

A MARINE'S MURDER TRIAL AND THE DRUG WAR: THE "DELICATE BALANCE" OF CRIMINAL JUSTICE IN THE PHILIPPINES

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ABSTRACT: *This article draws on the murder trial of U.S. Marine Joseph Pemberton, who killed a Filipino transgender, to examine aspects of the Philippine criminal justice system. Deep-rooted institutional deficiencies for police, prosecutors, and trial courts, a backlog of thousands of cases, and overpopulated pretrial detention facilities have created a crisis that currently exists within the criminal justice system. The country's "war on drugs" has served to reinforce the perception that justice in the Philippines is only for the influential and wealthy. Filipinos have wryly noted that for the poor, there is really no justice, just-"tiis,"—which, in the vernacular means "just endure suffering."*

Challenging the entrenched, cultural resistance that has frustrated previous reform efforts, the newly appointed Chief Justice of the Supreme Court has vowed to institutionalize changes designed to expedite the administration of justice. On a practical level, the question in most criminal cases is not whether the accused committed the crime, but rather what is the fairest, most expeditious method to handle the particular offense and offender. As detailed herein, the end goal of justice in the Philippines is restoration of social harmony. Along those lines, this article argues that creative use of legally recognized procedures such as plea bargains and barangay (community) mechanisms, utilizing reconciliation and financial settlements, can help overcome significant barriers in terms of reaching an otherwise seemingly elusive justice.

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I. INTRODUCTION

If you are a citizen of another country and a tourist here, you better behave.¹

-- Rodrigo Duterte, President of the Republic of the Philippines

Philippine President Duterte, having pledged to make inclusive growth and poverty reduction his top priority, considers illegal drug use, crime, and corruption the key barriers to economic

¹ As quoted in Genalyn Kabling, *Duterte Tells Tourist: Better Behave*, MANILA BULLETIN (July 11, 2018, 3:41 PM), <https://news.mb.com.ph/2018/07/11/duterte-tells-tourist-better-behave/> [perma.cc/G3NW-LK95].

development.² This Article will assess the ramifications of the country's "war on drugs" upon its criminal justice system,³ but first we will examine the local murder trial of a U.S. Marine to place the Philippine criminal justice system into perspective.⁴

An archipelago nation of more than 100 million people, the Philippines has a rich history combining Asian, European, and American influences.⁵ Its legal system is a mixture of civil, common,

² CIA, *The World Factbook: Philippines: Economy*, <https://www.cia.gov/library/publications/the-world-factbook/geos/rp.html> [perma.cc/T57A-72Z8] (last visited Jan. 23, 2019). The economic upturn of the Benigno Aquino government (2010-2016) was accompanied by a 46% rise in crime, committed mostly by those at the bottom of the economic ladder. Daniel Wagner & Edsel Tupaz, *Duterte and "The System"*, HUFFINGTON POST (May 14, 2017), https://www.huffingtonpost.com/entry/duterte-and-the-system_b_9949756.html [perma.cc/YCD8-538Z]. Although the Philippines has a resilient economy, with extreme poverty decreasing by more than half over the past three decades, there are nonetheless wide disparities in income and quality of life across regions and sectors in the Philippines. A third of Filipinos survive through farming or fishing, industries in which productivity has lagged. As a result of low growth from 1980 to 2005 (0.63% average annual increase in GDP per person), 17% of the total population still lives below the poverty line. *The Philippines Has the Most Persistent Poverty in South-East Asia*, THE ECONOMIST (Nov. 25, 2017), <https://www.economist.com/asia/2017/11/25/the-philippines-has-the-most-persistent-poverty-in-south-east-asia> [perma.cc/K2RP-G282].

³ There has been controversy over the conduct of the anti-drug campaign, with accusations of vigilante killings and extrajudicial killings allegedly conducted by law enforcement, coupled with denials from Philippine government officials. Any critical statements herein of the Philippine executive, legislative, or judicial branches are specifically referenced, and as with any secondhand source, these sources may be subject to problems of bias and inaccurate reporting of information. See Rigoberto Tiglao, *Why Does The New York Times Hate Duterte*, MANILA TIMES (Aug. 31, 2018), <https://www.manilatimes.net/why-does-the-new-york-times-hate-duterte/436474/> [perma.cc/538D-ZW5S] (asserting that the "liberal establishment" has "shed its pretensions for objectivity" with respect to President Duterte and is "spreading very false data on the country's anti-drug war").

⁴ The official "Trial Observer Reports" for the trial of U.S. Marine Private First Class (PFC) Joseph Pemberton, Olongapo City Regional Trial Court Branch 74, Philippines, submitted to the U.S. Pacific Command (date unknown, trial dates March-Dec. 2015) [hereinafter Trial Observer Report], were obtained from the U.S. Department of the Navy under the Freedom of Information Act (copies on file with the author). Those reports, the Court of Appeals opinion, as well as local news coverage provide the particulars described herein.

