and the invention of energy-saving devices. Another key development was the emergence of more and more multinationals – the modern symbol of globalization. While misgivings have been expressed regarding the effects of multinational corporations on the economy and the worker population, especially those in developing countries, a Columbia University economist, Jagdish Bhagwati, states that “studies find that they actually pay a “wage premium” – an average wage that exceeds the going rate in the areas where they are found, ranging from 40% to 100%.” He asserts that foreign corporations with better technology and management practices provide technology transfer, new ideas and expectations and increased competition in the local job market.<sup>2</sup>

A third factor that promoted globalization was the creation of international economic institutions – such as the International Bank for Reconstruction and Development (the World Bank), the International Monetary Fund (IMF), and the World Trade Organization (WTO) – to help regulate the flow of free and fair trade and money among nations. The duties of the 147-member WTO, successor to the General Agreement on Tariffs and Trade (GATT), includes, among others, administering trade agreements, acting as a forum for trade negotiations and assisting developing countries. To dispel any doubt that the U.S. is now, more than ever, integrated with the world economy, WTO's Director-General, Supachai Panitchpakdi, has stated that “a quarter of U.S. Gross Domestic Product is tied to international trade, up from 10% in 1970”. America's wider global objectives, such as fighting terrorism, reducing poverty, improving health, integrating China and other countries in the global economy, are seen as linked, in one way or another to world trade.”<sup>3</sup> The latest WTO framework agreement lays down the basic aim of the talks,” to establish a fair and market-oriented trading system through a programme of fundamental reform.” But the final balance must grant special treatment for developing countries, where agriculture is of critical importance to economic development. Developing countries had blamed lavish subsidies

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<sup>2</sup> Bhagwati, Jagdish, *Do Multinational Corporations Hurt Poor Countries?*, AMERICAN ENTERPRISE, May 2004.

<sup>3</sup> Jill Jusko, *The Two Sides of Trade*, INDUSTRY WEEK, Apr. 2004.

paid to farmers mainly in rich countries for driving down prices and effectively sidelining them on world markets.

Finally, advances in telecommunications and computer technology made it much easier for people to communicate with each other and to conduct their business. Managers, for example, can now easily coordinate the global activities of their organization involving various corporate divisions, clients, and suppliers, without even leaving their headquarters.

But globalization has its dark, ugly side too. Events in one country may have serious consequences for ordinary people in another part of the world. In the late 1990s, for example, a long economic recession in Japan spread to Southeast Asia. The countries of Southeast Asia had relied on Japanese banks for money to prop up their economies and on Japanese consumers to buy their products. The recession prompted Japanese banks to curtail their investments and purchases, causing many other Asian economies to flounder. Eventually other foreign investors panicked and pulled their money out of Southeast Asia. Consequently, thousands of Thais, Indonesians, Filipinos and many others in the Pacific Rim lost their jobs. While the crisis has passed, the effects of the economic "Asian Flu" are still being felt in some quarters.

It is too recent to forget the Severe Acute Respiratory Syndrome (SARS) epidemic which first appeared in Guangdong, China in 2003. But because the Chinese authorities opted to suppress information about this menace at a time when such news would have been easily picked up and disseminated world-wide, the virus grew out of bounds and quickly spread to other Asian countries like Hong Kong, Singapore, Vietnam, Taiwan and crossed the Pacific to Canada. It was a retired military Communist doctor, who learning of the alarming number of SARS cases and deaths in the capital, wrote to the press revealing the true figures, and at great risk, signed his name. His revelations, corroborated by other Chinese doctors and the World Health Organization (WHO), helped to contain a potential global epidemic. This modern-day hero, Dr. Jiang Yanyong, received the Ramon Magsaysay Award, the equivalent in Asia of the Nobel Prize, in August, this year, in Manila for breaking China's habit of silence and forcing the truth of SARS into the open.

At bottom, what should have been merely a domestic health problem, soon raised questions of possible violation of global human rights which had implications on political rights, law and politics, as well as social

policy. For to contain the epidemic, governments were forced to quarantine infected areas, condemn and slaughter suspected animal carriers by the thousands and impose stringent health measures in ports of entry to the extent of rejecting possible carriers into their borders. It is no exaggeration to state that countries in my region are still jittery over the possible spread of other highly contagious diseases like "mad cow disease", avian flu and AIDS.

Throughout the world, both rich and poor countries have increasingly been dependent on one another economically. Perhaps with the exception of the behemoth US and Chinese economies, they face problems with global dimensions. This includes the ultimate example of a global challenge – the assault on our ecological system. High rates of consumption coupled with economic desperation have led to such environmental pressures as the depletion of resources, the generation of pollution and the conversion of natural habitats for economic uses. In the long term, the success of globalization may well depend on its ability to bring about and sustain economic wellbeing to all of the world's inhabitants without causing further environmental damage.

The enjoyment of the benefits of progress, as well as acceptance of attached responsibilities, is no longer the exclusive prerogative and burden of a single nation or a single race. Now, more than ever, global cooperation is necessary if we are ever to continue reaping the blessings of mutuality.

### LEGAL AND JUDICIAL GLOBALIZATION

While initially, the phenomenon of globalization took place within an economic context, it was inevitable that it should have ramifications on the entire social and cultural fabric of the countries affected. All too soon, the domestic wranglings were exploding into conflict situations of transnational proportions that threatened to disrupt harmonious relations between and among racial and ethnic groupings, not to speak of developed nation-states. Responding to internal and external pressures, informal arrangements and laws had to undergo reformation, mechanisms were devised and novel infrastructure established to cope with situations never foreseen. And these had to take into account the idiosyncrasies of the developing private international law.

Even as law was evolving through a natural process of internal growth, and subtle adventitious accretions, a more radical but artificial means of altering the legal terrain of nations was taking place in the wake of armed conquest. Through military might, subjugating powers were effecting the unilateral transplantation of entire systems of laws upon the unwilling populace of conquered territories. At certain stages in the history of mankind, alien laws, regardless of their affinity with indigenous practices, have been superimposed upon the customs and folk beliefs of native inhabitants.

Let us take a leaf from the history of the Philippines. When the Spanish “conquistadores”, with the sword in one hand and the Cross in the other, overran the country, they ruled through edicts which emanated from the mother country. The Spanish Civil Code which traced its origins from Roman Law and the Code Napoleon regulated the personal and property relationships of the people for over three hundred fifty years – from the 16<sup>th</sup> to the 19<sup>th</sup> centuries.

At the threshold of the 20<sup>th</sup> century American forces defeated the Spanish monarchy and established their nation’s sovereignty in the Philippines. Erecting a form of government patterned after that of the United States, the drafters of the country’s historic Charter drew liberally from the American model which subsequently evolved into the 1945 Constitution of the Philippines, the dominant features of which were a republican form of government and a Bill of Rights. As we all know, the libertarian political and social philosophies of such theorists and thinkers of the French Revolution as Montesquieu and Jean Jacques Rousseau had, in the nineteenth and twentieth centuries, profoundly affected the spirit and the basic framework of the Constitution of the United States: the first, by his postulate that governmental powers should be lodged in separate executive, legislative and judicial bodies to safeguard personal liberty and the second, by his social contract theory that sovereignty ultimately resides in the people regardless of the fact that this attribute had been delegated to the government when men formed a social contract to live in society. Thus, the seeds of popular sovereignty and democratic rights from the Old World found fertile ground for growth in the Philippines through the instrumentality of the Anglo-American common law, which had by then, diluted the Romanesque influence of Spanish Civil Law. Clearly, the foundations of nascent legal and judicial globalization were already being laid on either side of the Atlantic and the Pacific.

During the relatively brief interludes of the Commonwealth and the Republican form of governments under American sovereignty in the first half of the twentieth century, American jurisprudence and case law were extensively applied in the resolution of disputes initially, by the American Justices appointed to the Supreme Court of the Philippines and later, by U.S.-trained jurists. The first batch of such judges sent by the Philippine government as "pensionados" under scholarship grants were enrolled at the Law School of Indiana University. In fact, there now stands a building at the Bloomington campus named in honor of Dr. Jorge C Bocobo whom a scholar has described as the "Father of the Brown Race Civil Code" and whose legal prowess was recognized by his appointment as Justice of the Supreme Court and President of the state-owned and operated University of the Philippines.

With more than two hundred years of interpreting constitutional human rights behind it, American jurisprudence has made a profound impact, not only on former colonies like the Philippines, but on independent, freedom-loving states and their judiciaries. These have found their way into foreign laws, not merely through the process of reception, then adoption of case decisions, but to a growing extent, through dialogue and "cross-pollination" among jurisdictions. The same factors that led to globalization by leaps and bounds in the economic and other fields of human endeavor in the last century have been responsible for producing a global legal world.

In her perceptive analysis presented in her paper on "The State of the International Judicial Community at the Outset of the 21<sup>st</sup> century",<sup>4</sup> Justice of the Supreme Court of Canada and immediate past President of the International Commission of Jurists Claire L'Heureux-Dube cited the following reasons for the increasing globalization of the legal world. First, more than ever, with the same issues facing many courts throughout the world, the discussions and equivalent legal debates are becoming more and more similar. This can be partially attributed to the advances in global communications and contacts. In addition, with this increasing transmission of news and information across borders, potential litigants are made more aware of the results of litigation in a certain jurisdiction, and may see them as encouragement to pursue similar causes in other countries.

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<sup>4</sup> Delivered at the Courts First International Conversation on Enviro/Genetics Disputes and Issues, EINSAC, Mauna Lani Bay, Hawaii (Jul. 1, 2001).

A second factor leading to the globalization of the judicial world is the links between national human rights guarantees and such international human rights documents as the United Nations Covenants on Civil and Political<sup>5</sup> and Economic, Social and Cultural Rights.<sup>6</sup> International human rights law has become kind of “common denominator” of understanding for judges interpreting national or regional human rights documents, such that national judges in a certain jurisdiction turn to the interpretation of human rights norms in another jurisdiction as persuasive authority.

A third factor leading to the growing internationalization of the judiciary is the advancement of communication technology. With the existence of computers and electronic databases, access to decisions in broad range of jurisdictions is possible. The Supreme Court of the Philippines, as parts of its Action Program for Judicial Reform (APJR), has launched what it calls the Court Administration Management Information System (CAMIS) which is developing a publicly accessible and comprehensive database of all cases under the jurisdiction of the lower courts, including the tracking down of the current status.

A fourth contributor to the increasing internationalization of the judicial world is the growing personal contact among members of the judiciary from different countries. Meeting face to face in conferences, building relationships and sharing ideas between judges and lawyers from different jurisdictions is bound to improve and refine the process of judicial globalization.

At the same time, the Honorable Claire L’Heureux-Dube pointed out that though the solutions of other countries or of the international community may be useful, foreign reasoning should not be imported without sufficient consideration of the context in which it is being applied. Solutions in one jurisdiction may be inappropriate elsewhere due to political and social realities, values and traditions which differ across borders, regions and levels of development. This is not to say that it would be useful to look to decisions from jurisdictions where the context is different. She stressed that “Cross-pollination helps not only when we accept the solutions and reasoning of others, but when we depart from them, since

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<sup>5</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966).

