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## Hidden in Plain Sight: International Law and Marxist Praxis in the Life and Works of Merlin M. Magallona

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### Abstract

Through symptomatic reading, we analyze the visible and the invisible – the explicit and the implicit – in the works of Filipino international legal scholar Merlin Magallona (1934–2022). We argue that Magallona’s international legal thought was rooted in Marxist theory and practice and honed through the mode of production debates in the Philippine communist movement during the 1960s. Specifically, he developed a critique of the neocolonial division of labour and produced a materialist reading of international legal doctrines through “Postcolonial Self-Determination” – a synthesis of the antinomy of positivism and self-determination. In practice, his Third World Marxism led him to support the NIEO and resist UNCLOS through constitutional litigation based on the imperialist Treaty of Paris of 1898. Magallona’s critique and praxis suggest new forms of resistance to the new imperialisms and underscore the imperative of a practice turn in Marxist international legal theory.

**Keywords:** history and theory of international law; Law of the Sea; international economic law; human rights; Marxist approaches to international law

“Critical theory must now carefully attend to the dimension of praxis.”<sup>1</sup>

The dissolution of the Union of Soviet Socialist Republics (USSR) had the paradoxical effect of deepening the legitimacy of the pursuit and exploration of Marxist thought in legal academia. Ironically, the flight of Marxist international law seems to have begun at the dusk of Soviet-style socialism; the demise of the world’s first socialist state gave birth to new works on Marxist approaches to international law, sparking something of a renaissance and showing the exciting possibilities of a critical international law.<sup>2</sup>

<sup>1</sup> Bernard HARCOURT, “Critical Praxis for the Twenty-First Century,” in Didier FASSIN and Bernard HARCOURT, *A Time for Critique* (New York: Columbia University Press, 2019), 271 at 288.

<sup>2</sup> See, among other works, China MIÉVILLE, *Between Equal Rights: A Marxist Theory of International Law* (Leiden: Brill, 2005); Susan MARKS, *International Law on the Left: Re-examining Marxist Legacies* (Cambridge: Cambridge University Press, 2008); Prabhakar SINGH and Benoît MEYER, *Critical International Law: Postrealism, Postcolonialism, and Transnationalism* (Oxford: Oxford University Press, 2014); B.S. CHIMNI, *International Law and World Order: A Critique of Contemporary Approaches* (Cambridge: Cambridge University Press, 2017); Luis ESLAVA, Michael FAKHRI, and Vasuki NESIAH, eds., *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge: Cambridge University Press, 2017); Jochen VON BERNSTORFF, Philipp DANN, and Max H. MAYER, eds., *The Battle for International Law: South-North Perspectives on the Decolonization Era* (Oxford:

Nonetheless, while contemporary writings are interesting and thought-provoking, they appear to have been written distantly from classical Marxism's field of praxis.<sup>3</sup> Recent works reveal a less intimate connection to the everyday life of social movements and the working class, which Georg Lukacs considered the unified subject and object of history.<sup>4</sup>

Certainly, an independent scholarly position may produce an original and stimulating critique. One need not follow the unproblematized unified subject of classical Marxism, which Laclau and Mouffe have previously critiqued. But the question of practice is altogether critical. Without roots in practice, Marxist theory becomes a mere academic abstraction. Practice is not only the criterion of truth; it goes into the problem of theory's achievement of an "immediate actuality".<sup>5</sup>

This problem of praxis is what the present article seeks to address if only to highlight "the most critical question in these times of global political turbulence: What is to be done?"<sup>6</sup> This article seeks to contribute to the growing scholarship on Marxist international legal theory through a study of the legal thought and critical practice of a Filipino international lawyer and scholar from the periphery, Merlin M. Magallona (1934–2022), who was actively involved in the Philippine communist movement from the 1960s to the 1990s, a proponent and popularizer of the New International Economic Order (NIEO), Dean of the University of the Philippines College of Law, and a founding member of the Asian Society of International Law.

The essay maps out Magallona's Marxism by analyzing the silences surrounding his work and reconstructing the context of his critique and practice, particularly his sustained involvement in mass movements, government, and cause-oriented litigation. It argues that Magallona's international legal thought and practice took the form of a critique of capitalism developed as a polemic against Filipino Maoists' adoption of "semi-feudalism, semicolonialism" during the mode of production debate in the Philippine Communist movement of the 1960s and 1970s. Magallona formulated a critique of the "neocolonial division of labour", a development in the capitalist mode of production that transforms former colonies into appendages of Western transnational corporations' supply chains. In line with his Marxist and anti-imperialist critique, he produced in his Third World texts a materialist explanation of the development of international legal principles through what may be described as "Postcolonial Self-Determination", a synthesis of the antinomy of positivism and self-determination that transforms positivism into an expression of self-determination. Magallona's Third World Marxism would make him embrace and promote the NIEO and use imperialist treaties to resist new imperial claims.

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Oxford University Press, 2019); Paul O'CONNELL and Umut ÖZSU, eds., *Research Handbook on Law and Marxism* (Cheltenham: Edward Elgar, 2021); Katherine GREENMAN, Anne ORFORD, Anne SAUNDERS, and Ntina TZOUVALA, eds., *Revolutions in International Law: The Legacies of 1917* (Cambridge: Cambridge University Press, 2021); and Ntina TZOUVALA, *Capitalism as Civilisation: A History of International Law* (Cambridge: Cambridge University Press, 2020).

<sup>3</sup> This problem is recognized in Robert KNOX, "Marxist Approaches to International Law", in Anne ORFORD, Florian HOFFMANN, and Martin CLARK, eds., *The Oxford Handbook of the Theory of International Law* (Oxford: Oxford University Press, 2016), 306 at 324–5; see also, Bernard HARCOURT, *Critique and Praxis* (New York: Columbia University Press, 2020), at 11: "The global crises could not be greater, and yet critical theory is missing in action. Having disdained the question 'What is to be done?' critical theory has little to offer by way of critical praxis."

<sup>4</sup> See especially Georg LUKACS, *History and Class Consciousness: Studies in Marxist Dialectics*, Rodney Livingstone trans. (Cambridge, MA: MIT Press, 1968) at 149–209.

<sup>5</sup> *Ibid.*; Tse-tung MAO, "On Practice", *Selected Works of Mao Tse-tung*, vol. I (Peking: Foreign Languages Press, 1960), online: Marxists Internet Archive [https://www.marxists.org/reference/archive/mao/selected-works/volume-1/mswv1\\_16.htm](https://www.marxists.org/reference/archive/mao/selected-works/volume-1/mswv1_16.htm).

<sup>6</sup> Harcourt, *supra* note 1 at 274.

The article concludes that Magallona's anti-imperialist critique and praxis may find relevance in the practice of Marxist international legal theory in the face of new imperialisms.

This article's reading of Magallona will be pursued through a particular mode of Marxist practice called "symptomatic reading". A *lecture symptomale* navigates between the said and the unsaid in the texts and establishes "connections between the field of the visible and the field of the invisible".<sup>7</sup> This mode of reading is appropriate for making the silence that surrounds Magallona's texts speak. Magallona lived a life in which "silence" was important for his political and personal survival. His writings were published under historical circumstances that make the unsaid more important than what was directly said. Hence, anyone who wants to make sense of his works must consider the silence and the voice one hears, establishing the connections between silence and words and between the visible and the invisible.

The article does not intend to cover all of Magallona's published works.<sup>8</sup> It has a modest objective: a preliminary understanding of the Marxist roots of his international legal ideas, relating them to the historical contingencies of Marxist movements in the Philippines and their anti-imperial imagination. By studying Magallona's praxis, we seek to present a different kind of Marxism emanating from the Global South, which reconnects Marxist theory to the practice of social movements and international legal theory. Ultimately, it does not aim to present the truest form of Marxism but describes the specificity of Marxist theory and practice in postcolonial Philippines.

This article is divided into seven sections. Following the introduction, we discuss and apply the Marxist reading of textual silences to Magallona's biography. This is followed by a reconstruction of Magallona's critique of international political economy during the mode of production debates in the Philippines in the 1960s. The third section analyses the silences in Magallona's essays on *jus cogens* and human rights as Third World texts embodying the antinomy between positivism and self-determination. The fourth and fifth sections continue to read the silences that surrounded Magallona's practice of Third World Marxism, first, in his botched proposals for the NIEO at the United Nations through diplomatic means and, subsequently, through party politics in his role as General Secretary of the Communist Party of the Philippines (PKP) and, second, his utilization of imperialist treaties against empires in his critique of the UN Convention on the Law of the Sea (UNCLOS) regime. Finally, the last section reflects on Magallona's critique and practice and their importance in reviving interest in the dimension of practice in Marxist international legal discourse.

<sup>7</sup> [Une relation ...entre le champ du visible et le champ du l'invisible]. Louis ALTHUSSER, "Du 'Capital' à la Philosophie de Marx" in Louis ALTHUSSER and Étienne BALIBAR, *Lire le Capital* (Paris: Maspero, 1973), 9 at 20, 28. Louis ALTHUSSER, "From Capital to Marx's Philosophy", in Louis ALTHUSSER and Étienne BALIBAR, *Reading Capital* (London: Verso, 2009), 13 at 20, 29. See the complete edition, Louis ALTHUSSER et al., *Reading Capital* (London: Verso, 2015). According to Althusser, symptomatic reading is a mode of reading that Marx applied to the classical political economists in which Marx allows us to see the blanks in the texts of Smith and Ricardo. Althusser theorizes that there are two principles here. The first is a reading establishing the silence or absences in the texts. The second is to see such absences in relation to the presences, the vision and non-vision within the vision itself. Althusser uses this Marxian mode of reading in reading the silences in Marx's *Capital* itself. Macherey applies Althusser's reading to literary texts.

<sup>8</sup> Magallona hardly wrote book-length treatments of his subject matter, with the probable exception of two. See Merlin M. MAGALLONA, *Fundamentals of International Law* (Quezon City: C & E Publishing, 2005), a reviewer for the Philippine bar examinations in catechetical form; and Merlin M. MAGALLONA, ed., *Dictionary of Contemporary International Law: With Commentaries* (Quezon City: University of the Philippines Law Center, 2011), the first of its kind to be published in a long time in the Philippine academia. He often wrote in essay or article form, which, when accumulated over time, would then be anthologized into a book organized around a common theme.

## I. Marxism and the Reading of Silence: The Life of Merlin M. Magallona

The identification of Merlin M. Magallona as a Marxist in a country that continues to be plagued by a five-decade-old communist rebellion in the countryside where “red-tagging” and red-baiting of activists remains as lethal<sup>9</sup> as it was in the Cold War in the 1950s, or, closer still, Guomindang China in the 1930s, may have been both awe-inspiring and discomfiting for some of his younger colleagues at the University of the Philippines College of Law. Thus, read the evasion, silence, and other forms of disguise in otherwise effusive tributes to the man after his passing on 1 January 2022:

Dean Merlin was instrumental in promoting international law through the many institutions he joined. He was a founding member of the Asian Society of International Law and was a member of its Executive Council (2007-2009). He was instrumental in setting up the Philippine Society of International Law and [re-establishing] the Philippine Yearbook of International Law[,] which he also led as Editor-In-Chief. Prior to this, he was Editor of the IBP [Integrated Bar of the Philippines] Journal for a considerable number of years. He was a member of the Expert Group on the Legal Aspects of the New International Economic Order established by the UN Institute on Training and Research in [1982] and was also listed as an Expert in Human Rights [by] the UN Human Rights Commission. He served as a member of the arbitral tribunal of the International Chamber of Commerce in Paris, France. Until his voluntary retirement from service at the Philippine Judicial Academy (PHILJA), he was Chair of its Department of International Law and Human Rights...<sup>10</sup>

The narrative curiously adds that Magallona was “a man with a colourful history of involvement with struggles for meaningful freedoms; stories about his activities at the onset of martial law...are now urban legend”.<sup>11</sup> What the nature of these “struggles” is, one does not know and finds no clue thereto. The unfamiliar reader is left to speculate.

The same evasion or silence can be gleaned from this official announcement from the University of the Philippines:

Born on Aug. 6, 1934, Magallona earned his bachelor of laws from the UP College of Law and served as one of the college’s faculty, teaching international law. He then became its associate dean from 1991 to 1995 and later its dean from 1995 to 1999. He also served as director of the UP Law Center Institute of International Legal Studies from 2000 to 2001...

He was undersecretary of foreign affairs from 2001 until his resignation in July 2002. He was a member of the Supreme Court Committee on Legal Education from 1999 to 2003.

<sup>9</sup> At least 133 lawyers have been killed in the Philippines since the 1980s and nearly half of the killings happened in the last six years coinciding with the turbulent reign of the Duterte administration (2016–2022): Jim GOMEZ, “Rights group: 59 lawyers slain in 6 years in Philippines” (15 October 2022), *Associated Press*, online: ABC News <https://abcnews.go.com/International/wireStory/rights-group-59-lawyers-slain-years-philippines-91547288>. Counting other human rights defenders – environmentalists, unionists, and journalists – at least 250 have been killed under the Duterte administration: Ana P. SANTOS “Duterte and the Climate of Impunity in the Philippines” (7 July 2020), *Deutsche Welle*, online: Deutsche Welle <https://www.dw.com/en/dutertes-four-years-in-power-extrajudicial-killings-rights-abuses-and-terror/a-54082293>.

<sup>10</sup> Rommel J. CASIS and Theodore O. TE, “Merlin M. Magallona: A Giant of his Time, A Man Ahead of his Time” (2022) University of the Philippines College of Law, online: University of the Philippines College of Law <https://law.upd.edu.ph/merlin-m-magallona-a-giant-of-his-time-a-man-ahead-of-his-time>.

<sup>11</sup> *Ibid.*

Magallona was counsel for the Philippines in the oral arguments before the International Court of Justice. He handled the case of “Legality of the Threat or Use of Nuclear Weapons” (Advisory Opinion, 1995) and the case “Concerning Sovereignty over Palau Ligitan and Palau Sipadan (Indonesia v. Malaysia)”, in which the Philippines intervened in 2001.

Magallona was a member of the expert group on the legal aspects of the New International Economic Order established by the UN Institute on Training and Research in [1982]...

In 2002, he represented the Philippines in the working group of the UN Diplomatic Conference on the Establishment of an International Criminal Court in Rome. He headed the Philippine delegation to the meeting of the International Criminal Court Preparatory Committee in 2002.<sup>12</sup>

Marxist literary criticism holds that texts often bear “the imprint of a determinate absence”.<sup>13</sup> Thus, “what is important in the work is what it does not say”.<sup>14</sup> As Louis Althusser’s student, Pierre Macherey, elaborates, “what the work cannot say is important, because there the elaboration of the utterance is acted out, in a sort of journey to silence”.<sup>15</sup> Reading the tributes to Magallona above, one feels that the texts direct the reader to a journey of silence. What are the things that the texts do not or cannot say?

