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The Rule of Law as the Great Equalizer

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Father Joel Tabora, S.J., President of the Ateneo de Davao University, President Carlos Zarate of the Alumni Association, Judge Virginia Hofilena Europa, Dean Manny Quibod of the College of Law, members of the law faculty, alumni of the College of Law, friends and fellow Dabawenyos. Maayong gaabii sa inyong tanan. I seldom accept speaking engagements, but when Ateneo de Davao invites me, I do not hesitate to accept. As some of you may know, I studied from Kindergarten to High School in Ateneo de Davao. In 2009, I became your co-alumnus when the University conferred on me an Honorary Doctorate of Laws. So I am very happy to be here tonight, and I thank you for inviting me to speak before you.

I congratulate you as you mark this watershed in the history of the Ateneo de Davao College of Law. Your 50th Founding Anniversary is, as you have appropriately called it, a “Celebration of Service and Excellence.” The graduates of the Ateneo de Davao College of Law are the leading private practitioners in Mindanao, and they populate the Judiciary, the prosecution service, and other government offices in Mindanao. Many have distinguished themselves in business and in politics. That is quite an achievement for the first 50 years, on top of being recognized today as one of the leading law schools in the country. Truly, every Dabawenyo can be proud that in this corner in Southern Philippines far from the center of power in Metro Manila, you can find one of the top law schools in the country.

As lawyers, your excellence in service to God and country springs from your adherence to the Rule of Law. One cannot practice law in service of the people, or dispense justice to his fellow men, without adhering to the Rule of Law.

But what is the Rule of Law? The Rule of Law is the adherence by both the ruler and the ruled to the Constitution, and to the laws and jurisprudence issued pursuant to the Constitution. The powers of the ruler are limited by the Constitution, the laws and jurisprudence. The rights of the ruled are protected by the Constitution, the laws and jurisprudence. But since the laws and jurisprudence must all conform to the Constitution, the Constitution appears to be the source of the Rule of Law.

But what if there is no Constitution? What will protect the people from violations of their basic human rights if there is no Constitution? This is not an idle question because right after the EDSA I revolt in 1986, there was a 30-day period, called the interregnum, when our country had no Constitution. This is the period from the revolt on February 23 and 24, 1986 until March 25, 1986 when the Freedom Constitution was adopted. The revolutionary government that took power had abolished the 1973 Constitution. What was the Rule of Law during this interregnum? What governed the leaders of the revolt and the people? What were the limits of the power of the leaders of the revolt, and what were the rights of the people?

In Republic v. Sandiganbayan, the Supreme Court ruled that in the absence of a Constitution what limits the power of the ruler, and what protects the ruled, is customary international law. In this case, the Court applied the United Nations Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights in determining whether the revolutionary government made an illegal search and seizure of the personal properties of a citizen during the interregnum when the country had no Constitution.

Interestingly, a parallel case happened in Germany after the fall of the Berlin Wall in 1989 and East Germany ceased to be a State. In deciding what law protected the East Germans during the period between the collapse of East Germany and its merger with West Germany, a period when East Germany had no Constitution, the German Supreme Court also applied customary international law.

Our Supreme Court decided Republic v. Sandiganbayan in 2003 without the benefit of any precedent in any country. If you read the case, you will see that Justices of our Supreme Court considered applying the 1973 Constitution, the Freedom Constitution, customary international law and even natural law. On the other hand, the Constitutional Court of West Germany decided their case also unaware of any precedent in any country. It was only later, during an international conference of justices, that Philippine Supreme Court Justices and German Constitutional Court Justices learned of the decision of each other’s court. The Filipino and German Justices were of course happy to discover that they arrived at the same conclusion.

So, in the ultimate analysis, the Rule of Law is customary international law because it is the default Rule of Law in the absence of a Constitution. This is fortified by the rule in customary international law that, at the international level, a state cannot avoid its international legal obligations by raising a contrary provision in its laws or Constitution. Our own Constitution incorporates this rule, and the entire body of customary international law, when it states that the Philippines “adopts the generally accepted principles of international law as part of the law of the land.” This incorporation of customary international law into our domestic law takes effect by operation of the Constitution without need of legislation.

This is the reason why, had the Memorandum of Agreement on Ancestral Domain or MOA-AD been signed, it could possibly be construed, if submitted to arbitration by an international tribunal, as creating an international obligation on the part of the Philippines to recognize the Bangsamoro Juridical Entity even if the creation of such entity is against our Constitution. This only shows that we cannot trifle with acts or agreements that could create international legal obligations on the part of the Philippines.

The Rule of Law, as expressed in customary international law, has expanded rapidly in recent times because of three major international conventions, namely: (1) the United Nations Convention on the Law of the Sea or UNCLOS; (2) the Agreement creating in 1995 the World Trade Organization or WTO; and (3) the Rome Statute, the treaty creating the International Criminal Court or ICC. The Philippines has ratified all these three conventions.