<sup>6</sup> International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966).



even then, understanding and articulating the reasons a different solution is appropriate for a particular country will make for a better decision.”<sup>7</sup>

As a result of the expanding reach of legal and judicial globalization, the literature and the curricula of law schools and mandatory continuing legal education programs have become more comprehensive, including international human rights, intellectual property, cyberspace and e-commerce, biodiversity, transnational organized crimes and law enforcement, international arbitration, immigration and citizenship, extradition and others. Professor Anne-Marie Slaughter of Harvard Law School opined that “[modern] judges should see one another not only as servants or even representatives of a particular government or party, but as fellow professionals in a profession that transcends national borders.”<sup>8</sup>

### INTELLECTUAL PROPERTY RIGHTS AND PIRACY

Few may be aware that in the Philippines, we have been celebrating Intellectual Property Rights Week since 1992. With the proliferation of pirated products peddled – and bought – with impunity in some of our shops, it is evident that many are not aware of what an intellectual property right or IPR is, or if they knew, would rather ignore this in view of the lucrative trade in prohibited commodities. I am inclined to believe that such may be the situation in many other countries.

In simple terms, IPR connotes that: authors have copyrights; scientists and inventors have patents; commercial firms have trademarks, service marks and trade names. Such terms may be alien to the uninitiated. Even less are aware of the related rights enjoyed by artists, performers, producers of phonograms and broadcast companies.

There can, however, be no doubt that the last decade has seen the metamorphosis of IPR as a mere instrument of protection to that of an active agent of development and progress. Nonetheless, if we look beyond IPR as an “instrument of protection” or “an active agent of development or progress,” we will discover that the main office of IPR is to celebrate or

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<sup>7</sup> Claire L'Heureux-Dube, *The Importance Of Dialogue: Globalization And The International Impact Of The Rehnquist Court*, 34 TULSA L.J. 15, 26-27 (1998).

<sup>8</sup> Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1124 (2000).

define man's genius or originality and, subsequently, to protect it. At times, these two terms may overlap, a fact Arthur Koestler duly acknowledged when he said, "The principal mark of genius is not perfection but originality, the opening of new frontiers." Others, like Johann W. Von Goethe, believe that nothing in this world is original, and goes on to say that everything has been thought of before, but the problem is to think of it again." In other words, to IPR critics like the eminent Dean William R. Inge, originality is nothing but "undetected plagiarism...the fine art of remembering what you hear but forgetting where you heard it."

One thing remains clear: IPR is a direct consequence of creative intelligence and whenever its product is inherently beneficial or may be developed for the common good, the protection of the creator's right must be ensured.

Considered as a "non-human right" because it is not enshrined in the Universal Declaration of the Rights of Man,<sup>9</sup> IPR is a concept borne of exigency, evolving as it did from the increased commercial interaction among nations and spurred by the need to place a premium on man's ingenuity. By contrast, the TRIPS Agreement, or the Agreement on Trade-Related Aspects of Intellectual Property,<sup>10</sup> sets the dimensions within which these commercial rights can be demanded and preserved in accordance with a pre-determined universal consensus. At the core lies the enforcement of IPR, which is all that really matters as far as a holder of an IPR is concerned.

I believe, however, that the TRIPS Agreement is less a product of necessity than of convenience. Before its advent, IPR was already being protected and enforced in many countries through several international conventions, some of which date back over a century. This would include the 1883 Paris Convention for the Protection of Industrial Property,<sup>11</sup> the 1886 Berne Convention for the Protection of Literary and Artistic Works,<sup>12</sup>

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<sup>9</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

<sup>10</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments-Results of the Uruguay Round vol. 31, 33 I.L.M. 81 (1994).

<sup>11</sup> Paris Convention for the Protection of Industrial Property, Mar. 20, 1883 (amended 1979).

<sup>12</sup> Berne Convention for the Protection of Literary and Artistic Works, Sep. 9, 1886 (amended 1979).

and the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.<sup>13</sup>

Trade dynamics call for periodic revisions of these cluttered treaties. For the Paris Convention, the latest changes occurred via the Lisbon Act of 1958 and the Stockholm Act of 1967. In the last 50 years, the Berne Convention has undergone three revisions: the Brussels Act of 1948, the Stockholm Act of 1967 and the Paris Act of 1971. The occasional loose provisions of these conventions were consolidated and a uniform set of remedies was devised which gave rise to the TRIPS Agreement.

Even as the TRIPS Agreement simplified the source of IPR and the reliefs available to a right holder, it also extended protection to rights that have emerged in the global market concurrently with the growth of international commerce, especially in technology-dependent industries. The Berne Convention secured the copyright of artists, writers and composers; the Rome Convention covered the related rights of performers, producers of phonograms and broadcasting organizations; and the Paris Convention allowed inventors to patent their works.

Over the years, other areas of concern surfaced, such as the production and distribution of live or still film and live music; information technology, including digital data transfers, computer programs and compilations of data, telecommunications, and satellite transmission; biotechnology and pharmaceuticals; and designer products. These are, by and large, addressed by the TRIPS Agreement, supplemented by the inclusion of rental rights in the use of computer programs and cinematographic works, undisclosed information or what is commonly known as trade secrets, and control of anti-competitive practices in contractual licenses. Hovering on the horizon is the highly controversial but potentially profitable field of genetic manipulation or GM, which in its embryonic stage is already the subject of dispute.

In this time of seemingly unlimited access to information, products, and services via the digital highway that is the Internet, IPR holders are wary that their interests may be greatly compromised due to lack of sufficient safeguards along the boundless coasts of global trade. On

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<sup>13</sup> Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, (Oct. 26, 1961).

the other hand, developing country-members are quick to point out that IPR and the conventions protecting them primarily pertain to the developed nations, without necessarily taking into account products and industries endemic to a particular State, as well as the capacity of such country to police its own ranks. The TRIPS Agreement is no exception. In fact, it imposes additional obligations on developing States that are already signatories to the other three conventions, in addition to extending protection to parties to the TRIPS Agreement which are not parties to the other conventions, thus, making the process of creation, infringement and redress clearly one-tracked.

Still, in terms of enforcement, the TRIPS Agreement by far offers the best possible protection and recourse to any IPR holder. It even devotes and entire portion, composed of five sections and twenty articles, solely on IPR enforcement, Article 41(1) presumes that a member-State has adequate remedial mechanisms to prevent or, at the very least, deter infringement. The procedure must be fair and equitable, fundamental and cost- and time-efficient. In other words, IPR cases are to be handled just like any other dispute applying municipal laws. Therefore, common due process requirements, such as notice, the right to present evidence, and the right to counsel, must be observed.

It must be underscored that the growing awareness on IPR and the corresponding concern on their protection and implementation are due in large measure to globalization. The TRIPS Agreement itself is a mere product of the Uruguay Round of the General Agreement on Tariff and Trade or GATT, which treats of the more complex, more expansive realm of global commerce at both the macro and micro level. The seemingly unfettered business environment is fertile ground for violating or abusing IPR. Hence, enforcing IPR would be mutually beneficial to all members of the international community. But because it is not self-policing, we must ensure that, at the very least, IPR should be effectively and efficiently enforced in our own independent backyards.

Where do judges and legal practitioners like us come in?

Many lawyers are aware of the laws pertaining to IPR. They must, however, have a deeper understanding of the provisions of the TRIPS Agreement so that these may be applied with equal force and effect in every State. It is this ideal that must be maintained not only in hindsight but more importantly in anticipation of a more complex trade relationship revolving

around IPR. The key is enforcement. Any law, however well-crafted and well-thought out, will be useless if it cannot be enforced properly and adequately.

The Philippine government has taken some crucial steps in this direction. The country's judges are already being trained through programs designed by the Philippine Judicial Academy, and the Departments of Justice and Interior and Local Government have their own training modules for prosecutors and law enforcers. It must be noted that since many IPR violations, especially piracy and product counterfeiting, are being committed by or through transnational criminal organizations, regional cooperation among different law enforcement agencies must be encouraged, if not vigorously pursued, to cut the source of the problem.

Note the Intellectual Property Code of the Philippines (IPCP),<sup>14</sup> which was enacted into law on January 1, 1998 as Republic Act No. 8293. Like the TRIPS Agreement, it unified the Philippines' disparate laws on patents, copyrights, trademarks, service marks, trade or business names, and other IPR; the TRIPS Agreement itself is embodied in the IPCP. It is no wonder, therefore, that the remedies available here would include the same remedies prescribed under the TRIPS Agreement. This is precisely what was alluded to earlier, about the necessity or desirability of expanding the general provisions of the TRIPS Agreement so that they may find local application.

These substantive laws require appropriate rules of procedure for effective implementation and enforcement. Since the rules do not sufficiently address the problems attendant to IPR violations, the Supreme Court of the Philippines adopted the Rule on Search and Seizure in Civil Actions for Infringements of Intellectual Property Rights in January 2002. The said Rule took effect in February 2002.

The Philippines is also one of the first countries to adopt a law on e-commerce. The Electronic Commerce Act of 2000<sup>15</sup> specifically makes Internet service providers (ISPs) liable for infringement of IPR, whether directly committed by such ISPs or indirectly by allowing their clients to commit the same. It also penalizes "piracy or the unauthorized copying,

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<sup>14</sup> Rep. Act No. 8293.

<sup>15</sup> Rep. Act No. 8792.

reproduction, dissemination, distribution, importation, use, removal, alteration, substitution, modification, storage, uploading, downloading, communication, making available to the public, or broadcasting of protected material, electronic signature or copyrighted works including legally protected sound recordings or phonograms or information material on protected works, through the use of telecommunication networks, such as, but not limited to, the internet, in a manner that infringes intellectual property rights.”<sup>16</sup>

The reference to the Intellectual Property Code and E-Commerce Act is a veiled attempt at encouragement to push for the enforcement of IPR laws within the context of the TRIPS Agreement. This is the best, if not the only way to guarantee protection to individual and corporate right holders at the national and international stage. Prosecutors may be urged to make use of the vast resources of their government to enforce IPR whenever criminal sanctions are called for. Judges, for their part, could contribute overwhelmingly to this effort by applying the full force of municipal laws alongside the GATT and the TRIPS Agreement in cases involving any violation or abuse of IPR. By doing so, they will be sending a message loud and clear that in their country, IPR is secure and fully protected. This, in turn, will pose a challenge to the rest of the world to do the same in order to preserve the unity of purpose that we are beholden to uphold.

Justice Reynato Puno, encapsulates it thus: “intellectual piracy, infringement and unfair competition are global concerns that must be addressed with firm hands by the State. For today, the protection of intellectual property is a cornerstone of economic progress in all civilized countries.”<sup>17</sup>

### FREEDOM OF EXPRESSION, CYBERLAW AND E-COMMERCE

Prussian monarch Frederick II once said: “My people and I have come to an agreement which satisfies us both. They are to say what they

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<sup>16</sup> Id. § 33(b).