⁵ STANLEY KARNOW, IN OUR IMAGE: AMERICA'S EMPIRE IN THE PHILIPPINES 37-55 (1989). See also *the Philippines*, U.N. DEV. PROGRAMME (2018), <http://www.ph.undp.org/content/philippines/en/home/countryinfo.html> [perma.cc/7DQC-EU22]. The Philippines became a U.S. territory in 1898 after the Spanish-American War, when, in exchange for \$20 million, Spain transferred control of the Philippine Islands to the United States. The U.S. then battled Philippine revolutionary forces in a three-year war to consolidate control. In 1934, the U.S. allowed the Philippines to become a self-governing commonwealth, with full independence to follow in 1944. The Japanese invasion and occupation during World War II postponed independence until 1946. Eleanor Albert, *The*

Islamic, and customary law.⁶ The past century has seen the development of a vast body of evolving statutory and case law in all fields, including criminal law and procedure.⁷ The Philippines and the United States afford similar constitutional rights to criminal defendants.⁸ The Philippine Constitution's Bill of Rights significantly states, "No person shall be held to answer for a criminal offense without due process of law."⁹ The Philippine Revised Rules of Criminal Procedure sets out the rights of an accused at trial; listed

U.S.-Philippines Defense Alliance, COUNCIL ON FOREIGN REL. (Oct. 21, 2016), <https://www.cfr.org/backgrounder/us-philippines-defense-alliance> [perma.cc/NVV3-6BCN]. During the Commonwealth period, American culture became a salient feature of Filipino society, most clearly in popular culture where American entertainment overlaid Spanish, Malay, and Chinese customs. Karnow characterized this as "three centuries in a Catholic convent and fifty years in Hollywood." KARNOW, *supra* note 5, at 9.

⁶ The Philippines implements laws that reflect a civil law legacy from Spanish colonial rule, such as the Civil Code and the Revised Penal Code, and the constitutional and common law tradition of the American colonial period. Philippine law also incorporates elements of precolonial customary law and Sharia Law of the country's Muslim population. Background Note on the Justice Sector of the Philippines, ASIAN DEV. BANK 20 (Dec. 2009), <https://www.adb.org/publications/background-note-justice-sector-philippines> [perma.cc/KKY4-QSV8] [hereinafter ADB Background Note]. See also Petra Mahy & Jonathan Sale, *Classifying the Legal System of the Philippines*, XXXII PHILIPPINE J. OF LAB. AND INDUS. REL. 1 (2012) (explaining the Philippines' hybrid legal system dominated by common law influence).

⁷ Unless otherwise indicated, the Philippine cases, laws, and regulations cited herein are accessible online from the following websites, as applicable: the Supreme Court at <http://sc.judiciary.gov.ph/jurisprudence/> [perma.cc/5LQK-WQJ7]; the Courts of Appeals at <http://services.ca.judiciary.gov.ph/casestatusinquiry-war/> [perma.cc/J7GA-H26R]; the Office of the Court Administrator (OCA) at <http://oca.judiciary.gov.ph> (select "Issuances") [perma.cc/Y4SE-VYJB]; the LawPhil Project's Philippine Laws and Jurisprudence Databank at <https://www.lawphil.net/judjuris/judjuris.html> [perma.cc/XZV4-QSM7]; and the Chan Robles Virtual Law Library at <http://lawlibrary.chanrobles.com/> [perma.cc/L9PY-3THM]. See Antonio Santos, *Philippines: Basic Information for Legal Research in the Philippines*, DOING LEGAL RES. IN ASIAN COUNTRIES 99-144 (2003), https://ir.ide.go.jp/?action=repository_uri&item_id=32942&file_id=22&file_no=1 [perma.cc/S432-3YNH].

⁸ See Am. Bar Ass'n, *Access to Justice for Philippines Mindanao* 6, 13 (2012), https://www.americanbar.org/content/dam/aba/directories/roli/philippines/philippines_access_to_justice_assessment_2012.authcheckdam.pdf [perma.cc/V98V-UZQV] [hereinafter ABA Justice Report] (noting that the 1935 Constitution and the Bill of Rights enshrined in the 1987 Constitution were based on the American system); see also ADB Background Note, *supra* note 6, at 23-24 (noting that the Bill of Rights requires justice sector institutions to safeguard the rights of persons accused of committing crimes).

⁹ CONST. (1987), art. III, § 14(1) (Phil.).

first is the right “to be presumed innocent until the contrary is proved beyond reasonable doubt.”¹⁰

The U.S. Embassy website warns, however:

Experience has shown that arrests and trials in the Philippines are often unpredictable. Significant deviations from prescribed procedures do occur, arrestees are often not given clear information about procedures and charges, and allegations of corruption are common.¹¹

The U.S. State Department’s latest annual human rights report is more explicit:

Human rights issues included unlawful or arbitrary killings by security forces, vigilantes, and others allegedly connected to the government . . . forced disappearance; arbitrary detention; harsh and life threatening prison conditions; political prisoners; arbitrary or unlawful interference with privacy.¹²

There are 220,000 United States citizens living in the Philippines, including a large presence of U.S. veterans, and approximately 650,000 U.S. citizens visit the Philippines each year.¹³

¹⁰ Revised Rules of Criminal Procedure (2000), as amended (Phil.), Rule 115, § 1 [hereinafter Rev. Crim. Pro. Rule]. Other listed relevant rights include the right to be present and defend in person and by counsel at every stage of the proceedings; to testify as a witness in one’s own behalf, with silence not to be taken adversely; to cross-examine witnesses; to have compulsory process issued to secure defense witnesses; a speedy, impartial and public trial; and the right of appeal. *Id.*

¹¹ *Arrest of a U.S. Citizen*, U.S. EMBASSY IN THE PHIL.: U.S. CITIZEN SERVS., <https://ph.usembassy.gov/u-s-citizen-services/arrest-of-a-u-s-citizen/> [perma.cc/2ZPT-7KPX] (last visited Jan. 2, 2019). *See, e.g.*, Lewis Kamb, *King County Man Languishes in Philippines Jail Fighting Rape Charge*, THE SEATTLE TIMES (May 4, 2015, 5:13 PM), <https://www.seattletimes.com/seattle-news/crime/king-county-man-languishes-in-philippines-jail-fighting-rape-charge-2/> [perma.cc/VH3K-SUCY] (American citizen decrying the legal system as “broken and corrupt”).