To investigate this silence, Macherey advises us to move outside the work. We must look for what Althusser called the undivulged event in the text, which relates the text to a different text, “present as a necessary absence in the first”.<sup>16</sup> Following this symptomatic reading, we searched for that absent text and found the following:

It is with sadness that the *Partido Komunista ng Pilipinas* (PKP-1930, the Philippine Communist Party) belatedly learned of the passing away on January 1<sup>st</sup>, 2022, at the age of over 87 years, of Comrade Merlin M. Magallona (also known within the Party as “*Ka. Vidal*” [Ka or Kasama/Comrade Vidal]), who was the General Secretary of the PKP-1930 from 1987 to mid-1993. Previous to that position, he was a leading member of the Politburo of the Central Committee and a member of the Party Secretariat, heading the Ideological Affairs Department...

The PKP-1930 highly values his lengthy services as a cadre and leader of the Party from the 1960s to mid-1993, and his advisory positions in several mass organizations during the same period. He was responsible for a number of the Party’s polemics against Maoism and Trotskyism in the late 1960s and early 1970s.

Held as a political detainee under martial law, he served as one of the main negotiators of the Party with the Marcos martial law regime, with the negotiations leading

<sup>12</sup> “Carrying your Legacy: Magallona, 87” (2022) University of the Philippines, online: University of the Philippines <https://upd.edu.ph/carrying-your-legacy-magallona-87/>.

<sup>13</sup> Pierre MACHEREY, *Pour Une Théorie de la Production Littéraire* (1966/2014). This original text of Macherey is found online: OpenEdition Books <https://books.openedition.org/enseditions/628?lang=en>; The English translation by Geoffrey Wall is Pierre MACHEREY, *A Theory of Literary Production* (London: Routledge, 2006) at 89. [All page citations below refer to the English translation. The French text refers to the online source.]

<sup>14</sup> *Ibid.*, at 97. [Ce qui est important dans une œuvre, c’est ce qu’elle ne dit pas.]

<sup>15</sup> *Ibid.* [ce qui est important, c’est ce qu’elle ne peut pas dire, parce que là se joue l’élaboration d’une parole, dans une sorte de marche au silence]

<sup>16</sup> Althusser, *supra* note 8, at 29. [...un autre texte, présent d’une absence nécessaire dans le première]

to the Political Settlement of November 1974. Under that landmark agreement, the Party regained legal status and was able to rebuild legal mass organizations; political prisoners and detainees belonging to the Party and its pre-martial-law mass organizations were granted amnesty and freed; and surviving members of the Party-led HUKBALAHAP [Hukbo ng Bayan Laban sa Hapon/People's Army Against Japan] guerrilla army were given recognition and benefits as Filipino World War 2 veterans.

In exchange, the Party renounced the armed struggle, dissolved the Hukbong Mapagpalaya ng Bayan (HMB, the People's Liberation Army) [the former HUKBALAHAP in World War II], and surrendered its remaining weapons. All these steps were in line with the Party's much earlier realization of the need to regain legal status for the Party to bring its communist advocacies to the masses of our people and of the futility of the armed struggle in gaining political power, given the absence of prospects for a revolutionary situation.

The PKP-1930 thanks Cde. [Comrade] Merlin M. Magallona's past contributions for the cause of the Party and the international communist movement, and extends heartfelt condolences to his bereaved family and friends.

Secretariat of the Central Committee<sup>17</sup>

January 05, 2022

The text issued by the PKP fills some gaps in the information needed to understand the context of Magallona's critique of international law. To understand critique, one must know the "what" and the "how" of critique – the context.<sup>18</sup> The "how" of critique is an "inquiry into the condition of critique".<sup>19</sup> This inquiry includes an investigation or reconstruction of the space and time of critique. As such, the how of Magallona's critique cannot be known without the details provided by the text issued by the PKP, which deals with the least known aspect of his academic and practical work.

In a few paragraphs, the text of the PKP divulged the critical "events" in Magallona's life, which cannot be said in the first two texts. The PKP text identified Magallona as "Comrade Vidal" and a former "leader of the Party". He was a "cadre" from the 1960s to the 1990s and was involved in the polemics with the Maoists that preceded the establishment of the Communist Party of the Philippines (CPP-Maoist) in 1968.<sup>20</sup> He also led the

<sup>17</sup> PKP, "Message of Condolence on the Passing Away of Dean Merlin Magallona, A former General Secretary of the PKP-1930" (2022), online: SolidNet <http://solidnet.org/article/Philippine-CP-PKP-1930-THE-JANUARY-2022-ISSUE-OF-SULONG/>; also found in the *Partido Komunista ng Pilipinas* (Communist Party of the Philippines-1930) website, online: PKP <http://www.pkp-1930.com/january-2022>. 'PKP' is the Tagalog acronym of the Communist Party of the Philippines-1930. Tagalog is a major language spoken on the main island of Luzon in the Philippine archipelago and is the principal basis of Filipino, the national language. Kasama is Tagalog for "comrade". It means "one's companion" or "one who joins". The brackets are added for the benefit of the reader, who may not be familiar with the history of the Philippines.

<sup>18</sup> Didier FASSIN, "How is Critique", in Didier FASSIN and Bernard HARCOURT, eds., *A Time for Critique* (New York: Columbia University Press, 2019) at 13.

<sup>19</sup> *Ibid.*, at 14.

<sup>20</sup> There are two main communist parties in the Philippines: The Communist Party of the Philippines-1930 (PKP) and The Communist Party of the Philippines (Maoist). Union leaders established the PKP during the US colonial regime. The CPP was established by Merlin's erstwhile comrade José María Sison, who would apply Mao's "semifeudalism" and theory of the "protracted people's war". The CPP would challenge the Marcos dictatorship from the 70s to 80s. It once claimed to have around thirty thousand armed fighters and militias. See Kathleen WEEKLEY, *The Communist Party of the Philippines: A Story of its Theory and Practice* (Quezon City: The University of the Philippines, 2001).



PKP to a settlement with the Marcos dictatorship that culminated in the grant of amnesty to former guerrillas of the Huk Rebellion<sup>21</sup> from the late 1940s to the 1950s. From 1987 to 1993, Magallona served as the General Secretary of the PKP.

That Magallona was a long-time communist and a leader of the Communist party, the same party that led the anti-Japanese guerrillas and the post-war peasant rebellion, could not be mentioned. Such facts could not be said. These important details had to be wrapped in silence, banished to what may be considered the Freudian “unconscious”.<sup>22</sup>

We argue, therefore, that anyone who reads Magallona must pry into the silences of his personal and professional life history to understand his intellectual work better, beyond the urban legend whispered about in the rooms and corridors of the law school that had served as his academic home for over half a century. His interpretation of international law, his embrace of the NIEO, and his utility of colonial treaties to defend the Philippines against new forms of imperialism can only be meaningful in the context of the silences we have identified. We do not argue that such details could complete the picture. No work is ever complete. No author’s words can complete his speech. “To know what the writer is saying, it is not enough to let him speak, for his speech is hollow and cannot be completed at its own level”.<sup>23</sup> There will always be gaps, silences, and the unsaid in the text. It is, therefore, impossible to have a complete text. Thus, while we try to make sense of these silences that surround Magallona’s life and works, we also celebrate the silences that keep the contradictions within his work latent. It is the silence that gives life to his intellectual and practical work.<sup>24</sup>

## II. In the Mode of Production Debate: Comrade Vidal’s Contribution to a Critique of International Political Economy

In this section, we present Magallona’s critique of international political economy in the context of the mode of production debate in the Philippines, attempting to reconstruct his contemporaries’ views, the polemics, and the absent interlocutor in his writings; in other words, the “how” of his critique. The aforementioned PKP statement revealed for the first time that for more than thirty years, Merlin M. Magallona, as Comrade Vidal, had served as a leading Party cadre and was responsible for the party’s polemic with the Maoists. His lead role at that time had become obscured and turned into urban legend.

To reconstruct the context, we begin by reading his Maoist/National Democratic interlocutors. Maoist texts circulated widely in the Philippines as the Maoist movement became part of “global Maoism”.<sup>25</sup> The Maoist rebellion that the PKP had opposed in the 1960s has survived to this day as the biggest and longest-running insurgency in the Philippines. For this reason, it is easier to find references to Magallona in their early texts.

Many Maoist texts reveal that Magallona was locked in a polemical debate with his erstwhile PKP comrade, José María Sison (1939–2022), founder of the Communist Party

<sup>21</sup> The Huk Rebellion was the largest peasant uprising in the post-war period until the Muslim rebellion and the second communist insurgency in the 1970s. Born in 1934, Magallona was around fifteen years old when the Huks finally fought back against the new republic’s military. The Huks were mainly peasants who armed themselves during the Japanese occupation. They fought the Japanese well, but when the Americans returned they were prosecuted by the government as insurgents. Ultimately, they fought back and renamed the group “Hukbong Mapagpalaya ng Bayan” (HMB) or People’s Liberation Army. See Benedict J. KERKVLLET, *The Huk Rebellion: A Study of Peasant Revolt in the Philippines* (Quezon City: Ateneo de Manila University Press, 2014).

<sup>22</sup> See “Dire et ne pas dire” in Macherey, *supra* note 14.

<sup>23</sup> Macherey, *supra* note 14 at 93.

<sup>24</sup> See “Implicite et Explicite” in Macherey, *supra* note 14.

<sup>25</sup> Fabio LANZA, “Global Maoism”, in Christian SORACE, Ivan FRANCESCHINI, and Nicholas LOUBERE, eds., *Afterlives of Chinese Communism* (London: Verso and Australian National University Press, 2019), 85.

of the Philippines (CPP). Sison identified Magallona as one of the “ringleaders of the Lava revisionist renegade clique”. In his “On Lavaite Propaganda for Revisionism and Fascism” (20 July 1971), Sison specifically described Magallona as someone “employed with a reactionary government agency engaged in counterrevolutionary propaganda and previously with an agency of the US Government”.<sup>26</sup>

In another salvo, Sison attacked his enemies, once again using the Marxist/Maoist language of the day:

Such revisionist bureaucrats as Francisco Lava, Jr... Francisco Nemenzo... Merlin M. Magallona and others sit on their asses dictating their Rightist line, but they have such lumpen proletarian putschists elements as those of the Briones-Diwa Pasion gang to perpetrate fascist crimes for them.<sup>27</sup>

Earlier in 1967, the leading cadres of the PKP, Francisco Lava, Jr. and Magallona, had accused Sison of plagiarizing a collective statement by releasing it under his name.<sup>28</sup> That was two years before Sison’s “re-establishment” of the Communist party (CPP-Maoist) in Central Luzon, the heartland of the Huks.

<sup>26</sup> See José María Sison, *Defeating Revisionism, Reformism, and Opportunism: Selected Writings 1969 to 1974* (2013) at 145, online: BannedThought <https://www.bannedthought.net/Philippines/CPP/Sison/SelectedWritingsOfJoseMariaSison-1968-1991-DefeatingRevisionismReformismAndOpportunism-1969-1974.pdf> The Lava family led the PKP from the 1940s. Vicente, Jose, and Jesus Lava were former leaders of the PKP. See J. Y. DALISAY, *The Lavas* (Pasig City: Anvil Publishing, 1999); Jesus B. LAVA, *Memoirs of a Communist* (Pasig City: Anvil Publishing, 2002).

<sup>27</sup> *Ibid.* Nemenzo, a political science professor, would become President of the University of the Philippines 1999–2005), while Magallona would become Dean of the University of the Philippines College of Law (1995–1999). Sison, an English professor before becoming a top communist cadre, was the putative leader of the biggest leftist group in the Philippines. The Maoist party CPP he founded still controls the New People’s Army, its armed wing. For a long time, he lived in exile in Utrecht, the Netherlands, where he recently died when this paper was being written. At one or more points, all three had overlapping academic lives at the University of the Philippines.

<sup>28</sup> Merlin M. MAGALLONA and Francisco LAVA, JR. “Footnote on Nationalism: A Case of Literary Piracy”, *Philippine Collegian*, November 1967, 6. This work is cited in Joseph SCALICE, “Crisis of Revolutionary Leadership: Martial Law and the Communist Parties of the Philippines, 1957–1974” (unpublished dissertation, 2017) at 33. The strength of the dissertation is the retrieval of the day-to-day polemics of the time. But it is quite a simplification for it to argue that the break between the CPP and PKP was merely an expression of the Soviet-China split or that the two parties were merely Stalinist copies. The dissertation, while proffering many previously hidden but illuminating facts about the Philippine communist movement, makes simplistic arguments about the ultimate cause of the party split. In the present authors’ view, the bone of contention between the older and younger cadres was the experience of the Huk Rebellion. A counter-argument may be made that the decisive break arose primarily from interpreting the lessons of the practice of armed struggle and not the Sino-Soviet split as its central cause. However, the latter may have also influenced the break or coincided with dissensions within the Philippine communist movement. In 1999, the PKP pioneers, the Lava brothers Jose and Francisco, responded to a book on the Philippine experience of martial law written by essayist Conrado de Quiros, which they perceived to be biased towards Sison’s version of events: Jose B. LAVA and Francisco A. LAVA JR., “Some Fictions About the Left” (1999) 3 *Philippine Journal of Public Policy* 2 at 14–6. The following passage from their riposte is instructive:

Had de Quiros taken scholarly pains to look for documents of the [PKP] during the 1940s, 1950s and 1960s, or even just to interview the Lavas concerned, he might not have made so grave a mistake of giving currency to such falsities and distortions. He might have fairly reported that the Lavas were not subservient to the Soviet model... [PKP] documents have generally pointed out the protracted nature of the struggle... But after so many years of protracted armed struggle, the Party realized that the geographical conditions of the country, the relation of forces in and around the Philippines, etc. militated against the Maoist protracted war theory—i.e., building bases in the countryside and encircling the cities. **Sison’s experience over the last 30 years has proven the correctness of this assessment.** [Emphasis added.]



Behind the name-calling, denunciations, and counter-accusations lie irresolvable contradictions. Differences in social analysis, strategies, and ideologies were beginning to tear the PKP apart. By 1967, its membership showed signs of division that would ultimately end in the expulsion of Sison's group.<sup>29</sup> Established in 1930, the PKP saw its fortunes rise with the post-war order.<sup>30</sup> They were winning seats in government through elections. Nonetheless, the war and land problems in the countryside had radicalized many peasants in Central Luzon, who began to resist their landlords. In this brewing social conflict, the US colonial government and the new republic would support the landed elite and precipitate a civil war in the countryside. The PKP tried to follow a legal road to power, but the peasant uprising and the actions of the new government, including the disqualification of PKP-affiliated elected officials, would force it to adopt an "insurrectionist" line. The party's belated sponsorship of the rebellion eventually decimated its ranks after the government adjusted its counterinsurgency programme. The PKP went into decline after the defeat of the Huk Rebellion in the 1950s and the incarceration of its leaders.<sup>31</sup>

By the 1960s, a new generation of cadres had joined the PKP, and the unresolved social problems were beginning to swell the student arm of the PKP. However, the new youth was impatient. China's newly launched cultural revolution lit their youthful imagination, pulling them towards the Maoist doctrinal orbit. In practical terms, Sison was demanding an open critique of past policies of the PKP and its defeat in the Huk Rebellion. He was looking for an opportunity to formulate a new policy. However, he failed to obtain his own Zunyi.