<sup>17</sup> Explanatory Note, Rule on Search and Seizure in Civil Actions for Infringements of Intellectual Property Rights, Adopted on Jan. 22, 2002 by the Supreme Court of the Philippines and which took effect on Feb. 15, 2002.

please, and I am to do what I please.” This statement captures two essential facets of what we know now as freedom of expression – the freedom to speak out and freedom to act. In the United States, this freedom is protected by the First Amendment and is considered essential to the vitality of representative government. At the core of its concerns is the protection of expression that is critical of government policies. In the Philippines, this concept is enshrined in the Constitution as Article III, Section 4 of the Bill of Rights couched in terms derived from the United States’ First Amendment.

Freedom of speech generally includes freedom of the press. Because it is essential to political activities and religious practices, the exercise of the right of free expression often occurs in association with the exercise of the right of peaceful assembly and freedom of worship. It is also intrinsically related to academic freedom, at least the aspect that pertains to the right of teachers to express opinions in accordance with their beliefs and conscience and with immunity from dismissal or other penalty.

While life seemed complicated enough with the exercise of these aspects of freedom of expression brought to their uttermost limits, we never dreamt of quantum leaps in communications conquering both physical distances and outer space, surpassing even the fantasies of science fiction. With the advent of electronic media, instantaneous communication across the globe is now possible. People with ideologies and political, educational and religious messages have discovered new forms of media at their fingertips with which to convey these to a broad, mass-based and relatively anonymous audience.

For like it or not, we stand dazzled by the bewildering possibilities opening up before us with the unlocking of cyberspace, a hitherto uncharted territory. With virtually no maps, signposts or warning signals, we dare to cross over and explore virgin terrain. Marshall McLuhan, the communications guru had, with unusual prescience, predicted in the mid-1960’s that with the rise of electronic media, “we have extended our central nervous system itself in a global embrace. His notion of a “global village” has come to pass. Hence, such an information environment “compels commitment and participation. We have become irrevocably involved with,

and responsible for each other.”<sup>18</sup> Indeed, we have become in a very real sense, our “brother’s keeper”.

Without cartographers altering the physical metes and bounds, the latitudes and longitudes and the highs and lows of the earth’s topography, some age-old barriers have been practically obliterated, great distance breached and frontiers, pushed farther through globalized communications. Even as the expansion and development of radio and TV have continued unabated, the outmoded assumptions and blueprints are now undergoing drastic overhauling in light of the convergence of modern technologies and the giant strides being made through the conquest of cyberspace. Whereas radio and TV used to be beamed to a largely anonymous audience, the magic of cyberspace, the world-wide web and the internet now makes it possible to reach and address a relatively identified broad, mass-based target audience. To quote a hard-nosed observer: “With convergence, we have seen the traditional copper-wired telephone become a wireless handy device and metamorphosed into a combination of a digital still or video camera, a Personal Digital Assistant (PDA) or even a micro-computer or is it now a handheld or ‘wearable’ television and radio? A few years back there were developments of a disposable phone.”<sup>19</sup>

Many use the internet as a handy research tool. Gone were those days when we used to stay up in the library of Maxwell Hall, banging away at a manual, and later, an electric typewriter and producing carbon duplicates. Now with a click of the mouse, a student can have access to infinite resources surpassing even his professor’s reference materials. The rest have surely utilized the internet as a social vehicle, for instance, e-bay, friendster/ICQ, peer to peer communication and the like. Beyond this boon to scholars, it has been stated that: “the potential benefits of the internet are numerous and range from simple improvement of communications, to a revolution in commerce and an increased potential for expression and democratic involvement of citizens in some other level of political engagement.”<sup>20</sup>

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<sup>18</sup> David Croteau & William Hoynes, *Media Society: Industries Images and Audiences* (3d ed. 2003), *citing* Marshall McLuhan & Quentin Fiore, *THE MEDIUM IS THE MESSAGE: AN INVENTORY OF EFFECTS* (1967).

<sup>19</sup> Charlton Jules Romero, *Lecture Notes*, St. Scholastica’s College, 2004.

<sup>20</sup> *THE INTERNET, LAW AND SOCIETY* (Yaman Akdeniz, Clive Walker & David Wall eds., 2000).



Thus far, we have been dealing with that aspect of globalized communications which has made instantaneous interaction over great distances possible, thus changing the role of geography in our lives. However, a dimension fraught with legal implications is the content of the communication. It has been pointed out, and with reason, that "much of the concern to date has revolved around the threats to privacy, intellectual property rights, the prospect of universal defamation and the implications for national tax collection. Additionally, there are concerns about the security of network systems, and unauthorized access and denial of service attacks, concerns about the availability of indecent, obscene and racist content, concerns about the use of computer technologies for traditional property offences such as theft, fraud, threatening hate speech and online stalking. There are further fears about the disregard of national legal sensitivities, whether about contempt of court, gambling or otherwise."<sup>21</sup>

How many of us have cringed at the unexpected and sudden sight on TV of beheadings of hostages, carnage in civilian areas and more recently, the 87-second video footage showing the massacre of over three hundred schoolchildren, teachers and parents by masked gunmen demanding independence for Chechnya at the North Ossetia School in southern Beslan? To be sure, we would rather dwell on the major international events brought to our living rooms or bedrooms by satellite such as the recently-concluded Athens Olympic Games, viewed by hundreds of millions of sports enthusiasts living in different timezones. While we do not have the figures of the spectators of this event, we know that the Sydney 2000 Olympic Games was viewed by an estimated 3.7 billion people in 220 countries. CNN's network broadcasting via 23 satellites reaches more than 800 million people in 212 countries, not to speak of those hooked up via CNN's websites.<sup>22</sup>

Faced with the acceleration of commercial and social interaction over a broad expanse of the globe brought about by nontraditional, high-tech gadgets and instruments, the formal institutions regulating human conduct operating within territorial boundaries like law, had to grapple initially with the unknown. Thus, in order to curb possible excesses and avert potentially explosive transnational situations, lawmakers all over the world were called upon to enact appropriate legislation, and judges, to

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 7.

familiarize themselves with subjects not covered in law school curricula. More importantly, due to the nature of cyberspace, international negotiations were set into motion which eventually resulted in conventions, treaties and resolutions binding upon nations ratifying them. This is not to say that it has been possible to contain excesses of cyberspace. As one author succinctly put it: "The attributes of transnationality, instantaneity and accessibility make national regulation or indeed any level of imposed regulation very difficult to accomplish and enforce... These difficulties facing regulators are compounded by the fact that there is no overall ownership of the internet. It is made more complex by the convergence of media, creating uncertainties as to which authority should act and which sectoral standards should apply."<sup>23</sup>

In the realm of cyberspace, the task at hand for us lawyers and judges is to identify the subjects of what we may term as "translegal", as opposed to national, regulation appropriate to its safe carriage and conduct. "This would include: transborder or international carriage (including technical-technological standards); transborder access; privacy; encryption; domain names' content labeling/rating; international network hotlines and copyright."<sup>24</sup> A mastery of the laws governing intellectual property rights would be useful for this purpose, especially in the area of dispute resolution.

This leaves to the mechanisms and infrastructure at the national level the job of, among others: "ensuring compliance with agreed international principles; criminal law in respect of illegal content, e.g. pedophilic material, terrorist material and racial/ethnic/religious hatred material consistent with established principles of international law; working on schemes to regulate harmful content, including industry self-regulated codes, content rating schemes tailored to national cultural mores and hotlines; encouraging local language content and cyberspace; community education on the use of cyberspace and facilitation of local access to cyberspace."<sup>25</sup>

The rapid rate of technological change over the past decades, especially in the sphere of information management and exchange, and in communications systems, especially in cyberspace should give us an idea of

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<sup>23</sup> *Id.* at 9.

<sup>24</sup> UNESCO, *THE INTERNATIONAL DIMENSIONS OF CYBERSPACE LAW* (Teresa Fuentes-Camacho, ed. 2000).

<sup>25</sup> *Id.*

the necessity, if not the urgency, of looking ahead. For intellectual as well as practical considerations, the legal profession must plan for change in order to ensure that the benefits to be gained will be maximized.

It is a truism that technology – more precisely, the use of technological tools – will continue to induce extraordinary shifts in otherwise ordinary aspects of life. Law and legal practice are no exception. Evidently, because the legal profession has lagged behind other fields in adapting to improvements in technology, accelerated transformations entailing the espousal of such changes are likely to have a tremendous effect on traditional legal and judicial practice.

One such transformation that will most likely occur is what has come to be known as “dematerialization”. This concept connotes a substantial removal of the tangible barriers to communication among the courts, the court users, and the general public. I would venture to say that the practice of telecommuting is rooted in this notion. In essence, however, it requires more, namely, a movement from our physical space to cyberspace, a shift from a document-dependent system to paperless courts. In many jurisdictions, this is now a reality. The benefits that may spring from such a transition are immediately apparent.

In the Philippines, the e-commerce law, namely, Republic Act No. 8792 or the Electronic Commerce Act of 2002, was carefully scrutinized by the Supreme Court for the purpose of introducing appropriate changes in the Rules of Court. Such changes were reflected in the Rules on Electronic Evidence, adopted by the Court on August 1, 2001. With developments in information and communication technology, cases can now be initiated by a prospective litigant and pleadings filed electronically by lawyers from places other than the courthouse. As regards cost-effectiveness, equipping the courts with the latest hardware may seem too enormous an undertaking, considering the magnitude of work to be done, including training the end-users on how to maximize the utility of computers as “office managers”. Fortunately, the existing downward trend in the average cost of IT facilities will persist, making such an ambitious project less challenging. Moreover, no price is steep enough for the sake of efficiency and the speedy disposition of cases, or for ensuring a more effective system of case and court management.

The purpose, if not the result, of this entire exercise is what has come to be referred to as “paperless courts”. Under this setup, printed

documents that usually tie up court operations will be a thing of the past. Thus, the administration of justice will not only be streamlined toward greater efficiency, but, with thousands of trees saved as a direct consequence of the reduced consumption of paper the court will also fulfill its constitutional and natural obligation to align its operations in harmony with nature and the environment.

### ROLE OF JUSTICE SYSTEM IN ECONOMIC DEVELOPMENT

Commerce and industry are commonly recognized as the keys to unlock the doors of national prosperity, but they are by no means the only vehicles of sustainable development. In the case of the Philippines, there is still a need to understand our political history in order to see the complex relationship between the law and its objects – including foreign nationals – and how the courts intervene in resolving conflicting interests. The quality of justice meted out, as well as the speed by which it is made, is vital in measuring the soundness and viability of economic policies.

History shows violent swings in our nation's economy due in large part to our dependence on a stable foreign reserve. As the exchange rate steadily pulled the value of the peso down in the last quarter of a century, trade focused and continues to focus on export-oriented goods and services, with overseas Filipino workers generating the highest revenues. The widening trade imbalance, however, reveals the futility of this effort.