¹² U.S. DEP’T OF STATE, 2018 COUNTRY REPORT ON HUMAN RTS. PRACTICES: PHILIPPINES 1 (Mar. 13, 2019), <https://www.state.gov/documents/organization/289319.pdf> [https://perma.cc/62AG-GKQ9] [hereinafter STATE HUMAN RTS. REP.].

¹³ *U.S. Relations with the Philippines: Bureau of East Asian and Pacific Affairs Fact Sheet*, U.S. DEP’T OF STATE (July 17, 2018), <https://www.state.gov/r/pa/ei/bgn/2794.htm> [perma.cc/VYQ5-A3LH].

Ex-pats of all types, whether U.S. servicemembers or otherwise, and in all contexts, whether in the Philippines or elsewhere, invariably commit, or are alleged to have committed crimes against the host population.¹⁴ Offenses against local nationals are not typical but neither are they unusual.¹⁵ In order to promote its image as a tourist haven, the Philippines pursues a policy of resolving within two weeks cases arising out of minor crimes committed by tourists.¹⁶ Major crimes and high profile cases, however, are particularly difficult because they combine strong host country sensitivities with the danger of a less than impartial trial.¹⁷ Per the latest available Philippines Bureau of Jail Management and Penology (BJMP) data, 309 foreigners—of whom twenty-eight are Americans—are in Philippine jails.¹⁸

¹⁴ Tyler Hill, *Revision of the U.S.–Japan Status of Forces Agreement (SOFA): Relinquishing U.S. Legal Authority in the Name of American Foreign Policy*, 32 UCLA PAC. BASIN L.J. 105, 119 (2015) (commenting on U.S. servicemember misconduct in Japan). See, e.g., Simon Parry, *The Forgotten: Life Inside Notorious Philippine Detention Centre Where Inmates ‘Disappear’ Without Being Charged*, SOUTH CHINA MORNING POST (July 6, 2017), <https://www.scmp.com/magazines/post-magazine/article/1846705/forgotten-foreigners-notorious-philippine-detention-centre> [perma.cc/QJ4E-PFWX] (describing various crimes committed by foreigners and conditions inside the Bureau of Immigration Bicutan (Manila) Detention Centre, where 150 foreigners are held).

¹⁵ Hill, *supra* note 14. Military deployments often are followed by complaints of damages, personal injury, and sometimes, death. INT’L & OPERATIONAL L. DEP’T, U.S. ARMY, OPERATIONAL LAW HANDBOOK 122, 287 (2012), https://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2012.pdf [perma.cc/H5VV-376F].

¹⁶ Poncevic Ceballos, *Lecture, Civil and Criminal Justice Reform in the Philippines*, U. OF H.K., CTR. FOR PUB. AND COMP. L. 37:00–37:45 (Mar. 5, 2015), <http://attylaserna.blogspot.com/2017/09/civil-and-criminal-justice-reform-in.html> [perma.cc/H5VV-376F].

¹⁷ See U.S. DEP’T OF STATE, REPORT ON STATUS OF FORCES AGREEMENTS 17, n. 12 (Jan. 16, 2015), <https://www.state.gov/documents/organization/236456.pdf> [perma.cc/8REB-42K9] [hereinafter STATE SOFA REP.] (commenting on incidents that “media or public opinion regard as an act of . . . deliberate indifference to the lives of locals”). In closing arguments in PFC Pemberton’s murder trial, the defense counsel noted that there had been “unprecedented media coverage of this case which would not have occurred if the accused was a Philippine citizen . . . There have also been several rallies to condemn the accused during this trial. There was a Senate investigation where witnesses testified against the accused and the Senators publicly condemned the accused.” Trial Observer Report #25 (Sept. 17, 2015).

¹⁸ For current figures, see the “Data and Statistics” section of the BJMP website at www.bjmp.gov.ph/datstat.html [perma.cc/4DXM-6P7H] (select “Foreign Detainees”) (last updated May 2018). Most detainees are Chinese. *Id.* at 110; Americans rank second in number. *Id.*

In August 2017, a Philippine news story reported, “US Marine Joseph Scott Pemberton will be taking his fight for innocence in the killing of Filipino transgender Jeffrey ‘Jennifer’ Laude in 2014 to the Supreme Court after losing his bid to reverse his homicide conviction before the Court of Appeals.”¹⁹ Harry Roque, a prominent civil rights attorney who served as the Laude family’s private lawyer participating in the criminal case, welcomed the appellate court’s decision, saying, “The fact that a member of the U.S. Marines was found guilty for breach of our criminal laws [and affirmed on appeal] for the very first time is an affirmation of Philippine sovereignty.”²⁰ As will be discussed in greater detail, a civil law legacy from Spanish colonial rule authorizes a person injured by a criminal offense to take part in the criminal prosecution, and as an incident of the criminal action, to recover civil damages.²¹

