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Editorial Comments

The Value of the Manila Declaration on International Dispute Settlement in a Case in Which the Philippines is a Party

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1. "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons": this well-known definition is set out in the *Mavrommatis* case of 1924 and repeated in a number of other verdicts of the two Hague Courts.[1]

2. In its Judgment of 1995 in the *East Timor* case, the ICJ stressed in addition: "In order to establish the existence of a dispute, 'It must be shown that the claim of one party is positively opposed by the other' (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p.328); and further: 'Whether there exists an international dispute is a matter for objective determination' (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p.74)". On this basis, the Court rejected the objection of Australia that the matter was in fact of a dispute of Portugal with Indonesia: "Portugal has, rightly or wrongly, formulated complaints of fact and law against Australia which the latter has denies. By virtue of denial, there is a legal dispute".[2]

3. In the present controversy surrounding the South China Sea, China protested against a Philippine plan to explore for oil and gas in the area in the South China

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1 Cf. Judgment No. 2, 1924, PCIJ, Series A, No. 2, 11. See also Northern Cameroon, Judgment, ICJ Reports 1963, 27; and Applicability of the Obligation to Arbitrate under Section 21 of the UN Headquarter Agreement of 26 June 1947, Advisory Opinion, ICJ Reports 1988, 27, para.35.

2 ICJ Reports 1995, 99–100, para.22.

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Sea (or according to the terminology recently coined by the Philippines: the "West Philippines Sea"). On 4 July 2011, the Chinese Embassy delivered a protest to the Philippine government after Manila had invited foreign companies to bid for the right to explore for oil and gas in 15 areas. According to the mass media, Chinese officials opposed the inclusion of "areas 3 and 4" northwest of the island of Palawan in the invitation for bidding.[3]

4. It is an undisputed fact that the said areas 3 and 4 are not part of the territorial seas of the Philippines within the 12-mile zone measured from its baselines. In respect of the exploration and exploitation of oil and gas in the continental shelf beyond territorial seas, it is desirable that the coastal States in the area conclude agreements on its delimitation before issuing concessions for these activities. In addition, the international courts and tribunals are of the view that the concessions unilaterally granted do not prejudice the delimitation. More or less, they take concessions into account when they confirm the median line between the opposite coasts of the parties.[4]

5. However, China's legitimate protest against the Philippines' unilateral act, in order to safeguard its legal interests in a future agreement on delimitation, was interpreted by the Philippines as an aggressive territorial claim, exacerbating the tension in the potentially resource-rich region. The government of Manila is now seeking political support from the United States, Japan and countries bordering China. This is the best way of letting a minor disagreement degenerate into a dispute dangerous for the maintenance of international peace and security.

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6. In this situation, it seems appropriate not only for the Philippines and China, but also other permanent members of the UN Security Council and other States in the region, to abide by the spirit and letter of the 1982 Manila Declaration on the Peaceful Settlement of International Disputes. The said Declaration was adopted by consensus in the UN General Assembly on 15 November 1982 as part of resolution 37/10.

7. We must first deal with the legal scope of the principles of the United Nations as set forth in Articles 1 and 2 of the UN Charter. Reflecting the fundamental rights and duties of sovereign States, these principles are axiomatic in nature, accepted virtually by all States as being a prerequisite for the existence and functioning of the present political world order and for the maintenance of international peace and security. As such, they are peremptory norms of general international law (*jus cogens*). Moreover, because all universally recognized States are today UN Members and

3 Associated Press, Philippines dismisses China claim on land 80 km from Palawan (globalnation.inquirer.net/18091/philippines-dismisses-china-claim-on-land-80-km-from-palawan (last visited 15 November 2011)).

4 See, e.g., Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Decision of 17 December 1999, para.83.

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hence parties to the UN Charter, they are bound by these principles just as they are bound by treaty obligations.