The 1997 crisis was a major wake-up call for all of us. It taught everyone not to be complacent amid progress brought about by greater global market access, and concentrate instead on developing and supporting indigenous industries. This would necessarily require a strong political will and a stable social order.

Since time immemorial, the law has been utilized for the primary purpose of maintaining this order. If order in civilized society breaks down, one can easily expect chaos to be taken to the edge of barbarism. Surely, nobody wants to relive the Dark Ages. To achieve true harmony, the law must co-exist with an unshakable mechanism for enforcing or interpreting concomitant rights and duties. This is where an effective and efficient justice system makes its presence felt – to resolve disputes that may erupt

between and among the people, the lawmakers, and the law enforcers regarding a law's content, application or manner of execution.

The role of the justice system in economic development is no different from its general utility. To put it plainly, peace, a direct result of "order", fosters a climate conducive to progress and prosperity. A closer peek into the past will demonstrate parallelisms of relative serenity in the Renaissance and in this century. Amid the random periods of turmoil in these two eras sprang cycles of highs and lows – more highs than lows, actually – in the various economies of the world. In the early days, such flourishing was the unexpected, yet, inevitable result of experiments in the political and economic theories of such brilliant thinkers as Jean Paul Sartre, Niccolo Machiavelli and Immanuel Kant. Developments in modern thinking would never have thrived in an atmosphere of social uncertainty, if not instability.

By contrast, in the past century that has seen two major wars, with most systems of socio-political and economic import installed in practically every corner of the globe, human creativity was pushed, and continues to be pushed, to the limit. Wars betray man's impotence to settle differences within the confines of man-made laws. Yet, before, between and after these armed conflicts, when the social order was operative, human creativity took center stage and made our lives more comfortable with mind-boggling breakthroughs in the physical sciences. Discoveries in science and technology, medicine, radio and communications, transportation, and electronic data processing, to name just a few, became the standards by which human progress was measured. Hence, those who ushered in this second Industrial Revolution witnessed a marked enhancement in their way of living. The fact that the developed nations control the most advanced technological tools is no coincidence. Again, I daresay that all these developments would not have been possible had no reliable and independent justice system enforced the proper legal conventions.

Consequently, citizens who are confident in their political leaders and in the courts are spurred towards improving themselves in all aspects of life. In the process, they become more efficient, more productive even if more competitive in ways that would never occur in a hostile environment.

An efficient and effective judiciary, enjoying the public's trust and confidence, reflects the state of the country and the resolve of its leaders to propel the economy forward. A stratospheric crime rate would naturally discourage business and investment. The inability of the courts to protect commercial interests would also defeat economic policies, however sound they may be. Inversely, when crime is kept at a minimum, people, in general, and business people, in particular, see the law at work. It is a situation where the law offers statutory protection, the authorities ensure physical security, and the courts balance all the conflicting interests in the community to serve the social order. Reforms underway in our judiciary through the efforts of the Chief Justice would inevitably lead to a rosy socio-political climate instrumental in initiating the necessary economic reforms. One of these is the Supreme Court's pursuit of alternative modes of dispute resolution to decongest the dockets of the courts.

#### ARBITRATION

Lord Woolf once said, "Litigation is to be avoided where possible, should be more cooperative and less adversarial, shorter and less complex, more affordable, more predictable, with costs more proportionate to the value of the claim." The Philippines' Chief Justice Davide, for his part, once said that, "It is high time that we... build upon our... traditions to create a Filipino judicial philosophy that seeks to end disputes with the least expense in terms of time, money and emotion, and with the most just resolution. The time is ripe for mediation."

Clearly, arbitration and other alternative modes of dispute resolution like negotiation and mediation are to be preferred to any other course of action because they are cheaper and provide a faster resolution of disputes. Being an advocate of alternative modes of dispute resolution, and being an arbitrator myself, I fully concur with this suggestion. In the Philippines, the law on Arbitration in general is found in the Civil Code of the Philippines. In 1986, more specific rules on arbitration in the construction industry applicable to domestic disputes were enacted in Executive Order No. 1008.

As regards arbitration of commercial disputes involving parties coming from different jurisdictions, the Philippines, as with other countries, fell back on the Model Law on International Commercial Arbitration

adopted by the United Nations Commission on International Trade Law (UNCITRAL)<sup>26</sup> on June 21, 1985 and recommended for approval on December 11, 1985. The product of the minds of the best legal luminaries in commercial law in the world, working intensively for two decades, it sought to harmonize the national laws on arbitration and, in the process, facilitate cross-border or international business transaction. Among other topics, the Model Law covers the essential elements of an arbitration agreement, the composition and jurisdiction of the arbitral tribunal, the conduct of the arbitral proceedings and enforcement of the tribunal's award. In case of ambiguity, the covering report of the UNCITRAL's Secretary General is available for guidance and reference.

Arbitration truly blossomed in the final decades of the last millennium. This was the time when international commercial arbitration gained worldwide acceptance as a means of resolving disputes arising from growing global trade. Due in large measure to this development, municipal arbitration laws have been made up-to-date in most jurisdictions. In the Philippines, Republic Act No. 9285 was recently passed, otherwise known as the "Alternative Dispute Resolution Act of 2004". With the Model Law attached as an appendix, the Act promotes the use of such alternative dispute means of settlement as mediation, conciliation and arbitration to expedite the dispensation of justice without sacrificing fairness and impartiality; in the long run, parties to international commercial disputes find that such procedures cut down costs, too. In the Philippines, courses on ADR have become part of the evolving curricula of progressive law schools, and such institutions as the Asian Institute of Management (A.I.M.) or professional organizations like the Personnel Management Association of the Philippines (PMAP).

The incisive assessment of the International Court of Arbitration, which was established way back in 1923, still holds true: "With the gradual removal of political and trade barriers and the rapid globalization of the world economy, new challenges have been created for arbitration institutions in response to the growing demand of parties for certainty and predictability, greater rapidity and flexibility as well as neutrality and efficacy in the resolution of international disputes."

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<sup>26</sup> Model Rule on Commercial Arbitration, U.N. Doc. A/RES/40/72 (1985).

What used to deter litigants from having recourse to international arbitration was the nightmarish prospect of turning to domestic courts for the enforcement of the arbitrator's decision and thus, going through the process of trial and presenting evidence all over again. With the approval in 1958 of the United Nations Convention on the Recognition and Enforcement of Arbitral Awards,<sup>27</sup> otherwise known as the "New York Convention", later ratified by the Philippine Senate, the signatory countries laid down the procedure which should be observed in the appreciation of, and compliance with, decisions or awards rendered by tribunals in international commercial disputes.

Under the Convention, if an arbitral award has been rendered in accordance with the parties' arbitration agreement, the courts of the country in which it is being enforced are obligated, as a matter of comity and goodwill, to give it full faith and credit. Under our Republic Act No. 9825, a regional trial court has to confirm a foreign arbitral award by requiring the party asking for its enforcement to file the original or authenticated copy of the award and arbitration agreement. It has to be proved, moreover, that the country in which the foreign arbitration judgment was made is a signatory to the New York Convention. However, if the foreign country is not a party to the New York Convention, provisions should nonetheless be made by our courts for the award to be accorded liberal treatment on grounds of comity and reciprocity. As a result of the, confirmation, foreign arbitral awards shall henceforth be treated and enforced in the same manner as final and executory decisions of courts of law of the Philippines. The writ of execution can be immediately issued by the court and enforced by its sheriff, thus giving all parties concerned much savings in terms of time and money.

The use of arbitration to resolve a variety of disputes forms a significant part of the system of justice on which our societies rely for a fair determination of legal rights. Arbitrators, therefore, undertake serious responsibilities to the public, as well as to the disputants. Those responsibilities include important ethical obligations. Since 1977, arbitrators such as myself, have been guided to a large extent by an Ethics Code drafted by the American Bar Association. The AAA adopted on March 1, 2004, a revised Code of Ethics for Arbitrators in Commercial Disputes.

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<sup>27</sup> United Nations Convention on the Recognition and Enforcement of Arbitral Awards, Jun. 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.



Such revision of the 1977 Ethics Code was necessitated by legal developments and heightened international trade transactions. Some of the substantive changes include: (a) establishing a presumption of neutrality, independence and impartiality on the part of all arbitrators, including party-appointed ones; (b) in the latter's case, there is now a duty on the part of the arbitrator to disclose if he or she will be acting in a neutral or non-neutral capacity; (c) arbitrators without exception are now required to disclose interests or relationships likely to affect their impartiality or which might create an appearance of partiality; (d) communications with the parties and other arbitrators are hedged in by guidelines; and (e) in addition to imposing impartiality and independence standards that form the basis of the presumption of neutrality, every arbitrator is obligated to determine his or her competence and availability to serve in the case.

### CITIZENSHIP

The United States has always prided itself on being the grandest melting pot in modern times. It is the land of milk and honey, the bastion of democracy. It conjures images of immigrants, the "huddled masses" from the Old World, crowded in ships slowly passing by the Statue of Liberty. It is a vision that in the last two centuries has not changed much with recent statistics showing 450,000 alien residents being granted U.S. citizenship every year. America is so culturally diverse in terms of its citizens' ethnic origins, yet its openness to strangers has given birth to a nation with a culture that is uniquely cohesive. But nations with strong economies and enjoy a comfortable area-to-population ratio, such as the U.S., Canada, Australia, and New Zealand, have in the recent past altered the mindset of people coming from countries plagued by poverty, civil unrest, or protracted wars. No longer do we simply speak of migration; instead, we witness diaspora, entire peoples willing to take root in any country other than theirs. I am not even speaking of refugees, but people who are capable of fending for themselves in every way. This could pose problems in the host State because of the potential adverse effects of massive human inflow on employment opportunities, utilization of resources, and peace and order.

Despite these developments, however, we have witnessed a trend of leniency in immigration and repatriation. The Philippine Congress, for instance, passed a law in 1995 (Republic Act No. 8171), which eased the

requirements for the repatriation of Filipino women who have lost their citizenship by marriage to aliens or due to political or financial needs. Under its Section 2, repatriation may be effected simply by taking the necessary oath of allegiance to the Republic of the Philippines and registration in the proper registry and in the Bureau of Immigration.

On August 29, 2003, our Congress passed Republic Act No. 9225, known as the Citizenship Retention and Reacquisition Act of 2003. Under the law, natural-born citizens of the Philippines who have lost their Philippine citizenship by reason of their naturalization as citizens of a foreign country are deemed to have re-acquired Philippine citizenship upon taking the oath of allegiance to the Republic. They shall thereafter enjoy full civil and political rights. This law is a direct offshoot of a 1989 Supreme Court decision where a Filipino who had lost his citizenship was deemed repatriated after he took his oath of allegiance to the Philippines and, therefore, eligible to assume the duties of public office.<sup>28</sup>

The Constitution of the Philippines provides that, "Dual allegiance of citizens is inimical to the national interest and shall be dealt with by law."<sup>29</sup> It took a 1999 decision of the Supreme Court to categorically recognize dual citizenship which "arises when, as a result of the concurrent application of different laws of two or more states, a person is simultaneously considered a national by those states. For instance, such a situation may arise when a person whose parents are citizens of a state that adheres to the principle of *jus sanguinis* was born in a state which follows the doctrine of *jus soli*. Such a person, *ipso facto* and without any voluntary act on his part, is concurrently considered a citizen of both states."<sup>30</sup> Hence, a Filipino born in the United States of Filipino parents is a citizen of both countries since *jus sanguinis* is recognized in Philippine jurisdiction and *jus soli*, in the United States.