Although the sense of injustice borne on victims (or families of victims) of U.S. military- or citizen-related crimes may not be any greater today than in previous times, internet social and media accounts would seem to indicate that the level of public outcry demanding justice has heightened.²² Eight years previously, another Marine, Lance Corporal (LCpl) Daniel Smith, had been convicted at

¹⁹ Virgil Lopez, *Pemberton to Appeal CA Ruling to SC*, GMA NEWS (Aug. 21, 2017, 3:06 PM), <http://www.gmanetwork.com/news/news/nation/622677/pemberton-to-appeal-ca-ruling-to-sc/story/> [perma.cc/7B54-PQ6S]. See Court of Appeals, Manila Special Sixteenth Division, *People of the Phil. v. Pemberton*, CA-G.R. CR No. 38620 (Apr. 3, 2017), *aff’d* on motion for reconsideration (Aug. 15, 2017) (Phil.). Except where the penalty imposed is *reclusion perpetua* (over 20 years), appeals to the Supreme Court are by petition for review on *certiorari*. See Supreme Court OCA Circular No. 2-90 (Mar. 9, 1990). Therefore, although Pemberton could and did file a direct appeal to the Court of Appeals, he could only file a petition for review with the Supreme Court. From a search of available online court records, it does not appear the petition was ever granted, let alone filed.

²⁰ Virgil Lopez, *CA Affirms Conviction of Pemberton for Killing Jennifer Laude*, GMA NEWS (Apr. 10, 2017, 12:27 PM), <http://www.gmanetwork.com/news/news/nation/606532/ca-affirms-conviction-of-pemberton-for-killing-jennifer-laude/story/> [perma.cc/MV7S-NL6M].

²¹ George Pugh, *Aspects of the Administration of Justice in the Philippines*, 26 LA. L. REV. 8, 16 (1965) (noting that civil-criminal joinder was one of the few Spanish procedural devices retained). Although the public prosecutor retains ultimate control and responsibility for a case, he may permit the attorney for the injured party to conduct the prosecution. *Id.* at 17.

²² Andrew Yeo, *Security, Sovereignty, and Justice in U.S. Overseas Military Presence*, 19(2) INT’L J. PEACE STUD. 43, 44 (2014) (examining the evolution of worldwide justice sensitivities in the context of anti-U.S. military protests).

trial of rape amidst an atmosphere of intense anti-U.S. protests.²³ Before trial and pending appeal, the United States kept Smith in custody at the U.S. Embassy in Manila.²⁴ Two years after conviction, the appellate court reversed the lower court's guilty verdict.²⁵ Due to U.S. efforts in both the Pemberton and Smith cases to maintain custody before and after trial, the commonly heard sentiment was "why are Filipinos admitting they're second class citizens in their own country?"²⁶

A foreign trial is not considered unfair merely because it is not identical with trials held in the United States, which most

²³ See Justin McCurry, *American Soldier Jailed for Rape in Philippines*, THE GUARDIAN (Dec. 4, 2006, 11:10 AM), <https://www.theguardian.com/world/2006/dec/04/usa.philippines> [perma.cc/N9SW-SVPH] (noting that this was "a keenly watched trial that sparked widespread anger at the US military presence in the Philippines . . . Observers interpreted the ruling as a victory for women's rights and a sign that the Philippines is no longer in thrall to the US, its former colonial power."). Smith's appellate brief emphasized that "the trial had become a "platform for anti-American sentiments . . . [h]e should have been tried before an impartial tribunal, without regard to the noise created by some 'activist' groups, who insisted on appellant's guilt, not because the prosecution has established his guilt beyond reasonable doubt, but because he is an American and a member of the U.S. Armed Forces whose presence here some sectors of our society detest." Appellant's Brief at 4, *People of the Phil. v. Smith*, CA-G.R. CR.-HC No. 02587 (Apr. 23, 2009), <https://archive.org/details/SubicBayRapeCaseDecisionByCourtOfAppeals> [perma.cc/2JYB-2HLF].

²⁴ The Philippine government agreed to allow Smith to remain in custody at the U.S. Embassy. The validity of the custody arrangement was brought before the Court of Appeals and then the Supreme Court, which ruled that Smith's custody at the Embassy *after* conviction was "not in accord with the VFA [Visiting Forces Agreement] itself because such detention is not by Philippine authorities." The Court ordered the government "to comply with the VFA and negotiate with representatives of the United States towards an agreement on detention facilities under Philippine authorities as mandated by Art. V, § 10 of the VFA." *Nicolas et al. v. Sec. Romulo, et al.*, G.R. No. 175888, 176051 & 176222 (*en banc*) (Feb. 11, 2009). One of the petitioners in the case (G.R. No. 176051) was attorney Harry Roque.