From the viewpoint of the PKP, it was Sison who was the factionalist. He was viewed as the enemy from within, who would take away the mass organizations and the party's membership. Moreover, although the PKP still had remnants of armed squads in Central Luzon, as pointed out by Sison in his diatribe, its leadership was leaning towards a parliamentary road to power. PKP leader Jesus Lava would later admit that the PKP decision to use armed struggle in 1949 was "the greatest error of the Party".<sup>32</sup> The legal settlement with the dictatorship, negotiated by Magallona, was not surprising given the experiences of the older generation of revolutionists.

Ideological debates always accompany the break up of Marxist movements. In 1968, while aiming at the PKP for its past mistakes,<sup>33</sup> Sison launched a mode of production debate by adopting Mao's concept of "semifeudal, semicolonial" to characterize Philippine postcolonial conditions. This characterization was an ingenuous way to justify a new revolutionary war in the countryside because this specific concept of mode of production<sup>34</sup> logically demands a corresponding military strategy.

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The Lavas were responding here to the book published two years before: Conrado DE QUIROS, *Dead Aim: How Marcos Ambushed Philippine Democracy* (Pasig City: Foundation for Worldwide People's Power, 1997) at 136, 140, 141.

<sup>29</sup> See Ken FULLER, *A Movement Divided: Philippine Communism, 1957-1986* (Quezon City: The University of the Philippines Press, 2011).

<sup>30</sup> See Jim RICHARDSON, *Komunista: The Genesis of the Philippine Communist Party, 1902-1935* (Quezon City: Ateneo de Manila University Press, 2011).

<sup>31</sup> See Ken FULLER, *Forcing the Pace: The Partido Komunista ng Pilipinas, from Foundation to Armed Struggle* (Quezon City: The University of the Philippines Press, 2007).

<sup>32</sup> Lava, *supra* note 27. Also cited in Robert LAWLESS, "Review of J. Lava, *Memoirs of a Communist*", (2004) 22 *Journal of Third World Studies* 244 at 245.

<sup>33</sup> CPP, "Rectify Errors, Rebuild the Party" (1968), online: Marxists Internet Archive <https://www.marxists.org/history/philippines/cpp/1968/rectify-errors.htm>

<sup>34</sup> The "mode of production" [*produktionsweise*] is a key concept of Marxism. Traditionally, it refers to the unity of the productive forces and the relations of production that (over)determine a superstructure of law, culture, politics, and ideology. Balibar enumerates the labourer, the means of production, the non-labourer, the property relation connexion, and the real or material appropriation connexion as the elements of any mode of production.

The concept of “semifeudalism, semicolonialism” has long been a matter of faith and creed in Philippine Maoist circles.<sup>35</sup> As a consequence, its analysis has not gone very far. But the concept has a long genealogy that can be traced to the late-nineteenth century legal discourse on the Chinese empire’s “semicivilized” status. In international legal texts of the late nineteenth and early twentieth century, China’s position was in a purgatory-like space, partly covered and partly uncovered by international law.<sup>36</sup> This semicivilized status corresponded to a semicolonial position, differentiating it from the savage colonies.<sup>37</sup> Lenin transformed the civilizational and juridical senses of the concept into a Marxist category that referred to China’s subordination under monopoly capitalism. Lenin’s concept of semicolonial status would later be adopted by Mao Zedong. As noted by Toni Barlow, the Chinese conception of “semifeudalism, semicolonialism” [半封建社会, 半殖民地] allowed the recognition of the singular while retaining the universal aspect of the contradiction. This recognition of the singularity allowed “for battle plans to be designed on the basis of real conditions”.<sup>38</sup>

The renewal of a peasant war after the defeat of the Huks in the 1950s depended on this new concept, popularized by Sison’s *Philippine Society and Revolution*.<sup>39</sup> It asserted that the semicolonial character of Philippine society springs from the dominance of US imperialism. At the same time, its semifeudal condition is characterized by the penetration of the feudal economy by US monopoly capital, transforming it into a commodity economy.<sup>40</sup> This mode of production creates a multitude of impoverished peasants who then become the natural and reliable allies of the proletariat. However, Sison’s appropriation of the Chinese concept ignored the specificity of the previous use to refer to a territory that has never been totally colonized. Moreover, calling the Philippines semifeudal justified a peasant-led protracted war in the countryside that diverged from the PKP’s failed insurrectionist line. Indeed, the military utility of the concept would make it hard for the CPP

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See Étienne BALIBAR, “On the Basic Concepts of Historical Materialism”, in Louis ALTHUSSER and Étienne BALIBAR, *Reading Capital* (London: Verso, 2009), 223 at 225. The section “From periodization to the modes of production” is particularly helpful. The relation between “base” and “superstructure” becomes essential to understanding tactics, strategies, culture, etc. Raymond Williams suggests that the base is the real relations of human beings, which are more dynamic, complex, and contradictory. See Raymond WILLIAMS, “Base and Superstructure in Marxist Cultural Theory”, *Culture and Materialism* (London: Verso, 2020), 35 at 38. On the relationship between politics and strategy, see Perry ANDERSON, *The Antinomies of Antonio Gramsci* (London: Verso, 2017). The idea that a mode of production may produce a specific legal form, not legal substance, is argued by Evgeniy Pashukanis and explored further in Miéville, *supra* note 2, which, in turn, is critiqued by Bill Bowring and B.S. Chimni, *supra* note 2.

<sup>35</sup> Especially after the 1990s when the CPP itself suffered a break up. See Armando LIWANAG, “Reaffirm our Basic Principles and Carry the Revolution Forward” (1991), online: Marxists Internet Archive <https://www.marxists.org/history/philippines/cpp/liwanag/1991/reaffirm.htm>

<sup>36</sup> Lassa OPPENHEIM, *International Law: A Treatise*, vol. 1 (London: Longmans, 1905).

<sup>37</sup> Umut ÖZSU, “The Ottoman Empire: The Origins of Extraterritoriality, and International Legal Theory”, in Anne ORFORD and Florian HOFFMANN, eds., *The Oxford Handbook of the Theory of International Law*, (Oxford: Oxford University Press, 2016), 123 at 132–6.

<sup>38</sup> Indeed, the rhetorical formulation of a double ‘semi’ is undoubtedly Chinese. Parallel constructions form part of Chinese rhetoric. For a discussion of the concept, see Toni BARLOW, “Semifeudalism, Semicolonialism”, in Christian SORACE, Ivan FRANCESCHINI, and Nicholas LOUBERE, eds., *Afterlives of Chinese Communism* (London: Verso, 2019), 237 at 240. Mao Zedong connected protracted war with China’s semicolonial, semifeudal mode of production. This is clear in Tse-tung MAO’s “On Protracted War”, *Selected Works of Mao Tse-tung*, vol. II (1967), online: Marxists Internet Archive <https://www.marxists.org/chinese/maozedong/marxist.org-chinese-mao-193805b.htm>.

<sup>39</sup> Amado GUERRERO, *Philippine Society and Revolution* (California: International Association of Filipino Patriots, 1970). Published in Hong Kong by the Communist Party of China’s Ta Kung Pao [大公报], it is the so-called bible of the Maoist insurgency in the Philippines, written under what is now Sison’s famous *nom de guerre*.

<sup>40</sup> *Ibid.*, at 63–4.

to give up its formulation even after fifty years of protracted war because doing so would render *passé* its entire struggle. Hence, the CPP insists on a semifeudal, semicolonial Philippine society to this day.

It was against this astute, if unoriginal, adoption of the Chinese formula that Magallona had to respond.<sup>41</sup> Against Sison's formulation, Magallona theorized that the Philippines and former colonial states in Southeast Asia were being positioned in a "neocolonial division of labour". He wrote:

The ASEAN countries are now in the throes of a transition from the colonial division of labor based on raw materials-finished products exchange to a neocolonial division of labor, which is transforming them into industrial appendages of transnational corporations based in the leading capitalist countries, for the manufacture of labor-intensive products, parts and components and for resource-intensive processing. Their economic growth still weighed down by dependence on primary export commodities, from which they are emerging, the ASEAN economies are entering a new stage in which they forge their technological links of integration to the internationalized assembly-line manufacturing of transnational corporations. This new level of economic integration is forming a new international division of labor in which the ASEAN countries assume a specialized role in the production cycle of transnational corporations through a fuller exploitation of their cheap labor power in labor-intensive industrialization and in the processing of their own raw materials for worldwide-based production facilities of transnational corporations.<sup>42</sup>

This theory of a neocolonial division of labour led Magallona to consider this new development a reversal of the UN Declaration of a NIEO.<sup>43</sup> Rather than seeing a liberating international order, what appeared to him was the NIEO version of transnational corporations of Western capitalist states – a "New Imperialist Economic Order".<sup>44</sup>

In the context of the domestic economy, this formulation denies the preponderance of feudal or semifeudal relations that would justify the protracted war and more bloodshed.<sup>45</sup>

<sup>41</sup> A PKP comment written by "Frunze" (Nemenzo) quoted in Sison's "On Lavaite" states: "Guerrero's dogmatism is even more absurd because the formulas he preaches are drawn from the experience of another country, and he does not consider the relevance of that experience to *the realities we have been through since 1950*. Instead, he arbitrarily selects facts and figures from different sources and fits all these into the Chinese schema" [italics supplied]. Sison, *supra* note 27.

<sup>42</sup> Merlin M. MAGALLONA, "Some Patterns of Political and Economic Developments in the ASEAN", (1981) Asian Studies Journal at 2, online: Asian Studies Journal <https://asj.upd.edu.ph/mediabox/archive/ASJ-19-1981/magallona.pdf>. ASEAN is the Association of Southeast Asian Nations, now comprising Brunei, Vietnam, Laos, Cambodia, Myanmar, Singapore, Malaysia, Thailand, Indonesia and the Philippines. It is now a fully-fledged international organization.

<sup>43</sup> UN General Assembly Resolution 3201 (S-VI) 1 May 1974 "Programme of Action on the Establishment of a New International Economic Order", online: UN Documents <http://www.un-documents.net/s6r3201.htm>.

<sup>44</sup> Magallona, *supra* note 43 at 15.

<sup>45</sup> In his memoir, Benedict Anderson recalls his first fieldwork into the Philippines pre-martial law when Nemenzo introduced him to a PKP stronghold in Central Luzon. Here, two young party members assisted in his research. He writes: "Some years later, I discovered to my horror that when Nemenzo broke with the Old Party, those same two sweet boys were murdered by the veterans on party orders." Benedict ANDERSON, *A Life Beyond Boundaries: A Memoir* (London: Verso, 2016), 131. Nemenzo himself would allegedly be made the target of an assassination posse sent by the PKP leadership following his ousting from the party for opposing the political arrangement with Marcos and for organizing an armed Cuban-inspired youth wing of the PKP, allegedly responsible for a series of bombing attacks around Manila without party blessing. It is unclear what Magallona's role was in this decision of the PKP leadership. On this sorry episode in the history of Philippine revolutionary movements, see Patricio ABINALES, "Pasion's Passion: Book Review: *Living In Times of Unrest: Bart Pasion and the Philippine Revolution* by Eduardo C. Tadem", *Positively Filipino* (14 April 2021), online:

Magallona saw monopoly capital transforming the Philippine economy into industrial appendages of transnational corporations. This view was reiterated in his other writings, where he argued that the martial law regime was a political mechanism to reorient the Philippine economy from a colonial to an industrial neo-colony. Through this process, farmers were being siphoned into the “cash nexus of capitalism”,<sup>46</sup> a process that effectively diminished the old feudal relations in the mode of production to a level that feudalism could no longer be considered dominant in Philippine society. In his critique of political economy, the Philippine economy was no longer dependent on the US.<sup>47</sup> Rather, what appeared before the eyes was a growing multiplicity of imperialist transnational corporations dominating the domestic market. These corporations invested in backward economies to take advantage of low labour costs, transforming the latter into appendages to their complex supply chains. In effect, the anti-imperialist critique could no longer be a critique of monolithic US imperialism.

In hindsight, between Sison’s and Magallona’s respective formulations of the mode of production, the concept of “semifeudalism, semicolonialism” was explosive. If the recruitment of the Maoists alone was to be the basis of success, then the Chinese formula won the day. After all, it was not easy to recruit thirty thousand members and open fifty-nine guerrilla fronts all over the archipelago from 1968 to the mid-1980s.<sup>48</sup> Of course, the semi-feudal, semicolonial formula’s success lies not in its originality; rather, it was simple and closer to Philippine reality in the 1960s and even the 1970s. There were many peasants to recruit and arm back then (when agriculture was more than one-third of the economy), and the declaration of martial law in 1972 drove many radicalized students from the city to the countryside, bloating the insurgency’s ranks. In a sense, through the formula, the CPP offered the most radical solution at the dawn of the Marcos dictatorship and stole the thunder from the PKP when there was a resurgence of activism in the Philippines and the world.

Magallona’s analysis, of course, had a point when it underscored the changing position of the US in the economy. Japanese aid and investments outpaced the growth of US aid and investment in 1974.<sup>49</sup> Nonetheless, as Philippine and international events would later prove, this quantitative change was not enough to create a qualitative change in the political, economic, and cultural predominance of US imperialism. In 1986, the US airlifted the Marcos family to Hawaii. US fighter planes flew over Manila during the bloodiest

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Positively Filipino <http://www.positivelyfilipino.com/magazine/pasions-passion>. The book’s subject was a key peasant leader of the PKP, Bart Pasion, a veteran of the anti-Japanese war. See also Fuller, *supra* note 30 at 123–4. The Lavas have denied that the Party sanctioned the use of violence against any of their erstwhile comrades, saying “[i]deas cannot be ‘killed’, and resorting to violence is a counterproductive manifestation of gross incompetence, as well as vindictive malevolence”. Lava and Lava, *supra* note 29 at 16. Nemenzo and Magallona somehow co-existed on campus as progressive academics with a shared critique of the political *status quo*. But over time, the description “Marxist” comfortably stuck to Nemenzo more than it did to Magallona. Nemenzo wore the label on his sleeve as a political science academic who operated largely in the parliament of the streets; this was not the case with Magallona, who was often enlisted to provide intellectual and legal heft to the government’s foreign policy and international legal initiatives.

<sup>46</sup> Merlin M. MAGALLONA, “A Contribution to the Study of Feudalism and Capitalism in the Philippines”, in *Feudalism and Capitalism in the Philippines: Trends and Implications* (Quezon City: Foundation for Nationalist Studies, 1982), 26 at 29.

<sup>47</sup> *Ibid.*, at 29.

<sup>48</sup> Weekly, *supra* note 21 at 104.