## ENVIRONMENT, BIODIVERSITY, SUSTAINABLE DEVELOPMENT

No other issue in contemporary times has so graphically demonstrated the utter dependence of nations on each others' linked-arm

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<sup>28</sup> Frivaldo v. COMELEC, G.R. No. 87193, 174 SCRA 245, Jun. 23, 1989.

<sup>29</sup> CONST. art. IV, § 5.

<sup>30</sup> Mercado v. COMELEC, G.R. No. 135083, 307 SCRA 630, May 26, 1999.

cooperation in order to survive as matters affecting nature's despoliation. Yet, in spite of the gravity of the problems facing us as a species, despite the complexity and enormity of the proposed solutions, no single individual, country, or race can be held accountable for bringing it about. What is even more frustrating is that compared to nature, we are expendable. At the end of the day, after all studies have been exhausted, after all our puny attempts to undo the damage have been made, we realize that nature is perfectly capable of healing itself without our help if only we would give Mother Nature some breathing space. But our unique humanness makes standing still an impossible feat. It seems almost paradoxical that while we strive and strain to shape our environment to reflect the advancements in various facets of our lives, we are unwittingly destroying the very fountainhead of our continued existence.

I do not intend to sound so grim. Saving our environment, or at least preserving its remnants, is possible. But in the Pacific Rim, which is home to at least seven of the seventeen globally identified mega-diverse countries, including the U.S. and the Philippines, as well as half of the world's population, the warning bells ring ominously. This is why we are collectively obligated to address the environmental risks to which our air, water, and land – under the ground and under the sea – are wantonly exposed.

The naturalist Margaret Mead said it best: "We are living beyond our means. As a people, we have developed a lifestyle that is draining the earth of its priceless and irreplaceable resources without regard for the future of our children and people around the world."

Quite a number of studies have been made showcasing the environmental concerns of diverse groups. To these may be added the population problem insidiously eroding the innards of every major city. We simply cannot discount the economic principle of supply and demand.

It is our demand that creates the need which primary producers are all too willing to satisfy, but it is our indiscriminate use of these products that creates the waste that will eventually obliterate their source. And the more the people, the greater the demand. We must not forget that we are on top of the food chain. If we allow the indiscriminate destruction of nature's blessings, we ourselves will be devoured. How true has it been said: "There is enough for man's need, but not enough for man's greed!"

The Pacific Rim holds some of the greatest natural treasures on earth. Yet the region is also among the hottest of the hotspots in the world. The dictum "abundance breeds waste" finds no better manifestation than in the ecological crisis in our region. In less than a century, we have depleted our marine, forest and water resources, and we have spread toxins that poison these same resources and threaten the continued survival of all plant and animal life.

In fact, in the last three decades, timber exports have dramatically increased in the Philippines, Indonesia and Malaysia, generating substantial foreign currency revenue for their respective governments, but at a heavy cost to the forest reserves. The seas have not been spared. In the Sulu-Celebes Marine Triangle, nefarious fishing practices employing explosives and poison are destroying some of the richest coral formations in the world. Most disturbing is the depletion and contamination of our water resources. We are informed that 97% of all the waters in the world is salty, 2% is locked in glaciers, and only 1% is available as freshwater in our streams, rivers, and aquifers. The effects of pollution and contamination on freshwater and marine systems are such that we have a grim scenario where the next global war will be fought over control of a state's water supply, not of its sovereignty *per se*.

Most Asian cities are weighed down by a thick cloud of toxic particles emitted by motor vehicles and factories – ironically, symbols of progress. Health and productivity repercussions are quite obvious. In China alone, about 178,000 people prematurely expire each year due to respiratory illnesses. Not only is air pollution deadly, it is also costly. In this regard, the World Bank estimates the cost of healthcare and its negative effects on productivity in Metro Manila alone to be between \$200 to \$300 million annually. This fact probably provided some of the impetus for our Congress to finally pass the Clean Air Act<sup>31</sup> in June 1999 but our judiciary has yet to render decisions interpreting its provisions.

There is no doubt that bad air is largely responsible for the thinning of the ozone layer and its greenhouse effect. In the past, climatic changes have been barely perceptible. The lack of global alarm led to complacency. Lately, however, the destructive power of nature has been

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<sup>31</sup> Rep. Act No. 8749 (1999). This is the Philippine Clean Air Act of 1999.

abnormally unleashed, leading to unprecedented atmospheric fluctuations giving life to such terms as "*el niño*" and "*la niña*".

It is ironic that the richest and most diverse region in the world, in terms of natural resources, is now almost scraping the bottom of the barrel. Indeed, much sooner than we realize the full impact of global warming and marine and forest resource depletion, our children will inherit a parched earth incapable of sustaining life as we know it today.

What I have cited thus far is humanity's losing battle against the degradation, despoliation and denudation of earth's natural resources abetted by the neglect and willful depravity of man himself which has unhinged the balance of Nature's ecosystems.

At the same time, within memory are the so-called "accidents" that wreak havoc on seas and forests such as the oil spills that pollute waters and kill all marine life within their perimeters; the forest fires that rage for weeks on end defying all attempts at containing them by water, chemicals or mechanical ways of isolating the area as by digging trenches around the circumference; the oil wells that feed fires seemingly gone berserk and the inundations that leave incalculable destruction of lives and properties in their wake. Sadly, the resulting pollution and devastation on land and space leap across geographical boundaries which have seemingly been obliterated, impelling the leaders of the affected areas to join hands in desperate cooperation.

What can we do or contribute to the global effort of saving the environment?

The initial step is recognition and awareness. Conferences have been held all over the world to identify the vital ecological issues and problems. But beyond such intellectual excursions into the realm of the possible, we, as lawyers and judges, must face the challenge of determining what active role we must play in enhancing concerted efforts to preserve and promote sustainable development in the wake of globalization.

Our lawmakers, in the exercise of their authority and powers, must take the initiative to harness the full force of the police power of the State or the power of promoting the general welfare in regulating the people's exercise of their rights and liberties. In doing so, the environment gains a

mighty ally, if not a savior, in government. In the Philippines, the State forged a pact with nature when the Constitution provided as a policy that, "The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."<sup>32</sup> A communal arrangement of "sharing" environmental legislation may also be established in certain regions so that fresh and practical ideas that may have local application can be fully exploited.

We will also greatly benefit from a uniform set of procedural rules governing cross-border or transnational environmental controversies. Any controversy involving environmental issues can be resolved through a collective effort, without necessarily resorting to extraneous mediation bodies.

Many countries have a sufficient legal framework for environmental protection and sustainable development. The Philippines, for one, may arguably have the most sophisticated set of Environmental Laws in our region. Yet, this has not prevented its terrestrial and marine resources from being depleted and contaminated to their present crisis proportions. But for a law to be effective, the reason behind it, the *ratio legis*, or the social good the law seeks to protect or advance, must be actively promoted. Indeed, the duty to promote the social end is a prime responsibility of everyone who aspires to live a healthy and productive life amidst a pristine environment.

Even as each can contribute in modest but meaningful ways, it should not be forgotten that there are institutional mechanisms that infuse existing law with dynamism and vigor. The courts, whether international or domestic, are confronted with the daunting task of, not merely concretizing the abstract philosophy and interpreting the letter of the law, but of achieving the social purpose through its creative and imaginative application.

For instance, in dealing with an imminent or ongoing ecological threat in an adjacent state but whose effects transcend the common border, it may be senseless for the courts to inhibit themselves by drawing an imaginary "demarcation line" beyond which it dare not stray. Herein is a challenge worthy of the best judicial minds. Can the law find a way of

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<sup>32</sup> CONST. art. II, § 16.

legally skirting the territoriality doctrine? Let us not forget that the citizenry look to the judiciary to wield its traditional clout and apply tried and tested sanctions. The notion of the judiciary evolving into a "profession that transcends borders" may finally be realized as brethren on either side of the affected area, taking cognizance of their common problem, make pronouncements complementing each other. Thus it is that the globalization of the judicial community may gradually materialize. The Executive, in turn, may be challenged to employ its "arsenal" of weapons through negotiations, diplomacy and pressures at the highest levels.

Allow me to cite an instance where the Supreme Court of the Philippines, faced by a seemingly insurmountable legal obstacle of procedural law, dared to be innovative and invoking a novel principle of inter-generational responsibility, established a resounding precedent to promote the "rhythm and harmony" of nature as enshrined in the Constitution.

At the height of wide-scale logging in the country's virgin forests ten years ago, 43 children filed with a trial court a class action against the Philippine government for the destruction of their natural heritage. The suit was initially ignored, even scoffed at, in legal circles. It did not even touch first base in the trial court, which dismissed the case outright without even a hearing on the ground that the children did not possess the legal personality to file the suit on their own behalf, much less on behalf of generations yet to be born. The children went to the Supreme Court via a special action of certiorari in *Oposa v. Factoran*.<sup>33</sup> In a seminal and widely acclaimed decision promulgated on July 30, 1993, the Supreme Court disregarded the procedural question, recognized the children's legal standing to sue on their own behalf and on behalf of others similarly situated and even those of generations yet unborn, and gave due courts to and granted the children's petition. The Court reasoned out that all people have a responsibility to care for the vital life support systems of the Earth, not just for this generation, but also – and most especially – for future generations. The mandate of the Constitution to protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature imposes this inter-generational obligation.

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<sup>33</sup> G.R. No. 101083, 224 SCRA 792, Jul. 30, 1993.

Unknown to many, this case spurred the drive against forest destruction in the Philippines. During the pendency of the case, our Executive Branch banned all logging activities in the country's virgin forests, which are now under the legal protection and coverage of our law on the National Integrated Protected Areas System.

In its effort to protect the seas and the coral reefs, the Supreme Court of the Philippines likewise struck a hard blow against cyanide fishing. In its decision in *Tano v. Socrates*,<sup>34</sup> it upheld the power of local governments to pass ordinances which, in effect, curtailed the market for fish caught with the use of sodium cyanide.

Another important component of environmental law enforcement and protection is monitoring. Our judiciary must be constantly apprised of the true environmental status of the region so that it can support the measures and mechanisms for maintaining adequate preparedness before any natural catastrophe or crisis overtakes it.

### TRANSNATIONAL ORGANIZED CRIME

No discussion on the legal challenges of globalization will be complete without mentioning crime, particularly transnational organized crime (TOC) as committed by transnational organized crime groups (TOCGs). The final formulation of the definition of TOCG which evolved after lengthy discussions of the INTERPOL at the First International Symposium on Organized Crimes in France in May 1988 runs thus: "Any group having a corporate structure whose primary objective is to obtain money through illegal activities, often surviving on fear and corruption." Obviously, this definition, as simplistic as it is, has become passé as it finds application only to the ordinary international criminal syndicates operating for profit within a circumscribed area.