²⁵ In accordance with the canons of judicial conduct, "a judge shall endeavor diligently to ascertain the facts and the applicable law *unswayed* by partisan interests, public opinion or fear of criticism . . ." PHIL. CODE OF JUD. CONDUCT, RULE 3.02 (1989) (emphasis added). The Court of Appeals' three-judge division believed that the trial judge in the Smith case fell short of that standard, ruling that there was an aura of improbability to the prosecution's version of the circumstances surrounding the alleged crime. *People of the Phil. v. Smith*, CR.-HC No. 02587. For a similar evidentiary analysis by the Supreme Court on analogous facts, see *People of the Phil. v. Cui*, G.R. No. L-48084 (June 20, 1988) (reversing rape conviction).

²⁶ As quoted during Senate debate over the propriety of the Philippines-United States Visiting Forces Agreement in Marvin Sy, *Senators Favor Review, Not Scrapping of VFA*, PHIL. STAR (Oct. 22, 2014, 12:00 AM), <https://www.philstar.com/headlines/2014/10/22/1383010/senators-favor-review-not-scrapping-vfa#z8AHwdDiEg7Gtu6J.99> [perma.cc/9NPA-7XR2].

prominently feature trial by jury.²⁷ The U.S. Department of Defense has listed numerous factors to consider in properly evaluating a decision to turn over a U.S. servicemember to foreign criminal jurisdiction.²⁸ The enumerated factors are practically identical to the list of trial rights set out in the Philippine Revised Rules of Criminal Procedure.²⁹ Of the commonly listed enumerated rights, the right to a speedy, impartial and public trial notably stands out.³⁰ A speedy trial is the essential ingredient of an “accessible and impartial dispute resolution,” which is one of the four universal principles that constitute a working definition of the rule of law.³¹

Nonetheless, according to the most recent World Justice Project (WJP) survey, civil and criminal justice are the worst aspects of the rule of law in the Philippines, even worse than corruption, with case delay and improper government influence being the most significant barriers in terms of reaching justice.³² As in many developing countries, subpar working conditions and other deep-rooted institutional deficiencies for police, prosecutors, and courts,

²⁷ U.S. DEP’T OF DEFENSE, DIR. 5525.1, STATUS OF FORCES POL’Y AND INFO. (July 2, 1997), ¶ 4.5(2) [hereinafter DOD DIR. 5525.1].

²⁸ *Id.* at Encl. 2. With the implementation of the NATO and other SOFAs, it has become the established norm that soldiers are subject to foreign systems of criminal justice. Jack Williams, *An American’s Trial in Foreign Court: The Role of the Military Trial Observer*, 34 MIL. L. REV. 1, 14 (1966). With Article VII of the NATO SOFA providing a model scheme of shared jurisdiction, the United States has entered into over 100 bilateral SOFAs around the world. STATE SOFA REP., *supra* note 17, at 1.

²⁹ DOD DIR. 5525.1, Encl. 2. The Defense Department’s relevant listed factors include the right to have the assistance of defense counsel; confront hostile witnesses; suppress evidence procured through illegal means; the government’s burden of proof; right against self-incrimination; trial by an impartial court; speedy and public trial, among others. *Id.*

³⁰ Compare factors listed in DOD DIR. 5525.1, *supra* text accompanying note 29, and Rev. Crim. Pro. Rule 115, *supra* note 10.

³¹ See *The Four Universal Principles*, WORLD JUST. PROJECT, <https://worldjusticeproject.org/about-us/overview/what-rule-law> [perma.cc/NY3N-8VC9] (last visited Jan. 2, 2019). The World Justice Project is an initiative of the American Bar Association (ABA) that measures rule of law adherence worldwide based on household and expert surveys. The first three universal principles are accountability, just laws, and open government. The fourth principle, accessible and impartial dispute resolution, is characterized by justice that, *inter alia*, is delivered *timely* by competent, ethical, and independent neutrals. *Id.*

³² *Philippines Country Profile: Rule of Law Index 2018–2019*, WORLD JUST. PROJECT (2019), <http://data.worldjusticeproject.org/#/groups/PHL> [https://perma.cc/X58N-EG8Z]. With a factor score of 0.31 in criminal justice, the Philippines was just slightly above Afghanistan’s factor score of 0.28. In the Southeast Asian region, only Cambodia had a lower criminal justice factor score (0.25); *Rule of Law Index, 2018 GLOBAL TABLE*, WORLD JUST. PROJECT (2019), <http://data.worldjusticeproject.org/#table> [https://perma.cc/6UQP-TJ4N].

and a backlog of thousands of cases may contribute to a breakdown of the rule of law.³³ The WJP survey ranked the Philippines 90th out of 126 countries in terms of how the rule of law is experienced.³⁴

Similarly, the World Bank's latest worldwide evaluation of rule of law ranked the Philippines at the 37th percentile, with a score of -0.4 (the scoring range is from -2.5 weak to 2.5 strong).³⁵

The Philippines performs poorly in most international corruption rankings.³⁶ Transparency International's Corruption Perceptions Index for 2018 ranked the Philippines at 99th out of 180 countries assessed, with a score of 36 out of 100, putting it at the bottom rankings of Southeast Asian nations.³⁷ The "long-lasting and entrenched dominance" of various family clans in the political and economic spheres arguably has hindered reforms necessary for the further deepening of democracy and the transformation to a more