<sup>49</sup> In 1974, Japan became the Philippines’ leading source of foreign investments. Magallona, *supra* note 47 at 55. See also Merlin M. MAGALLONA, *Japan in the New Stage of World Capitalism: A Regional Context of Problems in Law and Development in Philippine-Japanese Relations* (Quezon City: University of the Philippines Law Center, 1995); Merlin M. MAGALLONA, “Japan and the Industrial Integration of ASEAN: The Philippines as a Subcontracting State”, in *Globalization and Sovereignty* (Quezon City: University of the Philippines Law Center, 2016), 293.

coup against the post-dictatorship regime of Corazon Aquino. By the 1990s, Japan had become a junior partner of the US, and the latter was enjoying an unprecedented supremacy in world politics. Even the anti-American Rodrigo Duterte would leave the presidential palace in 2022 without being able to trash any US-RP military treaty.

Magallona's rejection of the semifeudal, semicolonial formula and his characterization of the martial law regime as a political mechanism to create an industrial neo-colony would also give him and the PKP the legal space to exist. However, the settlement with the Marcos dictatorship would have a political cost that relegated the PKP to the margins of Philippine political life. While it freed the older revolutionists from prison, the political settlement would mark the PKP as a collaborator of a dictator devoid of any political capital. It would appear to many younger idealists that the PKP had just filed its retirement from political life. It was a difficult Faustian choice.

In a way, the positions of Sison and Magallona were, in practice, the reiteration of the reform or revolution question that had been rehearsed within social movements from the Second International to contemporary times. Lenin's question of practice – "What is to be done?" – reappeared. At the most important historical junctures, it seems that social movements, including communist ones, confront the same question about practice.

Indeed, whatever weaknesses in Sison's and Magallona's theoretical formulations may now appear, one should note the undeniable connections of Marxist theorizing to the practice of their mass movements. These mode of production formulations were made at a particular historical conjuncture in the life of a mass movement, which had corresponding political strategies and tactics that determined the daily life of the Filipino masses. Undoubtedly, the theories had life-and-death ramifications for activists, party members, and mass organizations. It was a high rollers' gamble; there was no space for a mistake.

Viewed from our present terrain, Magallona's formulation may have underestimated the appetite of the dictatorship for plunder that would turn back the economic development of the Philippines by a decade or two. By the end of the 1980s, the post-dictatorship government could not even provide a 24/7 electricity supply to households and industry, much less establish a neocolonial "industrial" base. At one point, debt servicing took half of the national budget.<sup>50</sup> This crisis led successive governments to embrace a labour-export policy that would displace tens of millions of Filipino labourers to various parts of the world.<sup>51</sup> Thus, the "semi-feudal" countryside would be deprived of peasants not by industrialization but by exporting labour. By 2021, services would contribute sixty per cent to the economy, followed by twenty-eight per cent from industry and ten per cent from agriculture.<sup>52</sup> The industrial sector's share fluctuated while the agriculture sector's share would dive from thirty per cent in the 1970s to ten per cent by 2020.<sup>53</sup> Certainly, there is now a new division of labour in the global capital structure, but not as Magallona imagined. However, this apparent flaw does not diminish the relevance of Magallona's materialist lenses in understanding the development of international legal

<sup>50</sup> See Arsenio BALISACAN and Hal HILL, "The Philippine Development Puzzle", (2002) *Southeast Asian Affairs* 237 for an account by mainstream economists.

<sup>51</sup> In 2019, there were 2.18 million workers and an estimated 210 billion pesos (4.2 billion USD) of remittances. This number does not include Filipinos who do not go through government agencies. Philippine Statistics Office (2020), online: Philippine Statistic Authority <https://psa.gov.ph/statistics/survey/labor-and-employment/survey-overseas-filipinos#:~:text=The%20number%20of%20Overseas%20Filipinos,2.18%20million%20reported%20in%202019.&text=The%20number%20of%20Overseas%20Contract,from%202.11%20million%20in%202019>.

<sup>52</sup> Statista, "Share of Economic Sectors in the GDP in the Philippines" (2021), online: Statista <https://www.statista.com/statistics/578787/share-of-economic-sectors-in-the-gdp-in-philippines/>.

<sup>53</sup> The World Bank, "Agriculture, Forestry, and Fishing, value added (% of GDP), Philippines" (2020), online: World Bank <https://data.worldbank.org/indicator/NV.AGR.TOTL.ZS?locations=PH>.



doctrines. As we show below, an underlying Marxist logic in Magallona's work allows him to resolve the antinomy of positivism and self-determination in international law.

### III. The Dialectic in Magallona's Third World Texts: Towards a Synthesis of the Antinomy of Positivism and Self-Determination

In this section, we turn from Magallona's formulation of the postcolonial mode of production to his actual writings on international law. In the silences of Magallona's works on international law, we read a critique of imperialism and a dialectical materialist explanation of the development of international legal principles, particularly *jus cogens* and human rights. We argue that Magallona's critique embodies a dialectical vision that resolves the antinomy between positivism and self-determination by transforming positivist thought into an expression of self-determination.

In one volume of *Ashgate's Library of Essays in International Law* under the general editorship of Robert McCorquodale, Magallona's 1976 article "The Concept of *Jus Cogens* in the Vienna Convention on the Law of Treaties" is anthologized.<sup>54</sup> The essay does not explicitly reveal a Marxist polemicist. This is noted by the editor, who writes:

Since the issue of *ius cogens* caused considerable controversy at the Vienna Diplomatic Conference and as the status and substantive content of the concept itself remains the subject of debate, Merlin Magallona's essay...considers these issues. He reviews not only the emergence of the concept of a doctrine of international *ordre public* but also deals critically with some of the practical issues raised by the inclusion of *ius cogens* within the framework of positive law.<sup>55</sup>

The essay appears to be an ordinary doctrinal discussion of the emergence of *jus cogens* as positive law, which Magallona traces to the municipal law concept of *ordre public*. He then goes into a discussion of the definition, the function, and the treaty rules of *jus cogens*. One may get lost in his doctrinal analysis of the provisions governing the application, termination, and change of *jus cogens*; nonetheless, the Filipino scholar who wrote the essay was no ordinary doctrinal scholar. He was newly released from prison after being granted an amnesty and had just returned to the University of the Philippines College of Law as a Senior Lecturer.<sup>56</sup> A close reading of this essay will show that the author had not given up on Marxism, though an untrained eye barely recognizes it in the text. Perhaps prison has trained him to be subtler.<sup>57</sup>

<sup>54</sup> Scott DAVIDSON, ed. *The Law of Treaties* (London: Ashgate, 2004). Republished in 2016 by Routledge.

<sup>55</sup> Davidson, "Introduction", *supra* note 55 at xi, xix.

<sup>56</sup> For some details on Magallona's life as a party member, his travels to the USSR and the Soviet Bloc, and his life in the underground, see the op-ed piece: Ruben TORRES, "Farewell to a Dear Friend and Comrade," *The Manila Times* (7 January 2022). Torres, who would later serve as Secretary of Labor and Executive Secretary, admits that Merlin recruited him to the PKP in 1965. They travelled together to the Soviet Bloc, went underground, were detained, and received amnesty from the dictatorship.

<sup>57</sup> In a landmark 1977 book on human rights in the Philippines, answers to the question "How has martial law affected human rights...?" were collected. Magallona's and Nemenzo's responses are a study in contrasts and an insight into the relative autonomy of the university under a situation of political oppression. Nemenzo responded briefly thus: "Since I have no wish to go back to jail, I prefer to keep my thoughts on the subject a matter of private concern." (Francisco A. NEMENZO, "Response to Question No. 3" in Purificacion VALERA-QUISUMBING and Armando F. BONIFACIO, eds., *Human Rights in the Philippines: An Unassembled Symposium* (Quezon City: University of the Philippines Law Center, 1977) 81 at 112. On the other hand, Magallona echoed the classic Marxist concern for solidarity rights but elided mention of the tortures, arrests, and other egregious violations of civil and political rights committed by the agents of martial law that other contributors to the publication courageously pointed out in their answers: "Martial law has produced strong



There is no hint of Marxism in Magallona's statement that "[i]t is in the Vienna Convention on the Law of Treaties that the concept of *jus cogens* is introduced into positive international law for the first time".<sup>58</sup> Indeed, the statement sounds positivist rather than Marxist. This belief is reinforced by the writer's elaboration that identifying a norm that may be classified as *jus cogens* is "a consensual mechanism".<sup>59</sup> One may add to this positivist tendency Magallona's approving citation of Soviet jurist G.I. Tunkin's notion of "interconditionality of wills".<sup>60</sup>

However, the absence of Marxism in Magallona's text is only apparent. Magallona's Third World text contains the antinomy of positivism and self-determination. It viewed colonial treaty making as a form of laissez-faire market where the imperialists had unlimited powers to make contracts. The codification of *jus cogens*, the text argues, ended this classical capitalist practice of treaty making and affirmed the self-determination of peoples, thereby establishing the social basis of international law.

Yet it must be noted that the interconditionality of wills was a Soviet attempt to unify international law despite the opposing capitalist and socialist determinants of the wills of states. As a theory, it allowed for a "peaceful coexistence" between capitalist and socialist states during the Cold War.<sup>61</sup> This theoretical move had an ironic result: it transformed the Soviets into extreme positivists despite the Leninist perspective that underpins Tunkin's legal theory.<sup>62</sup> It made the "treaty" the most basic and reliable source of international law.<sup>63</sup>

This positivist tendency is certainly found in Magallona's conception of *jus cogens* as an "inter-national law". By grounding *jus cogens* on consent, he denied an abstract or teleological origin for it; instead, he proposed a materialist conception of legal development based on state relations and consensus. He argued that the concept developed from (1) the common experience of states in the struggle against fascism, (2) the new values

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negative effects on the right of the working people to form organizations to defend or advance their interests. The curtailment of the right to strike is a serious blow to the trade union movement. Since the strength of the working people as expressed in mass organizations is the only stable basis of economic development and social progress (in terms of the interests of the broad ranks of the working people), the struggle for human rights as this is explained in my response to Question No.1 above, has suffered a setback under the martial law administration... The martial law administration lacks the perception that a new society can only be built through the mobilization and participation of politically active masses, not by technocratic decision-making. Concomitantly, as martial law has impeded the organizational advance[ment] of the working people, it has strengthened in effect and by direct measures the position of social groups, which thrive on the right to make [a] profit at the expense of the labor of Filipino working people, particularly the foreign monopoly groups." (Merlin M. MAGALLONA, "Response to Question 3", *ibid.*, at 104-5). The UP Law Center had sent out questionnaires on six aspects of human rights in the Philippines to respondents across the political spectrum: from members of the academe, business, government (civilian and military), religious organizations, workers and peasant groups, and artist and professional groups. The responses were then gathered into a 278-page "unassembled symposium". The more cautious responses proffered by the former may be explained by the fact that Magallona had the cover of the political arrangement between the PKP and the Marcos administration and could invoke the arrangement as the basis for his studied criticisms of the government. Nemenzo, however, did not have the same protection; by this time, he had already been expelled from the Party (recall the discussion above in n 46). *Ibid.*, at 237.

<sup>58</sup> Merlin M. MAGALLONA, "The Concept of Jus Cogens in the Vienna Convention on the Law of Treaties", in S. DAVIDSON, ed., *The Law of Treaties* (London: Routledge, 2004), 495 at 497.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, at 502.

<sup>61</sup> Iain SCOBIE, "A View of Delft: Some Thoughts about Thinking about International Law", in Malcom EVANS ed. *International Law* (Oxford: Oxford University Press, 2018), 51 at 70.

<sup>62</sup> Bill BOWRING, "Positivism versus Self-determination: the Contradictions of Soviet International Law" in Susan MARKS, ed., *International Law on the Left: Re-examining Marxist Legacies* (Cambridge: Cambridge University Press, 2008), 133 at 136.

<sup>63</sup> Scobie, *supra* note 62. Vishinsky, cited in Bowring, *ibid.*, mentions the treaty as the basic source of international law.

that arose from the formation of socialist states, and (3) the exercise of self-determination by newly independent states. The norms that make up *jus cogens* can be “identified by the State themselves in their actual experience of struggle and cooperation”.<sup>64</sup>

Yet, Magallona does not advocate decadent formalism and positivism.<sup>65</sup> What animates his concept of *jus cogens* is a vision of radical self-determination. Indeed, Magallona does not fail to note in his conclusion that the inclusion of *jus cogens* in the convention resulted from strong support from Third World states.<sup>66</sup> More importantly, the openness and the consensual basis of *jus cogens* would allow states, including postcolonial states, to identify the norms that qualify as *jus cogens*.<sup>67</sup> This would then negate the imperialist practice of excluding colonials from international conferences, as during the American-Spanish meetings that led to the Treaty of Paris of 1898, through which the Philippines was transferred from one colonial power to another like a commodity. Substantively, *jus cogens* would function as limits to the objects of treaties, thereby eliminating the recurrence of colonialist transactions.

Marxist scholar Bill Bowring identified this antinomy of positivism and self-determination as one of the contradictions in Soviet international law. Positivism and self-determination may indeed be contradictory. Positivism was historically a tool of imperialism. Nineteenth-century positivism denied natives sovereignty, thereby transforming them into colonials and dependents.<sup>68</sup> Positivism also curtailed the rights of colonials through agreements made by Western powers, embodied in treaties such as the Act of Berlin,<sup>69</sup> the US-Spanish Treaty of Paris of 1898,<sup>70</sup> the Anglo-Dutch Treaty of 1824,<sup>71</sup> and many others. In contrast, self-determination was/is a revolutionary right that amounts to a constituent power. Its codification in international law was likened to international law’s recognition of the right to revolution by granting colonial peoples a “legal licence to use force”.<sup>72</sup>

This antinomy of “colonialist” positivism and “revolutionary” self-determination also appears in Third World texts such as Magallona’s. This is not surprising because the Third World state was both the object of positivist international law and the subject of the right to self-determination. While in the Soviet case, it was a matter of foreign policy and solidarity, the Third World state embodied the contradiction. In a sense, the colony had to resolve this object-subject position or, in Marxist parlance, the Third World state needed an “aufhebung”, a synthesis of the contradiction.

Thus, we find in Magallona a positivism that does not descend to a mere formality. We see a positivism that would allow participation in international lawmaking simultaneous with the exercise of self-determination. Indeed, one may see that Magallona’s positivism is positivism with limits, one that cannot encroach on the self-determination of nations

<sup>64</sup> Magallona, *supra* note 59 at 497.

<sup>65</sup> *Ibid.*, at 501.

<sup>66</sup> Magallona, *supra* note 59 at 516.

<sup>67</sup> *Ibid.*

<sup>68</sup> Antony ANGHIE, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

<sup>69</sup> *General Act of the Berlin Conference on West Africa* (signed 26 February 1885) (1909) 3 *American Journal of International Law* 51 Supplemental Official Documents, at 7–25.

<sup>70</sup> *Treaty of Peace between the United States of America and the Kingdom of Spain of 10 December 1898* (entered into force 11 April 1899) 30 Stat. 1754.

<sup>71</sup> *Treaty between His Britannic Majesty and the King of the Netherlands, Respecting Territory and Commerce in the East Indies of 17 March 1824*, Consolidated Treaty Series, International Court of Justice.

