

Protecting the West Philippine Sea: A Historic Task For Filipino Lawyers

Commencement Speech
June 9, 2019, San Beda College Alabang
School of Law

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Before you leave the portals of this law school to take the bar and practice your profession as lawyers, allow me to paint in broad strokes your role, in particular as future lawyers, in the defense of our territory and the protection of our maritime zones.

You know, of course, that without a territory there can be no State, and that is why it is the primordial duty of a State is to defend its territory. Under the Philippine Constitution, our national territory includes submarine areas where the Philippines exercises jurisdiction like the Philippine Exclusive Economic Zone and Extended Continental Shelf in the West Philippine Sea.

The Constitution specifically mandates that the State shall protect the nation's marine wealth in its EEZ. Under the Constitution, who in the State is tasked to protect the nation's marine wealth in its EEZ?

As you know, the essential elements of a State are territory, government, people, and sovereignty. The government and the people are the two groups of actors in these four essential elements. Thus, the government

and the people are the ones tasked to protect the nation's marine wealth in its EEZ.

Who in particular in government is tasked to protect our EEZ in the West Philippine Sea. The Armed Forces of the Philippines since the Constitution states that the Armed Forces is the "protector of xxx the State," and the "goal" of the Armed Forces is "to secure the xxx integrity of the national territory."

Who is the Commander-in-Chief of the Armed Forces? The President, and he has the constitutional duty to ensure the protection of Philippine EEZ in the West Philippine Sea.

The second group of actors within the State who are tasked to defend the State are the people who are not in the Armed Forces, citizens like you and me. As future lawyers of our country you have a special role to play in the defense of the Philippine State.

Under the Charter of the United Nations, adopted in 1945, the armed forces of a state can act only in self-defense since wars of aggression have been outlawed. Under the UN Charter, territorial and maritime disputes between states can only be settled peacefully, by negotiation, mediation or arbitration. Under the UN Charter, the use or threat of armed force is prohibited in settling territorial or maritime disputes. In short, the only way of settling territorial or maritime disputes is through peaceful means under the rule of law.

This is where you, as future lawyers of the people of the Philippine State, can play a vital role in protecting Philippine EEZ in the West Philippine Sea in accordance with the United Nations Convention on the Law of the Sea or UNCLOS.

When China seized Scarborough Shoal in 2012, we did not send the Philippines Marines to retake Scarborough Shoal. We sent our lawyers to The Hague to invalidate China's nine-dashed line claim before an UNCLOS arbitral tribunal. We brought the resolution of the dispute to a forum where warships, warplanes, missiles and nuclear bombs do not count, and where the dispute will be resolved only in accordance with international law, which is UNCLOS. And in July 12, 2016 we won an overwhelming victory because we resorted to the rule of law.

In the olden days, the rock stars in sea battles were captains and admirals in command of warships. Today, the rock stars in sea battles are lawyers with briefcases arguing before a tribunal in a stately palace of justice at The Hague. The forum for the sea battles has transferred from the turbulent high seas to a quiet palace at The Hague. But the intensity of the sea battles remain the same as the stakes remain just as high. The victor can expect to win huge maritime areas, with all the resources that can be found there.

In the case of the Philippines, we won at The Hague our full 200-NM EEZ in the West Philippines Sea, a maritime area larger than our total land area. All the fish, oil, gas and

other mineral resources found within this huge maritime area belong exclusively to the Filipino people. We won a great victory, not by firing shots in anger but by submitting painstakingly volumes of pleadings, ancient maps, marine biology studies, and documents.

Some of our national leaders have discouraged the Filipino people from asserting The Hague arbitral ruling on the ground that asserting the arbitral ruling means going to war with China. These national leaders tell us that our soldiers and sailors will surely be massacred in case of a war with China.

It pains me to hear our national leaders say this. The Vietnamese leaders always declare that their soldiers and sailors will fight and die to the last man in defense of their national territory and maritime zones. In contrast, some of our national leaders publicly broadcast to China that Filipino soldiers and sailors will not even go to the battlefield to avoid being massacred. Such a humiliating posture only makes Filipinos feel helpless while encouraging China to become even more aggressive in its actions in the West Philippine Sea. The sad thing is, these self-defeating public pronouncements by our national leaders are totally unnecessary.

In asserting the arbitral ruling, war with China is not an option and has never been an option. *First*, under the Constitution, the Philippines has expressly renounced war as an instrument of national policy. This means that the

Philippine is barred by the Constitution from going to war with China to enforce the arbitral ruling.