³³ *Corruption and Anti-Corruption in the Philippines*, TRANSPARENCY INT'L (2013), at 10, https://www.transparency.org/whatwedo/answer/corruption_and_anti_corruption_in_the_philippines [perma.cc/KBD9-JNRA] [hereinafter TI PH Profile]; STATE HUMAN RTS. REP., *supra* note 12, at 12 ("Insufficient personnel, inefficient processes, and long procedural delays also hindered the judicial system."); Argee Abadines, *Philippine Judiciary and Criminal Justice System Under Pressure: An Inside Look*, ASEAN TODAY (Feb. 6, 2017), <https://www.aseantoday.com/2017/02/philippine-judiciary-and-criminal-justice-system-under-pressure-an-inside-look/> [perma.cc/JDN2-K68P] (noting that many accused are too poor to post bail, common crimes such as drug possession do not allow for bail, and detainees spend years waiting for case resolution). *See also* Perfecto Caparas, *Right to Due Process of Law and Fair Trial: Issues and Challenges in the Philippines*, ASIAN HUMAN RTS. COMMISSION (2000), at 5, 8, <http://ssrn.com/abstract=2564216> [perma.cc/MZ78-L2JQ] (noting that inasmuch as the constitutional right to bail is illusory for the poor, detention prisoners prefer to plead guilty rather than languish further in the cramped, congested, unsanitary jails).

³⁴ *Philippines Country Profile: Rule of Law Index 2018–2019*, *supra* note 32. In the East Asia and Pacific region, the Philippines is ranked 13th out of 15 countries in experience of rule of law. *Id.*

³⁵ *Worldwide Governance Indicators (Rule of Law)*, WORLD BANK (2017), <http://info.worldbank.org/governance/wgi/index.aspx#home> [perma.cc/KHN4-RF9Y] (select "Interactive Data Access," then "Table View Tab").

³⁶ TI PH PROFILE, *supra* note 33, at 1–2 ("[T]he Philippines' history has been marked by a legacy of deeply entrenched patronage and clientelist systems, state capture by the ruling elite, and widespread high-level corruption.").

³⁷ *Table of Results: Corruption Perceptions Index (2018)*, TRANSPARENCY INT'L, <https://www.transparency.org/cpi2018#results> [perma.cc/UB7Q-MPFF] (last visited Feb. 13, 2019). The scale ranges from 0 to 100, where 100 is very clean, and 0 reflects a deep-rooted, systemic corruption problem. The Philippines' score has ranged between 34 and 38 over the past six years. For the Southeast Asian region, only Cambodia has had a consistently lower score (20–21). *Id.*

competitive market economy.³⁸ Philippine political dynasties leverage their political dominance over their respective regions and offices to enrich and protect themselves through embezzlements and kickbacks, and often resort to violence, fraud, overspending, and bribery in elections campaigns.³⁹

A “plunder” law was passed to deter officials from stealing high amounts of public monies.⁴⁰ One of the law’s signatories was Senator Joseph Estrada, who years later was charged and convicted, but then pardoned, for the plundering of state pension funds during his tenure as President.⁴¹ Other high-profile plunder prosecutions

³⁸ BERTELSMANN STIFTUNG, BTI 2018 COUNTRY REPORT—PHILIPPINES 4, 16 (2018), https://www.btiproject.org/fileadmin/files/BTI/Downloads/Reports/2018/pdf/BTI_2018_Philippines.pdf [<https://perma.cc/V6PC-GY9X>] [hereinafter BTI COUNTRY REPORT]. As stated by a provincial boss, “Politics in the Philippines is addition [money].” KARNOW, *supra* note 5, at 361. Notable Philippine political dynasties include the Marcos, Aquino, Arroyo, Estrada, and Duterte families. A dynasty is usually associated with a certain province or city that members of the family have led or represented for successive generations. Duterte’s daughter, Sara Duterte-Carpio, took over from her father as Davao City’s mayor after he won the presidency. Duterte’s son, Paolo Duterte, was vice-mayor of the city until he was forced to resign amid allegations he was involved in the illegal drug trade. Erin Cook, *Philippines Bids to Take the Family out of Politics*, ASIA TIMES (Mar. 23, 2018), <http://www.atimes.com/article/taking-family-politics-philippines/> [perma.cc/4XEZ-ADSK].

³⁹ TI PH PROFILE, *supra* note 33, at 3–4; BTI COUNTRY REPORT, *supra* note 38, at 8; KARNOW, *supra* note 5, at 22 (noting that no political candidate would campaign without a squad of bodyguards). See also *Batocabe Murder Shows Ugly, Deadly Side of PH Local Politics*, MANILA TIMES (Dec. 24, 2018), <https://www.manilatimes.net/batocabe-murder-shows-ugly-deadly-side-of-ph-local-politics/487192/> [perma.cc/Q5YA-TCTK]; ALAN BERLOW, *DEAD SEASON: A STORY OF MURDER AND REVENGE ON THE PHILIPPINE ISLAND OF NEGROS* 143–145 (1996) (describing how a powerful family in the southern Philippines controlled political offices—and thus public contracts, the police, and the courts—which in turn protected investments, provided a source of wealth, and generated prestige).

⁴⁰ The crime of “plunder,” as defined and penalized under Section 2 of Republic Act No. 7080 (1991), is to take undue advantage of one’s official position to unjustly enrich oneself and/or others at the expense of the Filipino people, with the aggregate amount accumulated being at least 50 million pesos (\$1 million).