<sup>72</sup> Antonio CASSESE, *International Law* (Oxford: Oxford University Press, 2005); Paola GAETA, Jorge VIÑUALES, and Salvatore ZAPPALÀ, *Cassese’s International Law* (Oxford: Oxford University Press, 2020), at 70.

and is dialectically transformed and appears now as a right to self-determination, a synthesis earlier described as Postcolonial Self-Determination.

Through this synthesis, Magallona celebrated the codification of *jus cogens* as “an end” of “the regime of laissez-faire in treaty making”.<sup>73</sup> On the one hand, he considered the “will of states” in the article as an expression of self-determination; on the other hand, he saw the end of unlimited state power in treaty making as a significant development of international law.<sup>74</sup> *Jus cogens* bade farewell to the “obsolete rules” that served the “exploitative interests” of the “major capitalist powers”.<sup>75</sup> Its codification against the opposition of the major capitalist powers was, without doubt, a manifestation of the power of the self-determination of peoples.

Magallona’s account of *jus cogens* is of a piece with his theory about the philosophical development of human rights resulting from the “sharp antagonism of social classes and social interests exploding into revolutionary upheavals”.<sup>76</sup> The clash of philosophies of rights merely reflects the historical struggle of social forces; here, history inevitably “screens out”<sup>77</sup> those that “impede the expanding socialization of freedom” in favour of those that advance the “felt necessities of the times”.<sup>78</sup> In this particular essay, written in 1989, Magallona never provides express clues of the provenance of his theory on human rights.<sup>79</sup> But the question of provenance is unmistakably answered by the central thesis of his paper:

Quite apart from the influence of ideas on the motivation of men, it needs to be emphasized that the watershed in the development of human rights has been formed by political revolutions and social upheavals—those historical moments of qualitative transformation defined by sharp conflict of class interests. If the protagonists appear to be fighting for ideas, it is because those ideas coincided with those interests. They struggled for those interests as reflected in ideas and fought for ideas in defense of interests.<sup>80</sup>

Human rights are a product of active engagement with social reality to secure not the promotion of an “isolated material benefit or redress [of a violated] right”<sup>81</sup> but “the greater enterprise of human rights as an affirmation of the need for broader democratic changes: it is a moment in the greater enterprise of social transformation, i.e., the revolutionary moment to enthrone the supremacy of the majority’s interests”.<sup>82</sup>

<sup>73</sup> Magallona, *supra* note 59 at 515.

<sup>74</sup> Indeed, many Third World states believed that the draft articles of the Vienna Convention embodied a new international law that “was becoming a set of legal principles that applied to all countries and not a few favoured States”. Representative of Ghana as cited in R. KEARNEY and R. DALTON, “The Treaty of Treaties” in S. DAVIDSON, ed., *The Law of Treaties*, (London: Routledge 2004), 3 at 3, 9.

<sup>75</sup> These quoted words appear in the essay’s conclusion. Magallona, *supra* note 59 at 516.

<sup>76</sup> Merlin M. MAGALLONA, “On the ‘Philosophical Basis’ of Human Rights” in Merlin M. MAGALLONA, *International Law Issues in Perspective* (Quezon City: University of the Philippines Law Center, 1996), 145 at 145.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*, at vii.

<sup>80</sup> *Ibid.*, at 149.

<sup>81</sup> *Ibid.*, at 150.

<sup>82</sup> *Ibid.* In the aforementioned 1977 book, to the question “what must be done in order to encourage respect for and ensure observance of human rights in the Philippines?”, Magallona responded in part, “[i]n social reality, human rights are activities, not concepts...They are to be acted out... Human rights are not studied for the sake of study. Human rights are not a fetish but a dynamic living force for progressive change even as, at the same time, the product of that change. An effective way to nullify human rights is to study them to death.” (Merlin M. MAGALLONA, “Response to Question 6” in Valera-Quisumbing and Bonifacio, *supra* note 58 at 195).

Remarking on the then two-year-old post-Marcos constitution, Magallona argues that the constitutional framework it established directs a process of social transformation toward “a regime of comprehensive human rights”<sup>83</sup> through which the Filipino people are empowered to exercise their collective right to self-determination to transform themselves into a “*constitutional sovereign force* in order that they can take their place in the seat of sovereignty as the source of ‘all government authority’”.<sup>84</sup> Thus, human rights consist of the objectives of comprehensive democratic changes in the life of the Filipino people as individuals – yet inseparable from their national life – as well as the means of achieving the possibilities they collectively and individually embody and protecting them from derogation.<sup>85</sup> This is further explained in Magallona’s reading of the new guarantees for freedom of expression provided in the new constitution, which states that “no law shall be passed abridging the freedom of speech, of expression or of the press, or the right of the people peaceably to assemble and petition the government for [a] redress of grievances”.<sup>86</sup> Magallona argues that the 1987 Constitution’s new understanding of free expression converged and “posited”<sup>87</sup> the inseparability of civil and political rights and social, economic, and cultural rights. There, both the individual and collective human need for self-fulfilment and development find the fullest expression:

The deep human need for individuality and pursuit of happiness through sharing of ideas, sentiment and experience with one another [and] the need for self-expression as a form of spiritual and emotional gratification through one’s work, leisure and the other dimension[s] of life are thereby given a more specific habitation in the fundamental law. From the viewpoint of the community as a whole, free expression of one’s perception of beauty, truth and spirituality becomes a medium by which the enrichment of culture and its continued development and renewal is accomplished, thus expanding the possibilities of social life. Thereby, the free development of the individual becomes a condition for the free development of the community.<sup>88</sup>

Here, the state is a central instrument for progressive change. Yet, in principle, Magallona’s theory of human rights does not reject remedies beyond the state; this is evident in the overall thrust of his argument that the concept and practice of human rights are a function of the conflict of historical forces. Such an historical conflict will necessarily marshal all institutional tools, whether domestic or international, toward human rights, as needed.<sup>89</sup> Contrast this to some of his Maoist counterparts who, in the early

<sup>83</sup> *Ibid.*, at 150.

<sup>84</sup> Magallona, *supra* note 77 at 151 [italics in the original].

<sup>85</sup> *Ibid.*, at 151–2.

<sup>86</sup> 1987 Constitution, art. III, sec. 4.

<sup>87</sup> To use the proper analytical positivist’s term. See Leslie Green, “Introduction” in H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 2012), i at xix.

<sup>88</sup> Magallona, *supra* note 77 at 152–3. This is a marked departure from an earlier definition of human rights he had adhered to. In the aforementioned 1977 human rights book, consistent with Marxist orthodoxy, he defined Human Rights as “liberties that necessarily pertain to the great majority of working people in their collective and organized efforts for the transformation of the social framework, to the end that the most human conditions in society are realized in terms of freedom from exploitation and want, the fulfillment of the right to work, and the abolition of poverty and illiteracy. In concrete social realities, human rights are exemplified in the working people’s right to strike against oppressive condition[s] of employment, and the right to mobilize themselves and participate fully in the political decisions of the country.” (Merlin M. MAGALLONA, “Response to Question 1”, in Valera-Quisumbing and Bonifacio, *supra* note 58 at 21).

<sup>89</sup> It bears noting that Magallona’s academic career intersected with and benefited from that of the prize-winning liberal essayist and statesman Salvador “SP” Lopez, who, prior to his presidency at the University of the Philippines (1969–1975), served as Chair of the UN Commission on Human Rights and, subsequently, a UN

years following the People Power Revolution that removed Marcos from power, considered the UN human rights system as no more than an appendage to the world capitalist system and, therefore, secondary to the revolutionary imperative.<sup>90</sup> Since then, the Maoists have embraced human rights as part and parcel of their national democratic struggle, if not in theory, at least in practice.<sup>91</sup>

That Magallona considers international mechanisms as useful fetters to state abuse of rights is also made evident when he considers human rights as a cornerstone of the UN Charter, such that any reading of the supremacy clause of the UN Charter found in Article 103<sup>92</sup> in relation to Articles 55 and 56 and the Universal Declaration of Human Rights<sup>93</sup> cannot be done outside human rights lenses,<sup>94</sup> whose grids presumably include *jus cogens* norms.

Thus, the erasure of the Filipino “Comfort Women” in the 1951 San Francisco Peace Treaty cannot be said to have waived all claims against the State of Japan arising from the Second World War, such a Treaty being subject to the UN Charter’s supremacy clause,<sup>95</sup> insofar as human rights obligations under the same Charter form part of the context of the Treaty and prevail over its waiver clause.<sup>96</sup>

However, Magallona would insist on consistency in method when invoking UN human rights instruments to protect the rights of Filipino citizens against political tyranny. This is evident in his critique of a landmark Philippine case arising from the so-called “inter-regnum” – one month following the 1986 People Power Revolution, when there was no constitution to speak of, Corazon Aquino’s revolutionary government scrapped the 1973 Marcos constitution.<sup>97</sup> In *Republic v Sandiganbayan*, the Philippine Supreme Court (PSC) held that even without a constitution, citizens’ rights are protected through the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights, to which the Philippines is a signatory.<sup>98</sup> The *ratio decidendi* of the case

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Rapporteur to the Economic and Social Council on Freedom of Information. Lopez played a key role in crafting UN human rights individual complaints mechanisms. In 1969, when Lopez became UP President, Magallona was appointed assistant professor at the College of Law. Lopez was also responsible for the policy to reinstate UP faculty released from Martial law detention automatically: 1 *University of the Philippines Gazette* 4 (30 April 1971), at 48; see “Salvador P. Lopez: Diplomat and Nationalist” *University of the Philippines Forum* (July–August 2011), at 6–8; Lisandro E. CLAUDIO, *Liberalism and Postcolony: Thinking the State in the 20<sup>th</sup> Century Philippines* (Quezon City: Ateneo De Manila University Press, 2017), at 111–46; and Steven L.B. JENSEN, *The Making of International Human Rights: The 1960s, Decolonization and the Reconstruction of Global Values* (Cambridge: Cambridge University Press, 2016); Francisco A. NEMENZO, “What I Remember of SP Lopez” *University of the Philippines Forum* (July–August 2011), at 5.

<sup>90</sup> Ramon CASIPLE, “Debate: Burning Issues in the Human Rights Debate: Questioning Human Rights” (1995) 1 *The Human Rights Journal* 1 at 82–93.

<sup>91</sup> On CPP and human rights in recent years, see Nathan Gilbert QUIMPO, “The Use of Human Rights for the Protraction of War” (2006) 21(1) *Kasarinlan: Philippine Journal of Third World Studies* 34–54 and Jayson S. LAMCHECK and Emerson M. SANCHEZ, “Friends and Foes: Human Rights, the Philippine Left and Duterte, 2016–2017” (2021) 45(1) *Asian Studies Review* at 28–47.

<sup>92</sup> *Charter of the United Nations*, 1 U.N.T.S.XVI (entered into force, 24 October 1945) art. 103.

<sup>93</sup> *Universal Declaration of Human Rights*, GA Res. 217 (III), UN Doc. A/810 (1948) arts. 55–6.

<sup>94</sup> Merlin M. MAGALLONA, “The San Francisco Peace Treaty with Japan and the Case of Filipino ‘Comfort Women’”, in Merlin M. MAGALLONA, *International Law Issues in Perspective* (Quezon City: University of the Philippines Law Center, 1996), at 266–77.

<sup>95</sup> *Ibid.*, at 267.

<sup>96</sup> *Ibid.*, at 268.

<sup>97</sup> See Perfecto V. FERNANDEZ, “Lecture on Dictatorship” in Marcia Ruth Gabriela P. FERNANDEZ, ed., *Law and Society: Collected Works of Perfecto V. Fernandez* (Quezon City: University of the Philippines Law Center, 2005) 507 at 507–13.

<sup>98</sup> *Republic v Sandiganbayan* [2003] G.R. No. 104768 [En Banc] 21 July 2003. This essay’s citations to Philippine cases are from the Philippine Supreme Court’s official website’s jurisprudence archive at <https://elibrary.judiciary.gov.ph/search>.

treated Filipinos as “subjects of the rules of international law”<sup>99</sup> and then held that the international documents applied directly to them, invoking previous Philippine jurisprudence that considered these instruments embodiments of customary international law (CIL). The problem with this reasoning, according to Magallona, is that, under Article 2 (1) of the International Covenant on Civil and Political Rights, the state party is the subject of international law as the possessor of obligations towards citizens.<sup>100</sup> Second, the reasoning does not square with the long-established doctrine that CIL (as “generally-accepted principles of international law” described in the constitution)<sup>101</sup> becomes part of Philippine law through the Incorporation Clause of the Constitution, as held in the very same jurisprudence invoked by the majority opinion. Since there is no constitution, there is no Incorporation Clause. Thus, there is no channel through which CIL, from the plane of objective international law, may be given direct effect in Philippine municipal law without the need for legislation. The Court’s reasoning practically makes the Incorporation Clause a surplusage.<sup>102</sup> The Court would not have had to resort to methodological incoherence in *Republic* had it invoked the long-standing precedents (such as, for example, those on unreasonable searches and seizures).<sup>103</sup> Magallona was certainly no exponent of cosmopolitan human rights.<sup>104</sup> But his texts reveal an international legal scholar who understood human rights as a positivization of individual and collective self-determination through treaties but subject to national constitutions that embody the self-determination of peoples. The following section shows how Magallona’s Postcolonial Self-Determination was pursued in practice.

#### IV. The New International Economic Order as a Field of Praxis of the Third World Marxist International Lawyer

In the dialectic between critique and practice, the two collide, clash, and confront each other as theorization challenges practice and vice versa.<sup>105</sup> In the following two sections, we discuss how Magallona’s critique of imperialism was concretized and actualized in praxis through his engagement with the government and mass movement in popularizing the NIEO and his legal challenge to Philippine baseline law. We discuss Magallona’s engagement with the NIEO in this section and his practice of litigation in the next.

In 1979, or five years after the PKP’s political settlement with the Marcos regime, Magallona inserted himself into the ongoing international debate on the development debacle in the Third World. On November 2 of that year, the Philippine Mission to the UN circulated a principal working paper he had authored in the Sixth Committee of the UN General Assembly, titled “Towards the Consolidation and Progressive

<sup>99</sup> *Ibid.*

<sup>100</sup> Merlin M. MAGALLONA, *The Supreme Court and International Law: Problems and Approaches in Philippine Practice* (Quezon City: University of the Philippines Law Center, 2010), 73 at 77, citing *International Covenant on Civil and Political Rights*, 16 December 1966, 1999 UN Treaty Series, art. 2, (entered into force 23 March 1976).

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*, at 77–8.

<sup>103</sup> *Ibid.*, at 79.

<sup>104</sup> Magallona’s insistence on methodological consistency is also rooted in his dualist theory of the Philippine practice of international law, in which a protectionist Constitution is supreme over international law. Magallona, *supra* note 101 at 1–8. See also Merlin M. MAGALLONA, *A Primer in International Law in Relation to National Law* (Quezon City: Central Professional Books, 1997); Merlin M. MAGALLONA, *Fundamentals of Public International Law* (Quezon City: C & E Publishing, 2005).