The common thread running through these three conventions is the creation of compulsory dispute settlement mechanisms in enforcing the provisions of the respective conventions. In short, each convention has a court or tribunal of its own empowered, in varying degrees, to issue binding decisions on states that are parties to the convention. In the case of UNCLOS, even private non-state entities may in certain cases be subject to the jurisdiction of UNCLOS tribunals. In the case of the WTO, member states are liable for the acts of their corporations or nationals who violate the rules of international trade on goods, services and intellectual property. In the case of the International Criminal Court, its criminal jurisdiction to decide cases involving crimes against humanity applies to individuals, whether or not these individuals are nationals of states that are parties to the convention. The ICC assumes jurisdiction only if a state fails in its duty to prosecute those who commit crimes against humanity.

Clearly, at the international level, customary international law is increasingly being enforced by international tribunals whose decisions are binding on states, and in certain cases even on companies and individuals. In the event that domestic law, such as statutes or constitutions of states, conflict with customary international law, international tribunals apply customary international law over domestic law. Thus, at the international level, customary international law prevails over the constitutions and laws of states. Customary international law is the Rule of Law among nations. This Rule of Law is what separates today civilized nations from rogue nations, which are the modern day equivalent of the ancient barbarians.

Recently, in Magallona v. Ermita, decided last August 16, 2011, the Supreme Court upheld the constitutionality of RA 9522, the amended Baselines Law that delineated the basepoints and connecting lines enclosing the archipelagic waters of the Philippines. Congress amended the old Baselines Law to comply with UNCLOS because the old Baselines Law, enacted long before UNCLOS, was non-compliant. Petitioner Magallona et al argued that the internal waters of the Philippines include all the waters enclosed by the rectangular area delineated in the Treaty of Paris of 1898 in which Spain ceded the Philippine Islands to the United States.

The Solicitor General, arguing for the constitutionality of the amended Baselines Law, pointed out the following: (1) both Spain and the United States have stated that what was ceded in the Treaty of Paris were the islands within the rectangular area, excluding the waters beyond the traditional three-mile territorial sea from the coastlines; (2) claiming as internal waters all the maritime area within the rectangular area in the Treaty of Paris violates UNCLOS; (3) no country in the world supports the claim that all the waters within the rectangular area are internal waters of the Philippines.

The amended Baselines Law manifests a growing recognition by states that there are legal, practical and economic reasons for complying with customary international law, and in particular in the case of the Philippines, with UNCLOS. For the Philippines to insist on the rectangular area in the Treaty of Paris is like China insisting on its 9-dashed line map to claim almost the entire South China Sea. Both claims have absolutely no basis in international law. In fact, the rest of the world reject both claims. If the Philippines finds a way to bring China to an UNCLOS tribunal, and argues that China’s 9-dashed line map overlaps with the Philippines’ rectangular area under the Treaty of Paris, one can just imagine the members of the UNCLOS tribunal scratching their heads in disbelief.

Of course, the Philippines must claim as its archipelagic waters the maximum area allowable under UNCLOS. Every state has a right to do so. Thus, after the Philippines became a signatory to UNCLOS in 1982, Philippine officials studied for several years various options on how to maximize the country’s archipelagic waters under UNCLOS. Finally, these officials agreed on one thing: establish lighthouses in low-tide elevations (LTEs), which are rocks above water at low tide but submerged at high tide. With lighthouses, these LTEs qualify under UNCLOS as basepoints to connect archipelagic baselines. Without lighthouses, these LTEs do not qualify as basepoints. Preparations were thus made to install lighthouses in several LTEs, particularly in the Kalayaan Island Group. In early 1998, the Philippine Government decided to install the lighthouses. However, at the last minute, the Philippine Government backed out and stopped the installation of the lighthouses. Thus, the Philippines missed the chance to maximize its archipelagic waters under UNCLOS.

The amended Baselines Law of the Philippines complies 100% with UNCLOS. From these baselines, we draw 200 nautical miles seaward to measure the Exclusive Economic Zone (EEZ) of the Philippines under UNCLOS. In its 9-dashed line map, China claims sovereignty over 90% of the South China Sea. In short, all along the coast of the Philippines facing the South China Sea, China claims sovereignty over all of the EEZ of the Philippines beyond the 24 nautical mile territorial sea and contiguous zone of the Philippines. If China’s claim is upheld, then not only the Philippines, but also Vietnam, Malaysia, and Brunei will have practically no EEZ facing the South China Sea.

All independent international law scholars who have written about China’s 9-dashed line map claim are unanimous in declaring that China’s claim has no basis in international law, and that it clearly violates UNCLOS. No country in the world supports China’s 9-dashed line map claim.

One can readily sea in any map that China’s EEZ, measured from its mainland baselines as submitted to the United Nations, does not overlap with the EEZ of the Philippines measured from the mainland baselines of the Philippines. Without China's 9-dashed line map, and its recent claim that the Spratlys Islands generate their own EEZs, China will have no overlapping EEZ with the Philippines.

One of the core principles of UNCLOS is that each coastal state is entitled to an EEZ of 200 nautical miles seaward measured from its baselines. If there are overlapping EEZs between opposite coastal states, then the boundary will be the median line, subject to certain equitable adjustments. UNCLOS would not have come into existence without this 200 nautical mile EEZ, which was an overriding demand by most coastal developing countries. Thus, every UNCLOS tribunal will have to uphold the 200 nautical mile entitlement of every coastal state, otherwise UNCLOS will become a mere scrap of paper and that will mean the end of UNCLOS.