⁴¹ In 2007, after a six-year trial, the *Sandiganbayan*, a special court with jurisdiction over criminal and civil cases involving graft and corruption, convicted former President Joseph Estrada of plundering four billion pesos (\$75 million) from state pension funds and sentenced him to life imprisonment. A month after Estrada’s conviction, then President Macapagal-Arroyo, who had been his Vice-President, unconditionally pardoned Estrada. See *Estrada Pardon: Transactional Politics Yet Again?*, THE PCIJ BLOG (Oct. 25, 2007), <http://pcij.org/blog/2007/10/25/erap-pardon-transactional-politics-yet-again> [perma.cc/J2PG-69XN] (“Only the criminally rich and mighty who have big power brokers behind them are given pardon with such haste.” (quoting a private lawyer who assisted the government prosecution panel)). Estrada is currently the mayor of Manila. See *Erap Estrada Is Richest Metro Manila Mayor in 2017*, RAPPLER (July 25, 2018),

have also met with little success.⁴² The “anarchy of families” look out for each other’s interests and resist any meaningful political and economic reforms.⁴³ With as much as seventy-five percent of the Philippine Congress hailing from dynastic families, annual attempts by various Congressional reformers to pass an “Anti-Political Dynasty Law” have failed.⁴⁴

The Philippine Constitution empowers the media and citizens to raise issues publicly without fear.⁴⁵ Despite this constitutional protection, the ability of journalists and media organizations to report freely has been endangered by continuous government campaigns to discredit critical journalists and media organizations.⁴⁶ Over the last

<https://www.rappler.com/nation/208159-richest-poorest-metro-manila-mayors-vice-mayors-saln-2017> [perma.cc/UC79-UNT8].

⁴² After leaving office, President Macapagal-Arroyo was charged in the *Sandiganbayan* with the plunder of 366 million pesos (\$6.8 million) in state lottery funds. The *Sandiganbayan* denied her petition to dismiss on insufficiency grounds; but, four years later during the pendency of trial, the Supreme Court granted her petition and ended the case. *Macapagal-Arroyo v. People of the Phil. and the Sandiganbayan*, G.R. No. 220598 (July 19, 2016). Prior to the Supreme Court decision, then President-elect Duterte stated that he would pardon Arroyo. Pia Ranada, *Duterte ‘Ready’ to Grant Arroyo Pardon*, RAPPLER (May 24, 2016), <https://www.rappler.com/nation/134021-duterte-grant-arroyo-pardon> [perma.cc/7TD4-KC7C]. Arroyo recently was elected Speaker of the Philippine House of Representatives. Audrey Morallo, *House Formally Elects Arroyo as Speaker*, PHIL. STAR (July 23, 2018, 8:48 PM), <https://www.philstar.com/headlines/2018/07/23/1836120/house-formally-elects-arroyo-speaker> [perma.cc/7UB9-WCWN].

⁴³ Cook, *supra* note 38.

⁴⁴ *Id.* See also *Congress Rejects Anti-Political Dynasty Provision in BBL*, ABS-CBN NEWS (July 10, 2018, 2:13 PM), <https://news.abs-cbn.com/news/07/10/18/congress-rejects-anti-political-dynasty-provision-in-bbl> [perma.cc/UNS8-HZ74].

⁴⁵ CONST. (1987), art. III, § 24(1) (Phil.) (“The state recognizes the vital role of communication and information in nation-building”); *Id.*, art. III, § 4 (“No law shall be passed abridging the freedom of speech, of expression, or of the press, or right of the people peaceably to assemble and petition the government for redress of grievances.”).

⁴⁶ The Philippines was ranked 134th out of 180 countries in the 2019 World Press Freedom Index. *RSF Index 2019: Philippines*, REPORTERS WITHOUT BORDERS (Apr. 16, 2019), <https://rsf.org/en/philippines> [https://perma.cc/UX9X-XKVE]. See also Center for Media Freedom & Responsibility, *Philippines: Independent Journalism Persists in a Growing Hostile Environment*, SOUTHEAST ASIAN PRESS ALLIANCE (May 4, 2018), <https://www.seapa.org/philippines-independent-journalism-persists-in-a-growing-hostile-environment/> [perma.cc/6P8Y-87W4]. The criminal libel law is still one of the most frequently used means to “silence” critical journalists, who are also subjected to harassment and threats online. *Id.* This Article relies on a variety of local news sources, including Rappler, Philippine Daily Inquirer, and ABS-CBN, each of which has been “at the receiving end of Duterte’s antipathy to the independent press.” The government has publicly discredited, threatened license revocations, and filed tax evasion and fraud lawsuits against the three. *Id.* See, e.g., *Rappler’s Maria Ressa Arrested for Cyber Libel*, ABS-CBN NEWS (Feb. 14, 2019), <https://news.abs-cbn.com/news/02/13/19/authorities-serve-arrest-warrant-vs-maria-ressa> [https://perma.cc/8E8B-SV39].

thirty years, an average of three to five journalists have been killed annually in the line of duty.⁴⁷