Second, the UN Charter has outlawed wars of aggression, and has mandated that territorial or maritime disputes between States must be settled peacefully without the use or threat of armed force. Any state that violates this is an international outcast and can be sanctioned by the Security Council. The sanction can even include a referral by the Security Council to the International Criminal Court for prosecution, in their individual capacities, of the leaders of the aggressor state for the crime of aggression, whether the aggressor state is an ICC member or not.

Third, only Congress, with the Senate and the House voting separately by two-thirds vote, can declare the existence of a state of war. I have not heard a single Member of the House or Senate advocating going to war with China to enforce the arbitral ruling.

And *fourth*, everyone knows that the Philippines will lose, and lose badly, in any war with China. Only a fool will go to war with China to assert the arbitral ruling.

The only option then for the Philippines is to assert and enforce the arbitral ruling through the rule of law, with the support of world opinion.

This is a task tailor-made for lawyers, and future lawyers like you. To protect our EEZ in the West Philippine Sea, Filipino lawyers must summon their utmost creativity in

utilizing all avenues and remedies under international law. Filipino lawyers must explore and push the frontiers of international law because international law is our strongest weapon in protecting our EEZ. In this epic battle to protect our EEZ in the West Philippine Sea, right will prevail over might, as we have shown in our victory at The Hague.

Our next strongest weapon is world opinion, in particular the opinion of coastal states that want to preserve UNCLOS because it is their paramount national interest that UNCLOS should continue to be the governing law for the oceans and seas of our planet. All other coastal states of the world have a compelling reason to support the Philippines, for if China can seize Philippine EEZ in the West Philippine Sea in stark violation of UNCLOS, then other coastal states can also lose their own EEZs to their more powerful neighboring coastal states.

We can also tap the support of the world naval powers, namely the U.S, UK, France, Australia, Japan, Canada and India, that want to preserve freedom of navigation and overflight in the EEZs and high seas of the South China Sea in accordance with international law. It is the paramount national interest of these naval powers to protect their trade routes and sea lanes of communications in all the oceans and seas of the world.

Every year, over one trillion US dollars in shipborne goods traverse the South China Sea as part of U.S. in-bound and out-bound trade. An even greater value of shipborne

goods, constituting U.K., French and other E.U. in-bound and out-bound trade, traverse the South China Sea every year. In the case of Australia, 60 percent of its total shipborne trade pass through the South China Sea every year. We can easily understand why these naval powers strongly invoke freedom of navigation and overflight in the South China Sea.

These naval powers assert that there are EEZs and high seas in the South China Sea as ruled by the arbitral tribunal, openly refuting China's claim that there are no EEZs of other coastal states and no high seas within China's nine-dashed line in the South China Sea. Under UNCLOS, there is freedom of navigation and overflight in all the EEZs and high seas of the world. Even as I speak now, a naval vessel of the world naval powers is exercising freedom of navigation and overflight in the South China Sea, effectively enforcing the arbitral ruling.

President Rodrigo Duterte recently asked, "Is it right for China to claim an entire ocean?" This fundamental question was answered more than 400 years ago. In the 1600s, a great debate took place between two of the greatest legal thinkers of that century. Hugo Grotius, later to be acknowledged as the father of international law, argued in *Mare Liberum* or The Free Sea that no state can own the oceans and seas beyond a state's then 3-NM territorial sea. John Selden, the greatest lawyer of England at that time, countered in *Mare Clausum* or The Closed Sea that states can own the oceans and seas.

Hugo Grotius' legal idea triumphed and became the foundation of the modern international law of the sea as codified in UNCLOS. Today, China is the only country in the world that claims almost an entire sea, a claim that no imperialistic power has made since Hugo Grotius' legal idea won that great debate of the 17th century.

Indeed, China is alone in the world in its position that a single state can own an entire sea. China has taken this position even though China actively participated from the very start in the drafting of UNCLOS, even as it has ratified UNCLOS, and even as it has a representative in the International Tribunal for the Law of the Sea, the primary adjudicatory body of UNCLOS.

In Southeast Asia, the Philippines is not alone in fighting China's nine-dashed line claim. The same nine-dashed line of China that encroaches on our EEZ in the West Philippine Sea also encroaches on the EEZs of Vietnam, Malaysia, Indonesia and Brunei. Using international law, we must coordinate more closely with these Asean states for the common defense of our respective EEZs.