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<sup>34</sup> G.R. No. 110249, 278 SCRA 154, Aug. 21, 1997.



### TERRORISM

With particular reference to terrorist groups that operate in the context of global and regional conflicts, the usual categorized boxes are no longer relevant or pertinent. Faceless and nameless, certainly not motivated by profit, they are undoubtedly well-funded; highly organized with their operations meticulously planned by their leaders who have placed themselves beyond the reach of international law; disdaining the orthodoxies of military engagements; utilizing airspace to target strategic areas with maximum global impact at minimal cost to their operators and setting up training centers world-wide to educate their followers in the employment of the most sophisticated weaponry to their advantage. Exalting martyrdom, they hold hostage even the most powerful nations which have to be in a constant state of high alert and vigilance, knowing full well their vulnerabilities to attacks that can take place any time, anywhere.

What will forever remain a grim reminder of the potent capabilities for destruction across borders of these *sui generis* terrorist groups is their 9/11 unprecedented attack on the World Trade Center Towers in New York City in 2001. Having transmogrified into more deadly entities, these modern-day TOCGs dare governments to track them down in their lairs and predict their next moves. Vital to their existence is the vast network of their faceless leaders, financiers and loyal followers with tenacious tentacles encircling the globe.

The Philippines, on its part, has been engaged in a continuing battle to ferret out terrorists believed to be members of the Jemaah Islamiyah (JI) network, the Indonesian-based group reputed to be the Southeast Asian arm for Osama Bin Laden's Al-Qaida international terror network. According to the International Crisis Group, an independent Brussels-based research organization, Mindanao, the southern island of the Philippines, has become a training ground for a new generation of recruits that could strike anywhere in the world, even as they maintain connections with local Muslim insurgents like the Moro Islamic Liberation Front (MILF) which has been waging a 26-year separatist rebellion against our government. Relatively scant attention has been given to TOCGs and terrorist groups by our leaders due in large measure to their preoccupation with such domestic problems as the imminent financial crisis, poverty and unemployment, peace and order and over-population. This has been compounded by the traditional notion that crime prevention lies within the purview of domestic law enforcement although the administration has not

been remiss in setting up Task Forces and special law enforcement groups to cooperate with their international counterparts to contain the spread of terrorism in this part of Asia.

Seemingly powerless to cope with a global menace that defies traditional rules of international law, normally complacent countries now resort to exchanging intelligence information or prisoners or detainees on their "Wanted List" and exerting international pressures and sanctions within a political, diplomatic and economic context.

The ordinary TOC, much like terrorism, is a serious global threat that has evolved into a sophisticated and even legitimate means of perpetuating criminal activities and shadowy nefarious operations across borders. It continues to threaten the future and the very existence of every man, woman, and child because of its innate voraciousness. No one is spared, not the Americas, not the European Union, especially not the developing countries and emerging democracies in Asia and Africa. It destabilizes economies and creates a façade of stability and progress to conceal the erosion of the moral fabric of modern society on which it feeds. Globalization and the growing popularity and application of the Internet have made it possible for TOCGs to expand their activities at an alarming rate under a cloak of legitimacy and to establish bases of operations beyond their normal and traditional confines. States with high poverty levels are particularly vulnerable to such incursions because of the staggering amounts these groups are willing to invest in employing offshore managers and in gaining the goodwill of some well-placed corrupt local law enforcers and officials. Many countries fit this profile, including, I must admit, the Philippines.

Turning now to the more manageable aspects of TOCs and TOGCs, international and regional efforts continue unabated in an effort to contain this threat. For instance, in Southeast Asia, the Philippines has sought to fight this war in alliance with its neighbors. In a grand show of regional solidarity, nine Ministers of Interior/Home Affairs and Representatives of ASEAN member countries converged in Manila on December 20, 1997 for the 1<sup>st</sup> ASEAN Conference on Transnational Crime and signed the ASEAN Declaration on Transnational Crime.. The Conference marked the culmination of a series of activities beginning with the adoption of the Naples Political Declaration and Global Plan of Action

of November 23, 1994.<sup>35</sup> The signatories to the ASEAN Declaration resolved to confront transnational crime by, among other measures, strengthening each nation's commitment to cooperate in combating TOC, encouraging them to assign police attachés and/or liaison officers in each other's capitals to facilitate cooperation, urging the networking of relevant law enforcement agencies in the member countries and expanding the scope of efforts against TOC. These steps, I believe, are necessary and commendable, but without the political will to carry them through, an international or regional defensive effort, much less an offensive one, will flounder in the face of the more focused and organized activities of criminal syndicates.

For some time, Philippine leaders have been aware of the guidelines and policies on the prevention and control of organized crime, judicial independence, extradition, mutual assistance, transfer of proceedings, and treatment of prisoners, among other matters. Unfortunately, there has been a dearth of relevant local legislation on these subjects, and the ones enacted have been fairly conservative, awaiting further laws for their effective enforcement.

On January 15, 1999, however, the Philippine Center on Transnational Crime (PCTC) was created. The establishment of the PCTC was deemed necessary after it was determined, among other things, that (a) TOC has adversely affected the political, economic, and socio-cultural stability and security of the Philippines; (b) the functions and responsibilities of various law enforcement and related agencies need to be linked, coordinated, and complemented to effectively combat TOC; and (c) the growing sophistication of TOC demands a concerted, synchronized, and focused effort from these agencies, including the judiciary.

In this regard, the PCTC has gone beyond its stated mission of formulating and implementing a concerted program of action for all law enforcement, intelligence and other agencies for the prevention and control of transnational crime, but held fast to its belief in a united and coordinated approach, both domestic and international, to safeguard national security and interest against the menace of transnational crime.

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<sup>35</sup> Naples Political Declaration and Global Action Plan Against Organized Transnational Crime, U.N. GAOR, 49th Sess., U.N. Doc A/49/606 (1995).

### TRAFFICKING IN HUMAN BEINGS

One of the most pernicious activities engaged in by TOCGs is human trafficking. Promoted by highly-organized syndicates operating across borders with the aim of amassing profit through illegal means, it is unique in its viciousness in that it preys particularly on women and children who are exploited mainly for sex or forced labor. In the process, fundamental rights of the victims are violated such as the rights to liberty and security of person; to freedom of movement; to freedom from discrimination; to the highest standard attainable of physical and mental health; to equal protection under the law; to sexual integrity and autonomy and the right not to be subjected to cruel, inhuman and degrading treatment.

These rights are all embodied in such international instruments, starting with the first one in 1926 which was the Convention to Suppress Slave Trade and Slavery<sup>36</sup> and the subsequent UN documents which are decidedly broader in scope than slavery, trafficking and forced labor, such as: the Universal Declaration of Human Rights;<sup>37</sup> the International Covenant on Civil and Political Rights;<sup>38</sup> the International Covenant on Economic, Social and Cultural Rights;<sup>39</sup> the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others;<sup>40</sup> the Convention on the Elimination of All Forms of Discrimination Against Women<sup>41</sup> and the Convention on the Rights of the Child.<sup>42</sup>

What is so odious in the trafficking of humans is that it not only reduces persons into mere commodities but also because it breeds such other crimes as those involving drugs, firearms, smuggling, illegal recruitment, and corruption of public officials. In white slavery cases, for example, methods of procuring women range from harmless and seemingly

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<sup>36</sup> Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926, Mar. 9, 1927, 60 L.N.T.S. 253.

<sup>37</sup> *Supra* note 9.

<sup>38</sup> G.A. Res. 2200A (XXI).

<sup>39</sup> G.A. Res. 2200A (XXI).

<sup>40</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Jul. 25, 1951, 96 U.N.T.S. 271.

<sup>41</sup> Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. GAOR Supp. No. 46 at 193, U.N. Doc. A/34/46 (1981).

<sup>42</sup> Convention on the Rights of the Child, G.A. Res. 44/25, UN GAOR, 54th Sess., Supp. No. 49 at 7, U.N. Doc. A/54/49 (2000).

unrelated activities (like foreign training or internship, adoption, family tours, religious pilgrimage, cultural exchange/promotion, sports events, and escort service), to cultural (marriage matchmaking or selling of a woman by her family), economic (job promises by illegal recruiters), and criminal (abduction).

Human trafficking is best understood against the background of poverty and "sexploitation". But on a higher level, the phenomenon of globalization has to be taken into account in understanding the full dimensions of the problem. More precisely, trafficking must also be analyzed in terms of the structural inequality between developing nations and the industrialized countries which have made use of their weaker counterparts as sources of labor and sex commodities. The more affluent are placed in a position where they can demand women and children as part of their consumable imports from countries that are poorer.<sup>43</sup> What then commences as an internal problem escalates to full-blown globalization, with the poorer countries providing the merchandise and the industrialized nations acting as zealous consumers. This exploitation of women and children has been facilitated by modern information networks, the latest of which is the use of cyber communications to advertise and prostitute them.<sup>44</sup>

What is alarming and causing countries to focus their sights on this global concern is its growing incidence. So rampant is the practice that Secretary Colin Powell remarked: "It is incomprehensible that trafficking in human beings is taking place in the 21<sup>st</sup> Century- incomprehensible but true. Trafficking leaves no land untouched, including our own."<sup>45</sup>

In the U.S., there is the Trafficking Victims Protection Act of 2000<sup>46</sup> and the Trafficking Victims Protection Reauthorization Act of 2003,<sup>47</sup> both of which provide the necessary tools to fight human trafficking within and beyond U.S. soil. From figures released by the State

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<sup>43</sup> *Trafficking in Women and Prostitution in the Asia Pacific*, (Coalition Against Trafficking in Women, Asia Pacific) (1996).

<sup>44</sup> Florida Ruth P. Romero, Judicial Use of International Conventions in Asia, in General, and in the Philippines, in Particular, to Foster Children's Rights: Sex Trafficking, Proceedings of the 4th Biennial International Conference of the International Association of Women Judges (1998).

<sup>45</sup> Third Annual Trafficking in Persons Report, Bureau of Public Affairs, Washington, D.C., (June 10, 2003).

<sup>46</sup> 22 U.S.C. § 7101 (2000).

<sup>47</sup> Pub. L. No. 108- 193 (2003).

Department, around 800,000 to 900,000 people are trafficked worldwide, including 18,000 to 20,000 in the U.S. alone. Most of these "human commodities" are women and children who are forced, intimidated or tricked into sexual or labor exploitation. Unfortunately, in the Philippines, there is a dearth of baseline data on the true state of human trafficking, due to among other reasons:

[T]he underground nature of trafficking, the stigma placed on victims of sexual exploitation; the lack of a name for the problem in the community level and awareness of acts of trafficking as violations of human rights, thus, the low rate of reporting; and the same lack of awareness among many government agencies and non-governmental organizations, thus the few interventions and documentation of cases.<sup>48</sup>

It is widely known, however, that among the countries where Filipino women and children are abused and prostituted are Hong Kong, Malaysia, Japan, Korea, Nigeria, Cyprus, Greece, Germany, Italy, the U.S. and the Commonwealth of the Northern Marianas Islands.