<sup>105</sup> Harcourt, *supra* note 3 at 43: “The process of theorization challenges and pushes my own praxis and vice versa ... the praxis also confronts my critical theories and challenges them...As a critic, I must engage, I must practice, and I must critique and reflect ... I agonize over this relation between my theory and praxis”.



Development of the Principles and Norms of International Economic Law”<sup>106</sup> The paper was commissioned to support a Philippine draft resolution on the same theme in relation to legal aspects of the international economic order,<sup>107</sup> the resolution of which was subsequently approved by the Sixth Committee on 6 December 1979 and adopted by the UN General Assembly on 17 December 1979 by a vote of 112 in favour, 6 against, and 26 abstentions.<sup>108</sup>

Being the principal working paper’s author, Magallona was enlisted as a member of a group of experts convened to study the legal aspects of the NIEO. His political affiliation – in his own words, a “political reason”<sup>109</sup> – would prove to be a stumbling block to his participation in the experts’ meeting at the UN headquarters in New York in 1982: the US Embassy in Manila refused to issue him a visa.<sup>110</sup> By his telling, we know that the Philippine mission in New York even called the Department of Foreign Affairs headquarters in Manila to conduct an inquiry into the US Consul’s refusal to issue him a visa given the embarrassment it caused to the Philippines, it being the main proponent of the subject matter to be discussed in New York.<sup>111</sup> The Marcos administration proved hapless before a minor American government functionary, whose machinations underscored the Philippines’ continuing neocolonial subservience to its former colonial master. Yet once again, we are not informed exactly what specific political reason might have served as the basis for the US embassy’s non-issuance of a visa or what came out of the investigation by the DFA.<sup>112</sup>

In his working paper, Magallona argued for a “restructuring of international law”<sup>113</sup> from its old colonial roots through which purportedly civilized nations laid the foundations of an international economic order skewed against decolonized and developing states to one based on “equity, sovereign equality, interdependence, common interest and cooperation among all states, irrespective of their economic and social system”.<sup>114</sup> Development has become a legal question insofar as “no system of norms can pretend to apply to an international community without embodying the major concerns and vital interests of the developing countries[,] which are rooted in their state of underdevelopment and premised in their just demand for equity”.<sup>115</sup> He thus argued that the standards for development under an NIEO may now be defined through an *erga omnes* “right to development” owed by states to the international community as a whole,<sup>116</sup> constituted by its three founding documents,<sup>117</sup> namely, the NIEO Declaration and Programme of

<sup>106</sup> “Towards the Consolidation and Progressive Development of the Principles and Norms of International Economic Law”, Sixth Committee of the UN General Assembly A/C.6/34/L.7, Working Paper, 2 November 1979.

<sup>107</sup> Merlin M. MAGALLONA, “Preface” in Merlin M. MAGALLONA, *International Law Issues in Perspective* (Quezon City: University of the Philippines Law Center, 1996), v at vi. The resolution, as approved, became UN General Assembly Resolution 35/166, *Consolidation and Progressive Development of the Principles and Norms of International Economic Law, Relating in Particular to the Legal Aspect of the New International Economic Order*, A/RES/34/150 (15 December 1980).

<sup>108</sup> Magallona, *supra* note 109 at vi.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*, at vi–vii.

<sup>111</sup> *Ibid.*, at vii.

<sup>112</sup> *Ibid.*

<sup>113</sup> Merlin M. MAGALLONA, “Towards the Consolidation and Progressive Development of the Norms of International Economic Law”, in Merlin M. MAGALLONA, *International Law Issues in Perspective* (Quezon City: University of the Philippines Law Center, 1996), 112 at 114.

<sup>114</sup> *Ibid.*, at 114–5, quoting UN General Assembly Resolution 3201 (S-VI) 1 May 1974 (Programme of Action on the Establishment of a New International Economic Order).

<sup>115</sup> *Ibid.*, at 119.

<sup>116</sup> *Ibid.*, at 120.

<sup>117</sup> *Ibid.*, at 121.

Action,<sup>118</sup> the Charter of Economic Rights and Duties,<sup>119</sup> and the Resolution on Development and International Economic Cooperation.<sup>120</sup> The three documents spring from the UN Charter's objective of "social progress and better standards of life in larger freedom"<sup>121</sup> through "international cooperation in solving problems of an economic, social, cultural, or humanitarian character".<sup>122</sup> Other provisions of the UN Charter provide further support: Article 55 obligates the UN to promote "conditions of economic and social progress and development" toward "the creation of conditions of stability and well-being...necessary for peaceful and friendly relations among nations".<sup>123</sup>

Moreover, through Article 56, member states pledged "to take joint and separate action in cooperation with the Organization".<sup>124</sup> The duty to cooperate toward solving economic problems in the international order is now a general principle of law.<sup>125</sup> International economic law is central to this project, as it deals with the public international law aspect of one purpose of the UN, namely international cooperation to solve problems of an economic character.<sup>126</sup> While the UN General Assembly played a leading role in the progressive development of norms and principles of international economic law,<sup>127</sup> the various organs and agencies of the UN system and international conferences helped crystallize these norms and principles,<sup>128</sup> as embodied in the founding documents, which are summarized in the following principles:

- (a) Sovereign equality of states, self-determination of all peoples, inadmissibility of the acquisition of territories by force, territorial integrity and non-interference in the internal affairs of other states;
- (b) The broadest cooperation of all state members of the international community, based on equity, whereby the prevailing disparities in the world may be banished and prosperity secured for all; and
- (c) Full and effective participation on the basis of equality of all countries in the solving of world economic problems in the common interest of all countries.<sup>129</sup>

Magallona had anticipated a later critique of the NIEO's statist vision.<sup>130</sup> Thus, in a 1977 essay, he concretized NIEO principles in the Philippine setting in a way that emphasized the sovereignty and self-determination of the people. Magallona saw the NIEO as the

<sup>118</sup> UN General Assembly Resolution 3201 (S-VI) 1 May 1974.

<sup>119</sup> UN General Assembly Resolution 3281 (XXIX) of 12 December 1974.

<sup>120</sup> UN General Assembly Resolution 3362 (S-VII) of 16 September 1975.

<sup>121</sup> Magallona, *supra* note 115, at 120, quoting *Charter of the United Nations*, 1 U.N.T.S.XVI (entered into force, 24 October 1945, Preamble).

<sup>122</sup> *Ibid.*, quoting *Charter of the United Nations*, 1 U.N.T.S.XVI (entered into force, 24 October 1945), art. 1(3).

<sup>123</sup> *Ibid.*, at 120, quoting *Charter of the United Nations*, 1 U.N.T.S.XVI (entered into force, 24 October 1945), art. 55.

<sup>124</sup> *Ibid.*, quoting *Charter of the United Nations*, 1 U.N.T.S.XVI (entered into force, 24 October 1945), art. 56.

<sup>125</sup> *Ibid.*, at 121–2.

<sup>126</sup> *Ibid.*, at 122.

<sup>127</sup> *Ibid.*, at 123, citing *Charter of the United Nations*, 1 U.N.T.S.XVI (entered into force, 24 October 1945), art. 13 (1).

<sup>128</sup> In particular, the United Nations Conference on Trade and Development (*ibid.*, at 125). See also Antony ANGHIE, "Legal Aspects of the New International Economic Order" (2014) 6 *Humanity Journal* 148.

<sup>129</sup> Magallona, *supra* note 115 at 124, quoting UN General Assembly Resolution 3201 (S-VI) 1 May 1974.

<sup>130</sup> For instance, B.S. Chimni has argued: "While it is true that the State is, in terms of international demarcation of territories, an institution of collective property, the ultimate control over this property is to vest with people. From this perspective, there is a need to address the difficult question of how to give legal content to peoples' sovereign rights. There is often in this respect the absence of appropriate legal categories and are difficult to implement in practice" (B.S. CHIMNI, "Third World Approaches to International Law (TWAIL): A Manifesto" (2006) 8 *International Community Law Review* 24).

continuation of the struggle for national liberation of decolonized states like the Philippines through economic development. After decolonization, “they were confronted, as they are still confronted, with powerful impediments to economic independence, which consequently continue to nullify the meaning of their political independence”. He argued that the Philippine national interest coincided with NIEO principles and was inseparable from a long history of colonial exploitation and continuing victimization through neocolonial patterns of economic development and foreign economic and financial domination.<sup>131</sup> To counter these regressive influences, the Philippines needed to do the following. First, it needed a strong-willed assertion of national sovereignty and self-determination.<sup>132</sup> Second, such an assertion meant full sovereignty over raw materials and natural resources against the unfettered exploitation by multinational corporations and recognition by the state that the national interest embraces not just state interests but:

the participation of all members of society in the establishment of forms of ownership of land and of the means of production which preclude any kind of exploitation of man, ensure equal rights to property for all and create conditions leading to genuine equality among peoples.<sup>133</sup>

Third, the national interest had to be understood as “the welfare of the broadest ranks of the people, not of an economically privileged few”.<sup>134</sup>

But Magallona remarked that these elements of the national interest, reflective of the NIEO, were missing in the existing framework of national policies promoted by the so-called “New Society” being touted by the dictator Ferdinand E. Marcos Sr. as the aim of his declaration of martial law. Magallona identified seven indicators of such pro-foreign capital national development programmes being carried out by the dictator’s government: (1) an export-oriented economy based on processing and light manufacturing industries; (2) heavy reliance on foreign-controlled technology and finance to build the same industries; (3) high incentives for multinational corporations, such as (a) profit and capital repatriation, (b) tax breaks, (c) access to domestic credit facilities, (d) low wages for workers, and (e) guarantees against expropriation; (4) allocation of land and mineral resources for export-oriented processing zones; (5) creation of free-trade processing zones; (6) massive infrastructure projects through foreign loans; and (7) private sector lead in economic development, with the government providing conditions for political stability and worker availability.<sup>135</sup>

In line with his mode of production formulation, Magallona argued that such an approach to development reduced the Philippine economy into a mere “production unit of an internationally integrated production system of global corporations” and raised the “urgent question” of whether or not the interest promoted is really that of the broadest masses of the people rather than foreign monopoly-capital.<sup>136</sup> In these two essays, there is no express mention of Marxist sources. Perhaps his double silences here are understandable. The first was forwarded as a Philippine government position to

<sup>131</sup> Merlin M. MAGALLONA, “National Interest and the New International Economic Order” in Merlin M. MAGALLONA, *International Law Issues in Perspective* (Quezon City: University of the Philippines Law Center, 1996), 129 at 134.

<sup>132</sup> *Ibid.*, at 135–6.

<sup>133</sup> *Ibid.*, at 137.

<sup>134</sup> *Ibid.*, at 138.

<sup>135</sup> *Ibid.*, at 141.

<sup>136</sup> *Ibid.*

the UN at the international level; the second, while it first saw the light of day in a journal for Filipino lawyers, was circulated in a domestic context in which martial law had been imposed and the author – released not too long ago from jail under presidential amnesty – has had to keep, somehow, to his party's bargain with the ruling power. Yet they dealt unmistakably with the outstanding issues from Third World Marxism's transformational imperatives and his stance in his mode of production debates with the Maoists.

Despite the short-lived promise of the proposals for establishing the NIEO, Magallona continued his advocacy of its principles in and out of the groves of academe. On 30 December 1986, the PKP held its "first open Congress since 1946, and its fourth open Congress since its founding in 1930"<sup>137</sup> in Cabiao, in the Nueva Ecija province in Northern Philippines, where Magallona was elected General Secretary.<sup>138</sup> With his election, the NIEO principles he had been advocating as an academic were rendered indivisible from the Marxist vision of his party politics; the PKP's political action programme included the promotion of NIEO principles, which were announced at the party congress.<sup>139</sup> In 1987, speaking in Moscow before a gathering of Marxist parties and representatives on the occasion of the 70th anniversary of the October 1917 Revolution, Magallona echoed the NIEO's issues as he spoke against the unchecked power of transnational corporations in Third World states as an ever-urgent concern.<sup>140</sup>

Today, Magallona's contributions to the NIEO discourse deserve a rereading in the wake of efforts in some quarters to revisit the NIEO's vision<sup>141</sup> and the continuing relevance of

<sup>137</sup> PKP, "The Philippine Path for Economic Independence, Popular Democracy, and Social Progress", Ninth Congress Party Programs and Aims (30 December 1986), online: PKP [http://www.pkp-1930.com/pkp-9th-congress?fbclid=IwAR0an0UD9wWOZ8npdW9T4ySeezFb6WhTvtSREMDn-gQmFUO\\_kg-hYmlbPF4](http://www.pkp-1930.com/pkp-9th-congress?fbclid=IwAR0an0UD9wWOZ8npdW9T4ySeezFb6WhTvtSREMDn-gQmFUO_kg-hYmlbPF4).

<sup>138</sup> *Ibid.*

<sup>139</sup> Magallona, *supra* note 133 at 141.

<sup>140</sup> Merlin M. MAGALLONA, General Secretary of the Central Committee, Communist Party of the Philippines (PKP) Speech, in *Meeting of Representatives of Parties and Movements Participating in the Celebration of the 70<sup>th</sup> anniversary of the Great October 1917 Socialist Revolution, Moscow, October 4-5 1987* (Moscow: Novosti Press Agency Publishing House, 1987), at 344. His speech said in part thus:

And how small is the number of big-time capitalists [on] the boards of directors of transnational corporations who decide on the plunder of vast neocolonial territories and countries and control their economies? As time passes, more and more extensive human and natural resources in the Third World are coming under the domination of relatively fewer monopolists. For that matter, how small is the number of financiers and bankers who decide on the pauperization of nations through [the] unpayable foreign debt? ...