8. Among others, these principles include the peaceful settlement of international disputes. Article 1(1) of the Charter defines the first purpose of the United Nations as follows:

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

Further, Article 2(3) provides that "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."[5]

9. Unlike treaties and customary law, resolutions and declarations adopted by the General Assembly are not an autonomous source of international law. However, although they are, in principle, no more than recommendations, it would be wrong to deny them any legal effect. Quite on the contrary, some of them have proven to be effective means of articulation of the customary process.[6]

10. The 1986 Judgment of the ICJ in the *Nicaragua* case dealt specifically with the *opinio juris* as one of the two essential elements of customary rules:

> ... *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations". The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.[7]

11. This is especially true of some declarations adopted by the General Assembly unanimously or by consensus and previously drafted by an *ad hoc* elaborating organ with large participation of Member States. Hence, the Declaration on Principles of

5 For more details see V.D. Degan, Sources of International Law (Martinus Nijhoff Publishers, 1997), 134–135.

6 Ibid., 194–201.

7 ICJ Reports 1986, 99–100, para.188.

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International Law concerning Friendly Relations and Co-operation among States is now generally considered as an act of authentic interpretation of the principles provided in the Charter.[8] In that Declaration, the principle of peaceful settlement of international disputes is put in the second place, just after that of the non-use of force.

12. The 1982 Manila Declaration was also adopted in the General Assembly by consensus including the support of both the Philippines and China. Its text was based on a previous negotiating arrangement. It is worth mentioning here that it was elaborated upon the initiative of some Third World countries, including the Philippines, alongside Egypt, Indonesia, Mexico, Nigeria, Romania, Sierra Leone and Tunisia. Hence the title: the "Manila Declaration". Nevertheless, its text scarcely goes beyond the provisions of the UN Charter and other rules and principles of general international law in this subject matter.

13. The above-cited provisions of the Charter, as well as the text of the Manila Declaration as the instrument of their interpretation, can be considered, like all other conventional instruments, as the sources of legal obligations of the States parties, i.e. all UN Member States. In this respect, neither the Charter nor the Manila Declaration impose on the States obligations pertaining to specific procedures of peaceful settlement of their disputes. After listing possible means available to the States, Article 33 of the Charter affirms "other peaceful means of their own choice".[9]

14. The principle of free choice of these means (by free agreement of parties concerned) is reaffirmed in the Manila Declaration, with an emphasis on the importance of negotiations. There is, however, a statement in Part I of the Manila Declaration that could be interpreted as a step forward:

> 7. In the event of failure of the parties to a dispute to reach an early solution by any of the above means of settlement, they shall continue to seek a peaceful solution and shall consult forthwith on mutually agreed means to settle the

8 With regard to the treaty interpretation, there is a general principle of law appeared already in Roman law: ejus est interpretare legem cujus est condere, i.e. the rule of authentic interpretation of legal acts. When it is a matter of a treaty, an authentic interpretation is one that is agreed upon by all parties involved. And when it is the question of a treaty constituting an international organization, a unanimously or almost unanimously adopted resolution by the most inclusive political organ, such as the UN General Assembly, can be an act of its authentic interpretation.

9 Art. 33 of the UN Charter reads as follows:

> 1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiations, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
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> 2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

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> dispute peacefully. Should the parties fail to settle by any of the above means a dispute the continuance of which is likely to endanger the maintenance of international peace and security, they shall refer it to the Security Council in accordance with the Charter of the United Nations and without prejudice to the functions and powers of the Council set forth in the relevant provisions of Chapter VI of the Charter.

15. According to Chapter VI, the Security Council cannot order a resolution of a dispute against the will of any of its parties. It can exercise the function of good offices and recommend to the parties in dispute appropriate procedures or methods of adjustment (Article 36 (1) of the Charter). The Council's eventual proposal of the terms of settlement, according to Article 37(2) of the Charter, is not legally binding on the parties. Any attempts by a permanent Member to impose its will on another State will probably be opposed by the majority in the Council, or vetoed by another permanent Member.

16. The Manila Declaration stresses the importance of direct negotiations between the parties in dispute. In this respect, paragraph 10 of Part I contains the following suggestion:

> 10. States should, without prejudice to the right of free choice of means, bear in mind that direct negotiations are a flexible and effective means of peaceful settlement of their dispute. When they choose to resort to direct negotiations, States should negotiate meaningfully, in order to arrive at an early settlement acceptable to the parties. . . .

17. Nevertheless, the legal importance of the Manila Declaration resides even more in its spirit than in its letter. Unlike the system of the League of Nations in which the obligation to settle was implied in the function of preventing aggressive wars, the entire system of the United Nations reposes on the prohibition of the threat or of the use of force "against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations" as provided in paragraph 4 of Article 2 of the Charter. This order of priorities is provided in the above-cited Article 1(1) of the Charter. The legal and political significance of the Manila Declaration resides in the interrelation between the two principles of the United Nations.