On cross border trafficking, Japan is said to have the largest sex market for Asian women with over 150,000 non-Japanese women involved, mainly from the Philippines and Thailand. It is estimated that foreign women's earnings in the sex industry account for one to three percent of Japan's GNP, which equals the military budget. In Korea, the economic crisis in 1997 led to further feminization of migrant labor, and there has been an increase in the number of women who have entered the sex industry. The market for women targeted for "sexploitation" has immensely expanded due to websites and the Internet.

Those countries that are signatories to UN documents dealing with the fundamental rights of women and children are committed to enacting national legislation to implement the policies embodied therein. Let me cite the Philippines as an example. It took eight years of lobbying and intensive spadework on the proposed anti-trafficking bill for a non-governmental organization, the Coalition Against Trafficking in Women to finally convince Congress to enact on May 26, 2003, Republic Act No. 9208 entitled "An Act to Institute Policies To Eliminate Trafficking In Persons

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<sup>48</sup> Jean Jean Enriquez, *Trafficking of Women and Children: Updates, Trends and Challenges*, FOCUS (Asia-Pacific Human Rights Information Center), Sept. 2004, at 2.

Especially Women and Children, Establishing The Necessary Institutional Mechanisms For The Protection And Support Of Trafficked Persons, Providing Penalties For Its Violations, And For Other Purposes." Profiting from several attempts of the international human rights community to define and criminalize the act, it was able to formulate a comprehensive definition in its Section 3(a) of "trafficking in persons" which included the elements of transporting of persons, with or without the victim's consent or knowledge, within or across national boundaries, by means of force or other forms of coercion, or the giving or receiving of payments or benefits, for the purpose of sexual exploitation, forced labor or services, slavery, servitude or the removal or sale of organs.

In the case of nations, like the United States, which are not signatories to these international instruments, the provisions are not binding. What could only motivate them to take measures to fight human trafficking, for instance, are their own internal commitment to human rights and pressures from the international community which, more often than not, are rather weak. Certain scholars have attributed the lack of prosecution of traffickers in the U.S. to international attitudes such as the prevailing idea that human rights violations occur only in other countries and there is a perceived reluctance to accept scrutiny on issues which it considers to be within its domestic purview.

Despite world-wide acknowledgment that such a transnational problem as human trafficking requires transnational solutions and global cooperation, it is still the stark reality that an estimated four million human beings, women and men, are trafficked each year, earning profits for the criminal networks of up to \$7 billion annually. Evidently, it is not for lack of treaty law, customary international law or "soft law" that the problem still straddles the globe, "soft law" here referring to sets of standards, principles or guidelines and codes of conduct which may be useful for governments to incorporate into their national law, coupled with a plan or agenda of action.

For one thing, trafficking, while rooted in poverty, implicates not merely economic considerations but civil, political, social and cultural rights as well. To illustrate, such stereotypes in our cultures have to be abolished that regard women and girls as little more than commodities to be marketed for gain, especially since the social and cultural patterns perpetuate the inferior status of women to men.

Then countries that are parties signatory to the relevant UN instruments dealing with fundamental rights of women and children have to ensure that the pertinent legislation is in place; that there is sufficient political will on the part of their leaders, especially the Executive, to implement and enforce its provisions and finally that the Judiciary takes every opportunity to interpret the substantive provisions in accordance with the legislative intent. With your indulgence, let me inject a personal note in connection with the important role that judges can play in combating trafficking, especially of women and children, and other illegal activities relating thereto. During the six years of my nine-year term that I sat as the only lady Justice in the Supreme Court of the Philippines, I never let pass any opportunity to uphold the self-esteem of women who suffer indignities and abuse in the hands of their husbands or powerful male figures in the workplace or the community. Male colleagues or associates do need reminding as they still entertain stereotyped notions regarding women and retain the traditional mindset on these issues. Whatever I imbibed in international conventions on the status of women, starting with the International Women's Year Conference in Mexico in 1975, found their imprint in decisions I crafted over the years.

To heighten this awareness on the part of lower court judges, several groups of women lawyers, with the blessings of the Chief Justice of the Supreme Court, conducted a competition among these judges for the purpose of giving what they called "Gender Justice Awards" to those who have demonstrated in their decisions and understanding of the plight of women who have suffered injustice in the cases pending in their courts whether these women were parties plaintiff or defendant.

Another obstacle that stands in the way of effecting a successful campaign against trafficking is that some administrative officers view the problem as one related to immigration. They betray their biases and prejudices when they see that most of the people victimized come from marginalized sectors. Still others harbor the false notion that those forced into prostitution and forced labor have brought these upon themselves and have nobody else to blame. While the victim may indeed be the visible factor in the equation, there are several factors at the transnational level which contribute and aggravate the problem such as the recruiter, pimp, conniving airport officials, immigration officials, establishment owners in destination countries, buyers, governments that consider overseas migration



as primary employment strategy and governments that earn from the sex industry.<sup>49</sup>

On the other hand, enforcement mechanisms are either inadequate or ineffective due to apathy, lack of political will and adverse but powerful economic and social forces. Both treaty law and the UN Charter-based human rights provisions have opened the door for advocates to press for the implementation of the enforcement remedies but NGOs have not found much use for these.

### INTER-COUNTRY ADOPTION

A deplorable aspect of trafficking in human beings engaged in by TOCGs is that of transporting babies across borders for profit in the guise of adoption.

Originally resorted to by childless couples within the confines of their respective countries, adoption has metamorphosed into a lucrative business with global dimensions with the subject being treated as an object governed by, just like any other commodity, the law of supply and demand. Just to show the resulting interplay of laws of different jurisdictions in the process of adoption, a baby born in the Philippines may be adopted in Indonesia by American parents living in the U.S. who may bring the child home through Malaysia.

International adoptions used to occur in the wake of war and humanitarian crises. For instance, American couples after World War II adopted European orphans mainly from Germany, Italy, Greece; then after the Korean War, from Korea and after the Vietnam conflict in 1975, some 3,000 children were given to foreign parents as part of Operation Babylift.

Between 1988 and 2001, statistics show a doubling of inter-country adoptions from 19,000 to over 34,000. The United States which has always adopted the greatest number of foreign children looks to China and Russia

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<sup>49</sup> *Id.* at 22.

as its major suppliers. In 2001, Americans accounted for 19,237 international adoptions which is more than half of the world's total.<sup>50</sup>

As the demand outstrips supply due to changing norms in traditional societies, various social and economic pressures, as well as the HIV/AIDS pandemic which is leaving large numbers of children orphans, the TOCGs are experiencing a boom in illegal adoptions, with an infant costing between \$5,000.00 and \$25,000.00 or being exchanged with appliances or commodities considered as luxury items by biological parents in poor countries. Consequently, the temptation is great for unscrupulous dealers to abduct or kidnap babies for sale to adoptive families or enter into under-the-table arrangements with orphanages to supply them with these children on a regular basis, more often than not, falsifying documents in the process.

While recognizing that legitimate adoption fills the need for creating loving relationships between families eager to have a child or have more, and babies bereft of caring parents, the international community cannot close its eyes to the corrupt practices being spawned by this trade of marketing infants across continents. But one is hard put to say when legitimate adoption shades off into illegal trafficking. Moratoria have been known to have been imposed on certain supplier countries to curb corruption but these have been futile. Clearly, measures designed to regulate global adoption were called for in the mid-1900s.

A major development which augured well for international adoption was the adoption of the Convention on the Rights of the Child (CRC) in 1989 as an offshoot of multilateral discussions in the United Nations to establish guidelines and norms in the field. The 191 states that are party to the CRC are directed to conclude "multilateral arrangements or agreements" to establish a transparent process for adopting children across national borders, including the enactment of necessary national legislation.

In 1993, a little-known inter-governmental organization established 100 years earlier called the Hague Conference on Private International Law responded by drafting a Convention on international adoption which was unanimously endorsed by its member countries. The resulting Hague Convention on Protection of Children and Cooperation in Respect of

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<sup>50</sup> Ethan Kapstein, *The Baby Trade*, FOREIGN AFFAIRS, November/December 2003.

Intercountry Adoption signed by 54 countries seeks "to take measures to ensure that intercountry adoptions are made in the best interests of the child, and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children."

Recognizing that child trafficking, like terrorism and the drug trade, can only be curbed through multilateral cooperation, the Hague Convention requires each state to designate a "central authority" to oversee the adoption process in its own territory, including the implementation of its directives through new domestic legislation and the coordination of adoption procedures with other states. The supplying countries are directed to clean up corrupt adoption networks and receiving countries, to crack down on the receipt of trafficked children.

Heeding the call of the Hague Convention, the Philippines passed Republic Act No. 8043, known as the "Inter-Country Adoption Act of 1995" allowing for the first time the adoption of Filipino children by aliens or Filipino citizens permanently residing abroad where this will prove beneficial to the child's best interests, provided that the maximum number allowed for foreign adoptions shall not exceed six hundred a year for the first five years. It created the Inter-Country Adoption Board as the central authority in matters relating to inter-country adoption.

On the other hand, the U.S. Congress passed the Intercountry Adoption Act<sup>51</sup> in 2000 with the State Department as its designated central authority. Much-needed regulations have yet to be established especially since adoption falls under the jurisdiction of the individual states and not the national government. Other countries are expected to follow suit if only to restore the legitimacy of the adoption process and the dignity of innocent babies.

The foregoing discussions on the involvement of TOCGs in such nefarious activities as terrorism, trafficking in human beings and intercountry adoptions are but the tip of the iceberg demonstrating the downside of globalization. Studies and their accompanying statistics do show that despite measures at the international, regional and national level to stamp out these heinous activities of TOCGs, the profit factor, the apathy of national officials, ineffective enforcement mechanisms and

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<sup>51</sup> 42 U.S.C. § 14901 et seq. (2000).

formidable economic and social pressures are too overwhelming to bring about a solution to the problem. Indeed, the race against the evolving face of crime, including this relatively new genre of TOC, seems to be almost hopeless for crime, as in other parts of the world, is always one or two steps ahead.

Another major obstacle to punishing TOC is judicial restraint. For TOCGs, the physical boundaries of nations do not exist. In dealing with them, there is bound to be a conflict between national or municipal laws and international laws governing controversies between or among states.

The other factor to be considered is the effectiveness of international conventions vis-à-vis domestic laws. To quote some scholars: "In view of the jurisdictional and political weaknesses of international tribunals, are national courts the more promising avenue in certain fields for the growth of a body of law regulating state conduct?" They sought to provide some enlightenment by saying that the two principles of judicial restraint must first be considered. Thus, they said that even if the doctrine of sovereign immunity and the act of state doctrine are similar in that they prevent "courts from becoming involved in disputes which might lead to friction between a foreign nation and their own... sovereign immunity applies only where a foreign state or its instrumentality is sought to be made a *party* to litigation or where its property is involved. On the other hand, the act of state doctrine focuses entirely on the *action* taken by that state, and may be applicable to litigation between two private parties to which that action is relevant. It determines not whether a court can assert (or must relinquish) *jurisdiction* over a party but whether it can fully examine and decide certain claims *on the merits*, even when such claims rest on the asserted illegality of foreign governmental conduct."<sup>52</sup> Without clear rules on conflicts of laws, problems may arise in executing judgments of convictions against foreign nationals.