In this battle to protect our EEZ in the West Philippine Sea, it is China that is alone against the world, while the Philippines has the support of Asean states that are also fighting China's encroachment on their own EEZs.

The Philippines also has the support of all the naval powers of the world other than China and Russia. The Philippines has likewise the support of the overwhelming

majority of coastal states that want to preserve UNCLOS because it is also UNCLOS that protects their own EEZs against their militarily superior neighboring coastal states.

Lastly, the Philippines has the support of an overwhelming number of international legal scholars of the Law of the Sea who know that if UNCLOS cannot apply to the South China Sea dispute, then UNCLOS cannot also apply to other disputes in the rest of the oceans and seas of our planet. That will mean the demise and eventual total collapse of UNCLOS, a dire consequence that these legal scholars will not want to happen.

I will not enumerate anymore the various legal actions that the Philippines can take under UNCLOS to assert and fortify the arbitral ruling as I have already discussed them on many occasions. Let me just mention an innovative legal action taken by two senior Filipino citizens and their Filipino lawyer in protecting our EEZ in the West Philippine Sea.

Last March of this year, former Secretary of Foreign Affairs Albert del Rosario and former Ombudsman Conchita Carpio Morales, assisted by their lawyer Atty. Anne Marie Corominas, filed a communication with the International Criminal Court charging three Chinese leaders, including President Xi Jinping, of crimes against humanity.

Specifically, the charge before the ICC is for depriving thousands of Filipino fishermen of their source of food and livelihood as a result of the massive destruction of

atoll reefs when China, upon instruction of President Xi Jinping, built seven facilities, including artificial islands, in the Spratlys. The atoll reefs are where the fish spawn, and without the atoll reefs the fish stock in the South China Sea will collapse.

One of these facilities is an artificial island located on Subi Reef, which the arbitral tribunal ruled is part of the territorial sea of Pagasa, the largest island occupied by the Philippines in the Spratlys. Another facility is the artificial island China built on Mischief Reef, which the arbitral tribunal ruled is part of the EEZ of the Philippines. Under UNCLOS, only the Philippines can erect any structure within its territorial sea or EEZ.

Under the Philippines Constitution, the areas where China built all its facilities form part of the national territory of the Philippines.

Under the Rome Statute establishing the ICC, leaders of a state that commit a crime against humanity, even if that state is not a member of the ICC like China, are personally liable if the crime is committed in the territory of an ICC member state like the Philippines. The communication of these three brave Filipinos was filed on March 15, 2019, two days before the effective date of the withdrawal of the Philippines from the Rome Statute. Thus, the crime charged took place in the territory of an ICC member State, conferring the ICC jurisdiction over the crime charged.

Obviously, the purpose of the communication filed by these three brave Filipinos is three-fold: *first*, to exact justice and compensation for the loss of the food source and livelihood of thousands of Filipino fishermen; *second*, to deter Chinese leaders from dredging other atoll reefs in the West Philippine Sea; and *third*, to fortify and enforce the arbitral ruling.

The legal action of these three brave Filipinos is an outstanding example of how Filipinos in their private capacities, pushing the boundaries of the rule of law in creative ways, can take up the cudgels for the Filipino people considering that the incumbent Philippine Administration is reluctant to assert the arbitral ruling. Other Filipino lawyers, and future lawyers like you, can explore other innovative ways of utilizing international law to protect our EEZ in the West Philippine Sea.

For if we lose our EEZ in the West Philippine Sea to China, we will lose it forever. We must therefore protect our EEZ with all the legal acumen we can summon for that is our primordial duty to our country as Filipino citizens, and in particular as life-long students of the law.

The battle to protect our EEZ in the West Philippine Sea is a long-term struggle that will span generations of Filipinos. My generation has laid the foundations to protect our EEZ, and the succeeding generations of Filipinos, including your generation, must build on these foundations. The battle to protect our EEZ is not only a whole-nation endeavor involving the present 105 million Filipinos, but also an

inter-generational struggle to protect what belongs to Filipinos of this generation as well as Filipinos of future generations.

I am confident that your own generation will rise to the historic challenge that lies ahead of you.

And so, to the 2019 Graduates of the San Beda College Alabang School of Law, as you leave the portals of this law school, always remember your primordial duty to defend and protect, in accordance with the rule of law, the national territory of the only country we have.