<sup>141</sup> See current efforts "to present, deliberate, and develop proposals for a New International Economic Order fit for the twenty-first century" (Progressive International, "New International Economic Order: 1974–2024", online: Progressive International <https://act.progressive.international/nieo/>). On 12 December 2022, the UN General Assembly, voting 123–50 with one abstention (Turkey), adopted a draft resolution entitled "Towards a New International Economic Order" – a symbolic vote for now, yet evocative of the continuing appeal of the NIEO. Qatar introduced the full text of the resolution as A/C.2/77/L.46 on 15 November 2022. The official press statement of the UN issued following the vote declared in part that:

By its terms, the Assembly expressed concern over the increasing debt vulnerabilities of developing countries, the net negative capital flows from those countries, the fluctuation of exchange rates and the tightening of global financial conditions, and in this regard stressed the need to explore the means and instruments needed to achieve debt sustainability and the measures necessary to reduce the indebtedness of developing states. United Nations, "General Assembly Takes Up Second Committee Reports, Adopting 38 Resolutions, 2 Decisions: Texts Aimed at Eradicating Rural Poverty, Promoting Development among Approved" (14 December 2022) GA/1248, online: UN <https://press.un.org/en/2022/ga12482.doc.htm>. Unsurprisingly, opposition to the resolution came largely from the developed world: the United States of America and European states and their rich allies such as Israel, Japan, and Korea.

the question: “[i]s the international system, including the international legal system, structured in a manner that leads to the systematic immiseration of the vast majority of the world’s population?”<sup>142</sup>

## V. Using Imperial Treaties against Empires: Reading Magallona’s Marxist Praxis of Inversion

We now turn to Magallona’s work on the Third UN Convention on the Law of the Sea (UNCLOS III).<sup>143</sup> Here, we see his Third World Marxism expressed as a staunch opposition to imperial projects of any kind – even those by Russian and Chinese Marxists – albeit his express targets were Western powers such as the United States of America. His approach to UNCLOS in relation to Philippine national territory assumes a paradoxical stance. On the one hand, he critiqued the imposition of a racist and colonialist international law in 1898 by the United States of America and Spain through the Treaty of Paris (TOP), by which the latter relinquished to the former control over its far-flung colonial outpost of the last three centuries for US \$20,000,000.<sup>144</sup> He wrote that the TOP “consolidated [the] historic crime” of obliterating the sovereignty of the Filipino people just as they emerged victorious from a revolutionary war against their colonial masters<sup>145</sup> and proved to be “an integral part of a legal regime of the international community constructed by the great powers based on their interests in the division and re-division of the world into colonies and protectorates”.<sup>146</sup> On the other hand, he followed an older nationalist (read: anti-colonial, anti-imperialist) tradition built on the colonial imposition of an exceptionalist Philippine national territorial claim. On such a stance, his scholarship rejected the multilateralism – and what he saw to be a militaristic and imperialistic bias – of the UNCLOS regime.<sup>147</sup> More importantly, towards the last two decades of his life, he dedicated himself to a defence of this nationalist view of Philippine national territory, concluding it with a constitutional challenge before the Philippine Supreme Court against

<sup>142</sup> Anghie, *supra* note 130 at 156. Moreover, recent scholarship (Jochen VON BERNSTORFF and Philipp DANN, “Introduction” in von Vernstorff and Dann, *supra* note 2 at 3) argues that:

These [NIEO] debates and their third-world international legal protagonists, as well as the new embattled concepts, have often been portrayed as a short-lived Southern or socialist (Cold War-) revolt within UNGA with ultimately minor and negligible implications for international law and legal scholarship...[N]othing could be more mistaken. Not only that, the outcome of this battle has fundamentally shaped what we presently conceive of as international legal structures. With hindsight, we hold that international legal structures in many areas of international relations have been transformed during this era, albeit with the effect of enabling a transition from classic European imperialism to new forms of US-led Western hegemony. The underlying aspirations, strategies, and failures of this battle thus are of vital importance for any future project aiming to address and alter the relationship between international law and fundamental inequalities in this world.

<sup>143</sup> *Convention on the Law of the Sea*, 10 December 1982; 1833 U.N.T.S. 397 (entered into force 16 November 1994), online: UN Treaty Collection <https://treaties.un.org/doc/Publication/UNTS/Volume%201833/volume-1833-A-31363-English.pdf>.

<sup>144</sup> Merlin M. MAGALLONA, “The Treaty of Paris of 10 December 1898: History and Morality in International Law” (2000) 75 *Philippine Law Journal* 2 159–71.

<sup>145</sup> *Ibid.*, at 159.

<sup>146</sup> *Ibid.*, at 160.

<sup>147</sup> One of his last publications was Merlin M. MAGALLONA, *The Philippines in the International Law of the Sea* (Quezon City: University of the Philippines Law Center, 2015), an anthology of eight of his essays and lectures on the topic written between 1995 and 2013.

a new Philippine Baselines Law that, in his view, severely diminished the constitutional foundations of the country's territorial borders.

The nationalist school had treated the TOP as the ultimate basis for establishing national borders. Its rectangular-shaped limits formed a colonial boundary that preceded UNCLOS and was long accepted, either by their acquiescence or through active participation in its development and embodiment into a treaty of cession by the leading Western colonial powers of the time, consolidated by effective occupation.<sup>148</sup> The territory Spain sold to the United States of America, as described in longitude and latitude in Article III of the TOP, assumes a rectangular area measuring 600 miles in width and 1,200 miles in length. The area embraced by the TOP's so-called "International Treaty Limits" was expanded by two other treaties, the 1900 Treaty of Washington,<sup>149</sup> wherein Spain relinquished to the United States islands belonging to the Philippine archipelago but lying outside the lines described in the TOP, particularly referring to the islands of Cagayan, Sulu, and Sibutu, and the 1930 United States-Great Britain Treaty,<sup>150</sup> which demarcated the boundaries of the Philippines and North Borneo, then under the administration of the United Kingdom.

Indeed, for a long time, it has been a Philippine constitutional truism that the TOP and its associated treaties formed the basis of the Philippine national territory and are writ large in Article 1, the National Territory provision, of the Philippine Constitution.<sup>151</sup> That is, until *Magallona v Executive Secretary*,<sup>152</sup> the case that ironically bears his name, came along. In 2009, the Philippines passed the Republic Act (RA) 9522,<sup>153</sup> which further amended the country's first baseline law, RA 3046 of 1961,<sup>154</sup> transforming the Philippines into an archipelagic state under the Law of the Sea regime. RA 3046 of 1961 was passed into law to strengthen the Philippines's territorial claim of an archipelago as a unity of land and water founded under the TOP it had espoused, which was rejected by UNCLOS I. This position is summarized in two *notes verbales* sent by the Philippines to the UN in 1955 and 1956, respectively, explaining for the first time to the international community its "sui generis"<sup>155</sup> territorial and maritime entitlements pertinent to "the only mid-

<sup>148</sup> Juan M. ARREGLADO, *Delimitation of the Extent of the Philippine Maritime Territory* (Manila: University Book Supply, 1982), at 31–5.

<sup>149</sup> *Treaty Between the Kingdom of Spain and the United States of America for Cession of Outlying Islands of the Philippines* of 7 November 1900 31 US Stat. 1942; II Malloy 1696; Official Gazette, online: Official Gazette <https://www.officialgazette.gov.ph/1900/11/07/the-philippine-claim-to-a-portion-of-north-borneo-treaty-between-the-kingdom-spain-and-the-united-states-of-america-for-cession-of-outlying-islands-of-the-philippines-1900/>.

<sup>150</sup> *Convention Between the United States of America and Great Britain Delimiting the Boundary Between the Philippine Archipelago and the State of North Borneo* of 2 January 1930, entered into force 13 December 1932 Official Gazette, online: Official Gazette <https://www.officialgazette.gov.ph/1932/12/15/convention-between-the-united-states-of-america-and-great-britain-delimiting-the-boundary-between-the-philippine-archipelago-and-the-state-of-north-borneo-1930/>.

<sup>151</sup> For a comprehensive account of this position, see Lowell B. BAUTISTA, *The Philippine Treaty Limits: Historical Context and Legal Basis in International Law* (University of the Philippines Law Center, 2015).

<sup>152</sup> *Magallona v Executive Secretary* [2011] G.R. No. 187167 [En Banc] 16 August 2011.

<sup>153</sup> Republic Act 9522, "An Act to Amend Certain Provisions of Republic Act No. 3046, as Amended Republic Act No. 5446, to Define the Archipelagic Baseline of the Philippines and for Other Purposes" (10 March 2009) Official Gazette, online: Official Gazette <https://www.officialgazette.gov.ph/2009/03/10/republic-act-no-9522/> [RA 9522].

<sup>154</sup> Republic Act 3046, "An Act to Define the Baselines of the Territorial Sea of the Philippines" (17 June 1961), UN.org, online: UN [https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL\\_1961\\_Act.pdf](https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_1961_Act.pdf). It was amended by Republic Act 5446 to correct certain typographical errors: Republic Act 5446, "Act to Amend Section One of Republic Act Numbered Thirty Hundred and Forty-Six, entitled 'An Act to Define the Baselines of the Territorial Sea of the Philippines'" (18 September 1968), Official Gazette, online: Official Gazette <https://www.officialgazette.gov.ph/1968/09/18/republic-act-no-5446/>.

<sup>155</sup> Arreglado, *supra* note 150 at 12.



ocean archipelago existing in the world”.<sup>156</sup> The relevant sections of the first *note verbale* stated, among other things:

1. All waters around, between and connecting different islands belonging to the Philippine Archipelago, irrespective of their width or dimensions, are necessary appurtenances of its land territory, forming an integral part of the national or inland waters subject to the exclusive sovereignty of the Philippines.
2. All other water areas embraced within the lines described in the Treaty of Paris of 10 December 1898, the Treaty concluded at Washington, D.C., between the [US] and Spain on 7 November 1900, the Agreement between the [US] and the [UK] of 2 January 1930, and the Convention of 6 July 1932 between the [US] and Great Britain...are considered as *maritime territorial waters* of the Philippines for purposes of protection of its fishing rights, conservation of its fishery resources, enforcement of its revenue and anti-smuggling laws, defense and security, and protection of its national welfare and security, without prejudice to the exercise of friendly foreign vessels of the right of innocent passage over these waters...<sup>157</sup> [emphasis added]

The second *note verbale* stated that “the breadth of the territorial sea may extend beyond twelve miles” based on historical grounds.<sup>158</sup> Magallona would lead a cast of petitioners – including a legislator, a former student of his and later on a law school colleague, and other law students<sup>159</sup> – to challenge RA 9522 of 2009,<sup>160</sup> a law that, according to the seventy-one page petition filed with the Philippine Supreme Court (PSC), meant nothing less than the “dismemberment of Philippine national territory”.<sup>161</sup> The *Magallona* petition assailed the new baselines law on the following principal grounds. First, it radically revised the scope and breadth of the Philippine archipelago as defined and ceded under the TOP and associated treaties and incorporated in all the constitutions of the Philippines<sup>162</sup> in 1935,<sup>163</sup> 1973,<sup>164</sup> and the present 1987 Constitution<sup>165</sup> under the principle of *uti possedetis juris*.<sup>166</sup> Second, by reclassifying the country’s Kalayaan Islands Group (KIG) in the South China Sea as a regime of islands and deleting references to the Philippine Sabah claim, the law amended the 1987 Constitution, which defined the national territory to include “all other territories over which the Philippines has sovereignty or jurisdiction”.<sup>167</sup> The KIG was constituted by Presidential Decree 1596 of 1978,<sup>168</sup> placing within

<sup>156</sup> *Ibid.*

<sup>157</sup> Bautista, *supra* note 153, Appendix 6 at 148–9.

<sup>158</sup> *Ibid.*, at 149.

<sup>159</sup> Among the petitioners were students from the public international law class at the University of the Philippines College of Law taught by Professor H. Harry L. Roque, Jr., the lead counsel for the Petitioners, was himself a former student of Magallona.

<sup>160</sup> RA 9522, *supra* note 155.

<sup>161</sup> *Magallona v Executive Secretary*, Petition (23 March 2009) at 3.

<sup>162</sup> *Ibid.*, at 39.

<sup>163</sup> The Philippine Constitution (1935) art. 1, Official Gazette, online: Official Gazette <https://www.officialgazette.gov.ph/constitutions/the-1935-constitution/>.

<sup>164</sup> The Philippine Constitution (1973) art. 1, Official Gazette, online: Official Gazette <https://www.officialgazette.gov.ph/constitutions/1973-constitution-of-the-republic-of-the-philippines-2/>.

<sup>165</sup> The Philippine Constitution (1987) art. 1, Official Gazette, online: Official Gazette <https://www.officialgazette.gov.ph/constitutions/1987-constitution/>.

<sup>166</sup> *Magallona v Executive Secretary*, *supra* note 163 at 153–6.

<sup>167</sup> *Ibid.*, at 48–9, quoting the Philippine Constitution (1987), art 1.

<sup>168</sup> PD 1596, “Declaring Certain Area Part of the Philippine Territory and Providing for Government and Administration” (11 June 1978), Official Gazette, online: Official Gazette <https://www.officialgazette.gov.ph/1978/06/11/presidential-decree-no-1596-s-1978/>.

a polygonal area maritime features over which the Philippines claimed full sovereignty and attaching it to a section of the TOP International Treaty Limits.<sup>169</sup> Third, RA 9522 converted Philippine internal waters into “archipelagic waters”, as defined under UNCLOS III.<sup>170</sup> In particular, the shift to UNCLOS III in the assailed law burdened Philippine internal waters “around, between, and connecting the islands”<sup>171</sup> with the right of innocent passage, including those of warships, submarines, nuclear-powered ships, and ships carrying nuclear or other inherently dangerous or noxious substances.<sup>172</sup> Fourth, concerning the regime of islands in the KIG and the Scarborough Shoal, the Philippines would have lost about 15,000 square nautical miles of territorial waters,<sup>173</sup> thus violating the Philippine government’s constitutional duty to protect exclusive marine wealth and the offshore fishing grounds for Filipino subsistence fishermen.<sup>174</sup>

The PSC, however, side-stepped the constitutional question raised by the *Magallona* petition by saying that RA 9522 was no more than Philippine compliance with its UNCLOS III commitments.<sup>175</sup> Thus, the *Magallona* majority opinion elided the ultimate question of compatibility between the UNCLOS III commitments and the National Territory provisions of the 1987 Constitution, ignoring the reservations the Philippines made when it signed UNCLOS III<sup>176</sup> precisely for that reason.<sup>177</sup> It also ingeniously skirted the petitioners’ argument that under UNCLOS III, some 15,000 nautical square miles of territorial waters will be lost by saying that “the reach of the exclusive economic zone drawn under RA 9522 even extends way beyond the waters covered by the rectangular demarcation under the Treaty of Paris”.<sup>178</sup> As to the KIG and Scarborough Shoal, the PSC, while saying that the assailed law maintains the Philippine claim of sovereignty and jurisdiction over both areas, admitted that both claims could not be observed in their original form because they violated UNCLOS III

<sup>169</sup> *Magallona v Executive Secretary*, *supra* note 163 at 48–9.

<sup>170</sup> *Ibid.*, at 53–5; see arts. 46–9, UNCLOS III *supra* note 146.

<sup>171</sup> *Ibid.*, at 2, quoting the Philippine Constitution (1987), art. 1, *supra* note 163.

<sup>172</sup> *Ibid.*, at 61; see arts. 52–3, UNCLOS III *supra* note 146.

<sup>173</sup> *Ibid.*, at 62.

<sup>174</sup> *Ibid.*, at 63.

<sup>175</sup> The PSC ruled (*ibid.*):

Even under [the] petitioners’ theory that the Philippine territory embraces the islands and *all the waters* within the rectangular area delimited in the Treaty of Paris, the baselines of the Philippines would still have to be drawn in accordance with RA 9522 because this is the only way to draw the baselines in conformity with UNCLOS III...UNCLOS III and its ancillary baselines laws play no role in the acquisition, enlargement or, as petitioners claim, diminution of territory.

<sup>176</sup> The US State Department, however, argues that RA 9522 did not make clear whether the waters within the baselines are archipelagic or remained as internal waters under the Philippine Constitution: United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs, “Philippines: Archipelagic and other Maritime Claims and Boundaries” (Limits in the Seas Report no. 142, 15 September 2014), online: <https://2009-2017.state.gov/documents/organization/231914.pdf>.