If China’s 9-dashed line map is questioned before an UNCLOS tribunal, there is no doubt that it would be declared as having no basis in international law. China’s 9-dashed line map simply cannot co-exist with UNCLOS. Upholding one means killing the other. The challenge then, for the Philippines as well as for other states trampled upon by China’s 9-dashed line map, is how to bring the validity of China’s 9-dashed line map to an UNCLOS tribunal, given that China has opted out in 2006 from the compulsory dispute settlement mechanism of UNCLOS. Had the Philippines and other claimant states brought China to compulsory arbitration before 2006, China, which ratified UNCLOS in 1996, would have had no recourse but to submit to compulsory arbitration. That would have ended China’s claim to the entire South China Sea under whatever basis or theory. Inexplicably, the Philippines and other claimant states missed their chance to bring China to UNCLOS before China opted out of the compulsory dispute settlement mechanism.

Not all is lost, however. First, a state that opts out of the UNCLOS compulsory dispute settlement mechanism is still subject to compulsory conciliation under UNCLOS. While the decision of an UNCLOS conciliation commission is not binding on the parties, its ruling is nevertheless persuasive. If the conciliation commission concludes that China’s 9-dashed line map has no basis in international law, then that is practically the end of China’s claim to 90% of the South China Sea. World opinion will turn strongly against China if it insists on its 9-dashed line map. The South China Sea is the second busiest international sea-lane in the world. More than one-half of the world’s merchant fleet by tonnage passes through the South China Sea every year. More than 80% of the crude oil for Japan, South Korea, and Taiwan passes through the South China Sea. The entire world has an important stake in the South China Sea. A country like China that depends on international trade for its growth and prosperity cannot simply ignore world opinion. As events in the break-up of Yugoslavia and the upheavals of the Arab Spring have shown, world opinion has become the defining moral force behind the Rule of Law.

Second, UNCLOS allows states to opt out of compulsory arbitration only with respect to the delimitation of overlapping maritime zones or issues involving historic bays or titles forming part of internal waters. The validity of China’s 9-dashed line map is an issue that is independent of maritime delimitation because it also affects fishing, scientific research and freedom of navigation in the South China Sea. No historic bay or title is involved because China obviously cannot claim the South China Sea as its internal waters.

Also, whether the geographic features in the Spratlys Islands Group in the West Philippine Sea are rocks or islands entitled to maritime zones is an issue not subject to the opt out clause as this issue does not involve the delimitation of maritime boundaries. Once the maritime status of these rocks and islands are defined, as distinguished from their sovereignty status, the extent of the disputed area in the South China Sea will also be defined and narrowed. If none of the islands generate their own EEZs, then there will be no overlapping EEZs between China and the Philippines in the Spratlys Islands Group. If some islands generate their own EEZs, then the dispute will be narrowed to those overlapping EEZs, freeing the rest of the South China Sea from any dispute.

Thus, some international law scholars have suggested that opposing claimant states should subject the validity of China’s 9-dashed line map, as well as the maritime status of the rocks and islands in the South China Sea, to compulsory arbitration under UNCLOS.

In this crucial battle to secure our EEZ under UNCLOS, the Philippines can never lose to China, unless the Philippines commits an irremediable blunder like bringing the battle outside of UNCLOS. We must bring the battle to an UNCLOS tribunal for resolution of the dispute under UNCLOS. Our right to our EEZ in the South China Sea is guaranteed under UNCLOS. UNCLOS will lose its reason for existence if it fails to secure for the Philippines its EEZ. If the Philippines brings the battle outside of UNCLOS, it can never expect to win over China, whether militarily or diplomatically.

UNCLOS is the Rule of Law in the settlement of disputes among states over maritime zones, and the living and non-living resources in those zones. UNCLOS is the ultimate solution to the maritime dispute in the South China Sea. The claimant states need not invent any other dispute settlement mechanism because UNCLOS, the culmination of several decades of arduous negotiations among members of the United Nations, already exists and applies as the prevailing governing international law in the settlement of maritime disputes. The principles embodied in UNCLOS constitute customary international law. Our Constitution mandates the adoption of customary international law as part of the law of the land.

This battle to defend our EEZ from China, the superpower in our region, is the 21st century equivalent of the battles that our forebears waged against Western and Eastern colonizers from the 16th to the 20th century. The best and the brightest of our forebears fought the Western and Eastern colonizers, and even sacrificed their lives, to make the Philippines free. In this modern day battle, the best and the brightest legal warriors in our country today must stand up and fight to free the EEZ of the Philippines from foreign encroachment. In this historic battle to secure our EEZ, we must rely on the most powerful weapon invented by man in the settlement of disputes among states - a weapon that can immobilize armies, neutralize aircraft carriers, render irrelevant nuclear bombs, and level the battlefield between small nations and superpowers.

That weapon - the great equalizer - is the Rule of Law. Under the Rule of Law, right prevails over might.

Thank you and a pleasant evening to all.