We see no quick solution to the problems posted by TOC in our jurisdiction. Our Supreme Court, however, has of late dealt on some matters which, under existing Philippine law and jurisprudence, are quite innovative although already accepted in other jurisdictions.

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<sup>52</sup> Henry Steiner & Detlev Vagts, *Transactional Legal Problems* (1994).

For instance, the results of DNA<sup>53</sup> testing were previously considered insufficient as an evidentiary tool. Dean Pacifico Agabin of the University of the Philippines College of Law, in one of his lectures, stated that, "The novelty of the scientific method for DNA testing should not be a ground for exclusion of evidence under (Philippine) rules. Neither should degradation of the specimen be invoked against admission, since this goes merely into the weight rather than the admissibility, of the evidence."

In the landmark case of *People v. Vallejo*,<sup>54</sup> the Supreme Court finally upheld the admissibility of DNA evidence in affirming the death sentence of an accused rapist-murderer. It held in part, citing the works of DNA experts: "In assessing the probative value of DNA evidence, therefore, courts should consider, among others things, the following data: how the samples were collected, how there were handled, the possibility of contamination of the samples, whether the proper standards and procedures were followed in conducting the tests, and the qualification of the analyst who conducted the tests."<sup>55</sup>

I am happy to say that the Philippine Judiciary has been quite proactive in adopting measures that are already being utilized in other progressive jurisdictions in that sphere of criminal prosecution and punishment. Then again, this seems to be more of a domestic affair. What about Filipino fugitives hiding in other countries, or fugitives from other countries who seek refuge in the Philippines?

### EXTRADITION

In cases where extradition is proper, calling for mutual legal assistance in connection with a criminal investigation or execution of a prison sentence, extradition treaties may be resorted to, in accordance with Presidential Decree No 1069, or the Philippine Extradition Law. In this regard, the Supreme Court has come up with a number of decisions that I would like to mention here.

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<sup>53</sup> Deoxyribonucleic acid.

<sup>54</sup> G.R. No. 144656, 382 SCRA 192, May 9, 2002.

<sup>55</sup> William Thompson, *Guide to Forensic DNA Evidence*, EXPERT EVIDENCE: A PRACTITIONER'S GUIDE TO LAW SCIENCE AND THE FJC MANUAL (1997); Charles Swanson, *CRIMINAL INVESTIGATION* (1996); Keith Inman & Norah Rudin, *AN INTRODUCTION TO FORENSIC DNA ANALYSIS* (1997).

In *Rodriguez v. COMELEC*,<sup>56</sup> the Court laid to rest the nagging issue as to what the term "fugitive from justice" means. At the time, the issue was raised not for the purpose of extraditing one of the parties, Eduardo T. Rodriguez, but to disqualify him from public office. The Court allowed Rodriguez' candidacy – and, eventually, his proclamation as duly elected Governor of Quezon Province – by stating that:

(T)he term "*fugitive from justice*" as a ground for the disqualification or ineligibility of a person seeking to run for any elective local position under Section 40(e) of the Local Government Code,... includes not only those who flee *after conviction to avoid punishment* but likewise those who, *after being charged, flee to avoid prosecution*.

*Intent to evade* on the part of a candidate must therefore be established by proof that there has already been a conviction or at least, a charge has already been filed, at the time of the flight. Not being a "*fugitive from justice*" under this definition, Rodriguez cannot be denied the Quezon Province gubernatorial post.<sup>57</sup> (Emphasis supplied)

It was, however, an empty victory for Rodriguez, who fled the United States in 1985 and returned to the Philippines to escape multiple charges of insurance fraud for allegedly faking the deaths of his mother-in-law and wife to illegally collect more than \$150,000 in insurance policies. It turned out that his wife Imelda and her mother were both alive at the time of the filing of insurance claims. On November 25, 2003, he was found guilty by a jury for one count of grand theft and four counts of insurance fraud before the Los Angeles Superior Court in California, and faces a possible maximum state prison sentence of eight years and payment of a \$100,000 restitution. Rodriguez was brought back to the United States by U.S. Deputy Marshals after he surrendered to a team of the Interpol Division of the National Bureau of Investigation last May 27<sup>th</sup> under threat of extradition. His wife is charged with one count of insurance fraud and is currently facing extradition charges before a Manila regional trial court.

On the other hand, in the earlier case of *Wright v. Court of Appeals*,<sup>58</sup> the Treaty of Extradition between the Philippines and Australia was utilized

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<sup>56</sup> G.R. No. 120099, 259 SCRA 296, Jul. 24, 1996.

<sup>57</sup> *Id.* at 312-313.

<sup>58</sup> G.R. No. 113213, 235 SCRA 341, Aug. 15, 1994.

when the Australian government sought the extradition of one of its citizens, Paul Joseph Wright, for offenses committed in Australia. The trial court, Court of Appeals and the Supreme Court were unanimous in deciding that Wright's case properly fell within the purview of the treaty, *which did not specify when the crime should be or should have been committed*. The court explained the concept of extradition very clearly:

A paramount principle of the law of extradition provides that a State may not surrender any individual for any offense not included in a treaty of extradition. This principle arises from the reality of extradition as a derogation of sovereignty. Extradition is an intrusion into the territorial integrity of the host State and a delimitation of the sovereign power of the State within its own territory. The act of extraditing amounts to a "delivery by the State of a person accused or convicted of a crime, to another State within whose territorial jurisdiction, actual or constructive, it was committed and which asks for his surrender with a view to execute justice."<sup>59</sup> (Emphasis supplied)

Not only may an individual not be surrendered unless the offense is included in a treaty of extradition, but, at least in the Philippines – U.S. Extradition Treaty, the act for which extradition is sought should be considered a crime in both the requesting state and the requested state. This "double criminality clause" thwarted the attempt of the U.S. to bring within its jurisdiction a young student in a computer school who, in 2000, was responsible for infecting computer systems all over the world with the "I Love You" internet virus. At the time he committed the hi-tech misdeed, it was not yet a punishable act under Philippine law. Consequently, he was neither prosecuted in Philippine courts nor extradited to the U.S.

In *Cuevas v. Muñoz*<sup>60</sup> the extradition of the respondent was being sought by Hong Kong's Magistrate Court for crimes allegedly committed in Hong Kong. The respondent claimed that his right to due process was violated when the trial court admitted the request for his provisional arrest and its supporting documents despite lack of authentication. Relying on its

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<sup>59</sup> *Id.* at 344.

<sup>60</sup> G.R. No. 140520, 348 SCRA 542, Dec. 18, 2000.

earlier pronouncement in *Secretary of Justice v. Hon. Lantion*,<sup>61</sup> the Court stated:

*In tilting the balance in favor of the interests of the State, the Court stresses that it is not ruling that the private respondent has no right to due process at all throughout the length and breadth of the extrajudicial proceedings. Procedural due process requires that a prior determination... should be made as to whether procedural protections are at all due and when they are due, which in turn depends on the extent to which an individual will be condemned to suffer grievous loss... In sum, we rule that the temporary hold on private respondent's privilege of notice and hearing is a soft restraint on his right to due process which will not deprive him of fundamental fairness should he decide to resist the request for his extradition to the United States. There is no denial of due process as long as fundamental fairness is assured a party.*<sup>62</sup> (Emphasis supplied)

This case was further refined in *U.S. v. Purganan*<sup>63</sup> where one of our Congressmen from Manila challenged extradition proceedings initiated by the Department of Justice in behalf of the U.S. Government. Congressman Mark B. Jimenez was the subject of the arrest warrant issued by the United States District Court for the Southern District of Florida for five indictments. In granting the petition, thereby paving the way for the respondent's extradition, the Supreme Court further explained the nature of extradition proceedings, thus:

By nature then, extradition proceedings are not equivalent to a criminal case in which guilt or innocence is determined. Consequently, an extradition case is not one in which the constitutional rights of the accused are necessarily available. It is more akin, if at all, to a court's request to police authorities for the arrest of the accused who is at large or has escaped detention or jumped bail. Having once escaped the jurisdiction of the requesting state, the reasonable prima facie presumption is that the person would escape again if given the opportunity.

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<sup>61</sup> G.R. No. 139465, 343 SCRA 377, Oct. 17, 2000.

<sup>62</sup> *Id.* at 392-393.

<sup>63</sup> G.R. No. 148571, 389 SCRA 623, Sep. 24, 2002.



On the other hand, courts merely perform oversight functions and exercise review authority to prevent or excise grave abuse and tyranny. They should not allow contortions, delays and 'over-due process' every little step of the way, lest these summary extraditions proceedings become not only inutile but also sources of international embarrassment due to our inability to comply in good faith with a treaty partner's simple request to return a fugitive. Worse, our country should not be converted into a dubious haven where fugitives and escapees can unreasonable delay, mummify, mock, frustrate, checkmate and defeat the quest for bilateral justice and international cooperation.<sup>64</sup>

Jimenez is currently serving a 21-month prison sentence after pleading guilty to two country of tax evasion and one count of conspiracy to defraud the United States and commit election financing offenses.

I daresay that these pronouncements on extradition will assume growing importance as TOCGs continue to unleash attacks ignoring inter-country boundaries and heedless of international sanctions.

### CONCLUSION

A quantum leap into cyberspace has indeed transformed our vast world into a "global village." For good or ill, it has breached natural and artificial barriers among nations, thus facilitating the exchange of commodities, services, information and technology and the adoption of social and cultural patterns. For lack of a "filtering device" and an effective mechanism, it has not been possible to treat countries even-handedly resulting in preferential treatment of some at the expense of others or in the dissemination of undesirable, even dangerous information.

For mutual protection and closer coordination, countries are constrained to set up tighter networking systems and enter into multilateral agreements culminating in treaties, conventions, resolutions and various kinds of *modus vivendi*.

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<sup>64</sup> *Id.* at 673-674.

All too soon, mankind has realized that it has to accept the evils of globalization along with its blessings. To ask whether it is a boon or a bane is posing a rhetorical question. What is certain is that this relatively recent phenomenon is raising legal challenges never anticipated in the past. Leaders and the governed alike are forced to draw upon their reserves of creativity, imagination, foresight and intuition to cope with, and possible to rein in, a juggernaut in the making.

Indeed, a multitude of legal problems and issues have sprung which continue to call for innovative legal solutions that could keep apace with the dizzying rate of change. It behooves all of us, therefore, particularly lawyers and judges, to be mindful of the role each one can play in the ever-expanding world of the law, for it is the rule of law that makes the attainment of lasting peace and harmony possible. It is the rule of law that empowers us to do what we have to do now so that our children can survive in an increasingly competitive world.