<sup>177</sup> On the one hand, the Philippine negotiating team at UNCLOS III entered reservations to the treaty that essentially sought to preserve the Philippine position expressed in the *notes verbales* of 1955–1956 and the KIG claim. On the other hand, they also committed the Philippines to the same treaty by signing it. See Philippine Declaration to the UN Secretary-General (10 December 1982), online: 2009–2017 Archive for the US Department of State [https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXI-6&chapter=21&Temp=mtdsg3&clang=en#EndDec](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=en#EndDec). See especially paras. 1–3, 6–7 of the Declaration. *Magallona* criticized this schizophrenic position taken by the Philippines. See Merlin M. MAGALLONA, “The Ecuadorian and Philippine Models: Distinctions and Implications” in Merlin M. MAGALLONA, *The Philippines in the International Law of the Sea* (Quezon City: University of the Philippines Law Center, 2015), 17 at 17–29.

<sup>178</sup> *Magallona v Executive Secretary*, *supra* note 154.

requirements for an offshore archipelago.<sup>179</sup> The PSC glossed over the fact that the KIG claim had been tacked to one leg of the TOP's International Treaty Limits (ITL).<sup>180</sup> While the PSC was concerned about the country's non-compliance with UNCLOS III, it was silent on whether complying with it violated the constitution. For Magallona, the full turn to the UNCLOS III regime in RA 9522 meant a disastrous new "internationalization" of Philippine national territory, by which he meant: "what the Constitution described as 'National Territory' had become the object of the rights of every State Party or of their nationals, exercisable by them without the requirement of express consent or prior authorization on the part of the Philippine government in every instance".<sup>181</sup> Magallona's warning about the consequences of enclaving the KIG into a regime of islands under UNCLOS III proved prescient.<sup>182</sup> In the arbitral proceedings between the Philippines and China over the latter's nine-dash-line claim over the South China Sea, foreign lawyers for the Philippines adopted a strategic silence in formal submissions to the proceedings regarding the Marcos decree that established the KIG.<sup>183</sup> Perhaps this approach was necessary to prosecute the case successfully or, at least, avoid unnecessarily complicating the proceedings. Yet, it is also a potent source of confusion today among many Filipino policymakers and institutional gatekeepers, who remain tethered to the old Philippine constitutional national territorial imaginary anchored to the TOP regime.

In fact, in one brief paragraph, following the Philippines' own submission, the 2016 South China Sea Arbitral Award (AA) did away with the TOP regime – and with it, Article 1, the National Territory provision of the 1987 Philippine Constitution, as well as the KIG claim embodied in PD 1596 of 1978. The AA noted that in UNCLOS III, the Philippines "was the principal proponent of the concept of historic title", employing it "with respect to a claim (which it has since abandoned) to a territorial sea within the lines fixed by the Treaty of Paris (TOP) of 1898 between Spain and the [US] that governed the cession of the Philippines".<sup>184</sup> Thus, witness the PSC handing down a ruling in 2020

<sup>179</sup> The PSC held thus (*Magallona v Executive Secretary*, *supra* note 154):

Had Congress in RA 9522 enclosed the KIG and the Scarborough Shoal as part of the Philippine archipelago, adverse legal effects would have ensued. The Philippines would have committed a breach of two provisions of UNCLOS III. First, Article 47 (3) of UNCLOS III...Second, Article 47 (2)...

<sup>180</sup> See PD 1596, *supra* note 170, first "whereas" clause.

<sup>181</sup> Merlin M. MAGALLONA, "Internationalization of Philippine Territory: The Question of Boundaries" in Merlin M. MAGALLONA, *The Philippines in the International Law of the Sea* (Quezon City: University of the Philippines Law Center, 2015), 116 at 133.

<sup>182</sup> Merlin M. MAGALLONA, "Demystifying [the Republic of the Philippines's] Delimitation Dilemma" in Merlin M. MAGALLONA, *The Philippines in the International Law of the Sea* (Quezon City: University of the Philippines Law Center, 2015), 151 at 161–2.

<sup>183</sup> The Philippine Memorial to the South China Sea arbitral proceeding omitted mention and meaningful discussion of PD 1596 of 1978 in its statement of relevant Philippine laws on territorial and maritime domains. See *In the Matter of the South China Sea Arbitration: An Arbitral Tribunal Constituted Under Annex VII to the 1982 United Nations Convention on the Law of the Sea (The Republic of the Philippines v The People's Republic of China)*, Philippine Memorial Vol 1 (30 March 2014), at paras. 3.2–3.7.

<sup>184</sup> *In the Matter of the South China Sea Arbitration: An Arbitral Tribunal Constituted Under Annex VII to the 1982 United Nations Convention on the Law of the Sea (The Republic of the Philippines v The People's Republic of China)*, Arbitral Award of 12 July 2016, PCA Case No 2013-19, at para. 223. Aside from the fact that PD 1596 of 1978 was expressly attached to the TOP ITL, it had the effect of constituting an offshore archipelago of the area it straddled, with the maritime features; that is, the continental shelf and the waters within such area subject to full Philippine sovereignty. But also often missed in popular discussion of the SCS arbitration is that the AA held that the creation of an offshore archipelago in the Spratlys, whether in its entirety or only in part, violated the Law of the Sea. *Ibid.*, at paras. 571–6. Instead, the Arbitral Award ruled that the Spratlys, outside of low tide elevations, was little more than rocks or

appreciatively invoking the KIG regime, as if the AA that had already declared it dead and buried did not exist and had never happened and as if, in the first place, the PSC did not pay tribute to the AA in another section of the very same ruling.<sup>185</sup> The AA has become the subject in some official quarters in the Philippines of “veneration without understanding”,<sup>186</sup> where it is accorded import contrary to its own holdings and honoured by being misread (often, from the very position UNCLOS III had rejected – the TOP regime).

But Magallona, the Third World Marxist, saw fit to defend the TOP – a legacy of colonialism – by inverting it and making it central to the Philippine postcolonial project’s right to self-determination.<sup>187</sup> At its intersections with international law, Philippine national history is what the Filipino people must make of what other people have made of them. In Magallona’s thought, the Philippines’ right to self-determination eschewed a universalist UNCLOS III<sup>188</sup> because, for him, the justifications for such universalist claim veil imperialist and militaristic interests. His dualist theory of international law allowed him to give primacy to the Philippine Constitution against international commitments enshrined in the Law of the Sea regime. While it may appear obvious that the target of his anti-imperialist stance is the United States of America, given that he has also written substantially on the depredations suffered by national sovereignty as a result of the US military presence in Philippine territory,<sup>189</sup> his critique of UNCLOS III does not discriminate between Marxist and capitalist warships – nuclear-powered and armed, or

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high tide elevations able to generate no more than a territorial sea. *Ibid.*, at para. 626. The Philippines had argued in the arbitral proceedings that treating the Spratlys as but a collection of rocks and Low-Tide Elevations (LTEs) would lessen showdowns of sovereignty over such insignificant features and thus help establish law and peace in the South China Sea. *Ibid.*, at para. 421. However, the Arbitral Award did not quite capture the nature of the Philippine claim to maritime sovereignty under the TOP regime, as the claim considered the waters within the TOP ITL as internal waters while the territorial sea is measured from the archipelago’s baselines. See Magallona, *supra* note 186 at 155–61.

<sup>185</sup> *Republic of the Philippines v Province of Palawan* [2020] G.R. No. 170867, G.R. No. 185941 [En Banc, Consolidated Cases, on Motion for Reconsideration] 21 January 2020. The ruling quoted in *toto* paras. 285–90 of the AA. See AA *supra* note 186 at 121–2.

<sup>186</sup> We borrow a phrase from the title of a famous essay. See Renato CONSTANTINO, “Veneration Without Understanding (1972) 1 *Journal of Contemporary Asia* 3. The incoherence in Philippine reception of the 2016 SCS AA is discussed in greater detail in a book chapter for an anthology on the pedagogy of international law by the British Institute of International and Comparative Law: Romel Regalado BAGARES, “Teaching the Philippine National Territorial Imaginary or ‘Geobody’ after the 2016 South China Sea Arbitral Award” (forthcoming, Routledge).

<sup>187</sup> On inversion as a Marxist practice, there is a discussion in Louis ALTHUSSER, “Contradiction and Overdetermination”, *For Marx* (London: Verso, 2005), 87 at 89–94. See also Marx’s inversion of Hegel and the need to reverse the invertedness produced by the commodity form in Karl Marx, *Capital*, vol. 1 (London: Penguin, 1990) at 103, 163.

<sup>188</sup> See Yoshifumi TANAKA, *The South China Sea Arbitration: Toward an International Legal Order in the Oceans* (London: Hart Publishing, 2020).

<sup>189</sup> See, for example, Merlin M. MAGALLONA, “The New Bases Treaty: Political and Legal Issues” in Merlin M. MAGALLONA, *International Law Issues in Perspective* (Quezon City: UP Law Center, 1996) 171 at 171–200. In his 1987 Moscow speech, Magallona (*supra* note 142 at 344–5) also said:

The two largest military bases of the United States are established in the Philippines. The nuclear weapons in these bases place the survival of the Filipino people in the hands of the US military forces. By what necessity, how, when and against whom will these weapons be used and for whose interests are they deployed on Philippine soil? These questions are not for the Filipino people to decide, not even for the Philippine government to decide. These are issues which are for the exclusive decision of US politico-military leaders. Hence, the right to life—the central question of national sovereignty—hangs by some unknown contingency that is left to US imperialism... I do not think that US imperialism has imposed upon this kind of brutality in any other country.

otherwise<sup>190</sup> –entering what the Treaty of Paris-International Treaty Limits considered as Philippine internal waters and violating the Filipinos’ right to self-determination.

## VI. Conclusion

The recent turn to theory in international law is an opportunity to become (re)acquainted with the works of Merlin M. Magallona, an Asian international legal thinker from the periphery whose works embody a Third-World Marxism that was marked by the silence of the unsaid due to the specific context of his critique and praxis. To make the silence speak, we chose a mode of reading that came from the Marxist tradition he wholeheartedly embraced. Magallona’s works, it is argued, cannot be understood without knowing what others have ambiguously referred to as the “struggles” that he waged in his youth. A symptomatic reading of the silences in his works has allowed us to highlight the Marxist logic of his writings, one that is, in many ways, disguised and often unidentified.

Our reading, of course, is but a preliminary attempt; the archives have yet to speak exhaustively.<sup>191</sup> We have only started to fill in the gaps. Certainly, there remains a silence that gives life to his works.

In this article, we have reconstructed the mode of production debate in the Philippines during the 1960s and 1970s, the very context in which Magallona’s theorizing of a neocolonial division of labour arose and developed. We have shown that this materialist lens was utilized in his analysis of international legal categories, which he connected to the transformations of social relations between classes and between states. His understanding of *jus cogens*, human rights, the NIEO, and UNCLOS revealed a theoretical attempt to retrace the development of international legal doctrines to the events that transformed post-war international relations, such as decolonization, anti-imperialist struggles, the formation of the Socialist bloc, and the struggle to remake the international economic order. As such, Magallona’s texts cannot be understood outside its Third World context, especially his synthesis of the antinomy between positivism and self-determination. If Third World texts can be argued as necessarily “national allegories”,<sup>192</sup> we also find in Magallona’s writings a specifically Third Worldist synthesis of this antinomy, where positivism becomes an expression of national self-determination.

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On 16 September 1991, the Philippine Senate voted to discontinue a treaty allowing the US bases in Subic and Clarkfield, the two largest US military facilities outside the American mainland. However, Chinese actions in the South China Sea opened new opportunities for their return. A Visiting Forces Agreement (VFA) and, more recently, an Enhanced Defense Cooperation Agreement (EDCA) between the Philippines and the United States ensured the return of a US military presence in the country. The leading cases involving the return of US military presence on Philippine shores are *Bayan v Zamora* [2000] G.R. No. 138570, G.R. No. 138572, G.R. No. 138587, G.R. No. 138698 (En Banc, Consolidated Cases) 10 October 2000 (on VFA) and *Saguisag v Executive Secretary* [2016] G.R. No. 212426, G.R. No. 212444 [En Banc, Consolidated Cases] 12 January 2016 (on EDCA). The PSC was trounced in all constitutional challenges filed against the VFA and its various iterations between these two cases. Thus, it had taken twenty-five years for the Philippine Supreme Court to wholly reverse the popular action taken by the Philippine Senate against US military presence in the Philippines. See Roland G. SIMBULAN, “The Historic Senate Vote of 16 September 1991: Looking Back and Looking Forward Twenty-Five Years After” (2018) 66 *Philippine Studies: Historical & Ethnographic Viewpoints* 3.

<sup>190</sup> See also Merlin M. MAGALLONA, “A Framework for the Study of National Territory” in Merlin M. MAGALLONA, *The Philippines in the International Law of the Sea* (Quezon City: University of the Philippines Law Center, 2015), 78 at 91.

<sup>191</sup> A complete annotated bibliography of Magallona’s works is yet to be made. Perhaps this is something that his academic home for over half a century can easily do if a Philippine viewpoint on international law is to be given wider access under the current push for an Asian TWAIL.

<sup>192</sup> Fredric JAMESON, “Third-World Literature in the Era of Multinational Capitalism”, in *Allegory and Ideology* (London: Verso, 2020) at 159.

Magallona's "Postcolonial Self-Determination", a Third World synthesis of the antinomy present in the first place in Soviet international law, was not a mere afterthought but a result of the unity of thought and praxis. Indeed, it was articulated in his solidarity with the mass organizations of the PKP, in his campaign for the NIEO, and in his use of the imperial Treaty of Paris of 1898 to challenge in court what he believed to be a legislative act to dismember Philippine territory and open it to new militarisms and imperialisms.

Yet, we have not shied away from identifying some problems in Magallona's work, especially in the PKP's settlement with the Marcos dictatorship. Moreover, Magallona could not (fore)see the pauperization of the Philippine economy under the Marcos dictatorship, including its state exportation of human labour to the world market. The exportation of labour would redefine the Philippines' position in the "new international division of labour" from then until now. There was indeed a new position for the Philippines in the international division of labour, but it was not the position that Magallona had predicted.

A blind spot in a thinker's work, of course, does not necessarily negate his work. The gaps in the economics of value of Adam Smith and David Ricardo were characterized by Marx as a blindness arising from the discovery of something new. Althusser and his students found the same blindness in the silences of Marx's *Capital*. Magallona's Third Worldist synthesis of the antinomy between positivism and self-determination remains relevant as we confront blatant attempts by rising and declining powers to reconfigure the world. Recent efforts to recover or revive the promise of the NIEO for twenty-first century problems only affirm the continuing validity of his critique of an imperialist international order. In this context, his practice of anti-imperialist positive international law should provide lessons for resistance in the coming years. Indeed, new contradictions between imperial powers may yet cause the formation of new social movements and new forms of international solidarities, which would demand a reconnection between theory and practice. Rather than remaining an urban legend, Merlin M. Magallona's anti-imperialist critique and praxis suggest new forms of resistance to the new imperialisms and underscore the imperative of a practice turn in Marxist international legal theory.

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