18. There is a distinction in the scope of obligations in the text of the Charter. The obligation set out in paragraph 4 of Article 2 imposes a result: interdiction of the use of force. On the contrary, in spite of its firm language, paragraph 3 provides a conduct: all States shall "settle their international disputes by peaceful means", failing to provide the obligation to find final solution.[10]

10 Cf. Jean Charpentier, in: Jean-Pierre Cot and Alain Pellet (eds.), La Charte des Nations Unies, Commentaire article par article (2nd rev. and enlarged edn, Article 2, paragraphe 3 Economica, 1991), 106.

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19. However, other paragraphs of Part I of the Manila Declaration are of utmost legal and political importance in this context, especially in the current dispute between the Philippines and China:

> 3. International disputes shall be settled on the basis of sovereign equality of States and in accordance with the principle of free choice of means in conformity with obligations under the Charter of the United Nations and with the principles of justice and international law. Recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with the sovereign equality of States.

As was already stressed, the principle of free choice of means is assured in Chapter VI of the UN Charter.

> 4. States parties to a dispute shall continue to observe in their mutual relations their obligations under the fundamental principles of international law concerning the sovereignty, independence and territorial integrity of States, as well as other generally recognized principles and rules of contemporary international law.

20. A clause from the Manila Declaration seems to be of particular importance for the present dispute:

> 8. States parties to an international dispute, as well as other States, shall refrain from any action whatsoever which may aggravate the situation so as to endanger the maintenance of international peace and security and make more difficult or impede the peaceful settlement of the dispute, and shall act in this respect in accordance with the purposes and principles of the United Nations.

21. Paragraph 13 of Part I is of particular importance:

> 13. Neither the existence of a dispute nor the failure of a procedure of peaceful settlement of disputes shall permit the use of force or threat of force by any of the States parties to the dispute.

22. Finally, there is no doubt that a disagreement between two States that involves the delimitation of maritime areas belongs to a specific class of legal disputes. In cases in which the interested parties do not find peaceful solution through negotiation, enquiry, mediation or conciliation, it is correct to quote here some paragraphs from Part II of the Manila Declaration:

> 5. States should be fully aware of the role of the International Court of Justice, which is the principal judicial organ of the United Nations. Their attention is drawn to the facilities offered by the International Court of Justice for the

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> settlement of legal disputes, especially since the revision of the Rules of the Court. . . .
>
> States should bear in mind:
>
> (a) That legal disputes should as a general rule be referred by the parties to the International Court of Justice, in accordance with the provisions of the Statute of the Court. . . .
>
> Recourse to judicial settlement of legal disputes, particularly referred to the International Court of Justice, should not be considered an unfriendly act between States.

23. The above provisions are purely optional. They do not prejudice the right to a free choice of means and procedures by all parties, as set out in Article 33 of the Charter. Hence, a judicial or arbitral procedure must be agreed by all of them.

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24. In conclusion, the Manila Declaration, as well as relevant parts of the UN Charter, insist on the principle of sovereign equality of all States, be they big or small, and regardless of their political, military or economic wealth. Closely connected to this principle is the principle of the free choice of means of settlement by the parties concerned in respect of their actual or potential disputes.

25. The two principles outlined above militate against unilateral acts even in granting concessions for exploration or exploitation of mineral resources in undelimited areas of the continental shelf. There is a possible solution of joint jurisdiction, user or exploitation of zones of overlap (or any part of them) that has already been suggested in the 1969 Judgment of the ICJ in the *North Sea Continental Shelf* case.[11] However, such a solution also cannot be imposed by a unilateral act by any of the States involved. The continental shelf of all coastal States constitutes a natural prolongation of their territory, without encroachment on the natural prolongation of the land territory of another State.

26. In an effort to find a solution acceptable to all interested parties, care must be taken that the solution does not violate the law of the sea. Paramount is the principle of non-use of force by any State.

27. Finally, in order to deserve its name in the title of the important declaration, Manila may wish to consider how its actual conduct may accord with the letter and spirit of the Manila Declaration, particularly regarding the obligation not to aggravate any dispute. Of course, other States in the region also have the same duty not to aggravate the dispute.

11 Cf. ICJ Reports 1969, 54, para.101 under (C)-(2).

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