This Article will draw on the Pemberton trial to illustrate the nature of the Philippine criminal justice system. Section II will examine historical issues related to Philippine criminal jurisdiction over U.S. military personnel and will discuss the trial in the context of that background. The footnotes in Section II track the Pemberton trial's progress in conformity with the Philippine Revised Rules of Criminal Procedure. As will be seen, if charged with a crime in the Philippines, U.S. military personnel are better protected than are ordinary Filipinos or foreigners.⁴⁸ For Filipinos, the criminal justice

⁴⁷ 156 Filipino journalists have been killed since 1986, with the pattern of killings remaining the same, usually carried out by hired gunmen riding-in-tandem on motorcycles. Center for Media Freedom, *supra* note 46. See also *RSF Condemns Philippine President-Elect's Comments About Journalists*, REPORTERS WITHOUT BORDERS (June 1, 2016), <https://rsf.org/en/news/rsf-condemns-philippine-president-elects-comments-about-journalists> [perma.cc/TA8H-23T4] ("Just because you're a journalist you are not exempted from assassination, if you're a son of a bitch. Most of those killed, to be frank, have done something. You won't be killed if you don't do anything wrong." (quoting President Duterte)).

⁴⁸ The U.S. Department of Defense directs military Judge Advocates to attend trials of servicemembers as observers and prepare formal, non-classified reports of the trial proceedings. DOD DIR 5525.1, par. 4.7. The trial observers usually are taken from the ranks of Judge Advocates stationed abroad who have been designated as "foreign liaison officers." More involved in the criminal procedural process than Embassy consular officers, the foreign liaison officer will hire local defense counsel (at U.S. expense), meet the prosecutor, and make many of the pretrial arrangements. The officer will regularly meet with the accused during the pretrial process to explain the basic procedures of local law, become more familiar with the accused's side of the case, and assist in trial preparation. Prior to trial, judges often invite the observer to meet and discuss the case. Williams, *supra* note 28, at 23, 48–49. In contrast, an Embassy consular officer is only authorized to visit an incarcerated U.S. citizen, ensure that he/she is receiving appropriate treatment, provide information on the Philippine judicial system, and provide a list of local attorneys. EMBASSY CITIZEN SERVS., *supra* note 11.

system is beset by a pervasive inequality between rich and poor.⁴⁹ Consequently, the system is tilted towards those with power.⁵⁰

As will be discussed in Sections III and IV, rule of law and human rights are existent not through the enactment of laws but through their implementation by police, prosecutors, and courts.⁵¹ If these three major institutions of the criminal justice system do not

⁴⁹ Edna Co, et al., *Philippines Democracy Assessment: Rule of Law and Access to Justice*, INT'L INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE 22 (2010), <https://www.idea.int/publications/catalogue/philippine-democracy-assessment-rule-law-and-access-justice> [perma.cc/C5PS-L2WL] (concluding that despite stated equality before the law, the Philippine criminal justice system treats rich and poor differently); Teresita Ang See, *Long Wait for Justice*, PHILIPPINE CTR. FOR INVESTIGATIVE JOURNALISM (Oct. 2, 2004), <http://pcij.org/stories/long-wait-for-justice/> (commenting that the criminal justice system is a “highly personalistic system where the institutions work only for those who have connections”) [perma.cc/8MVU-HNGP]; Caparas, *supra* note 33, at 11 (noting the perception that for the poor, there is really no justice, just- “tiis,”—which, in the vernacular means “just endure suffering”). See, e.g., Marlen Ronquillo, *Jeane Napoles and Paul Tanglao: A Tale of Two Countries*, MANILA TIMES (Dec. 23, 2017), <https://www.manilatimes.net/jeane-napoles-paul-tanglao-tale-two-countries/370361/> [perma.cc/G7YR-7UYH] (contrasting the dismissal of tax evasion charges filed against the daughter of businesswoman Janet Napoles, who had masterminded a scheme with members of Congress to plunder 10 billion pesos (\$185 million) from the lump-sum discretionary fund (“pork-barrel”) granted to each member of Congress, with the jailing of a store clerk who stole a can of corned beef worth 32 pesos (0.60 USD) and was unable to raise bail for a week.).

⁵⁰ The pork barrel scheme case, *id.*, resulted in plunder charges against, *inter alia*, three senators. The Supreme Court upheld the *Sandiganbayan*'s finding of probable cause. *Revilla v. Sandiganbayan and People of the Phil.*, G.R. No. 218232 (July 24, 2018). With plunder punishable by *reclusion perpetua*, a court will not grant bail if it determines that evidence of guilt is “strong.” Rev. Crim. Pro. Rule 114, § 7. Despite the probable cause finding, the *Sandiganbayan* granted bail to Senator Juan Ponce Enrile (currently age 94) on humanitarian grounds and to Senator Jinggoy Estrada (son of former President and now Manila Mayor Joseph Estrada) inasmuch as he was not the “main plunderer” and there was “no strong evidence” against him. See Raymund Narag, *The Real Issue Behind Senator Jinggoy Estrada's Bail Release*, RAPPLER (Sept. 18, 2017), <https://www.rappler.com/nation/182087-jinggoy-estrada-bail-sandiganbayan> (commenting that the same logic for bail release should also apply to the thousands of ordinary Filipinos who have languished in pretrial incarceration for unduly long periods—up to ten years—under harsh conditions, and for less serious offenses) [perma.cc/D6T6-MUYD]. The *Sandiganbayan* recently acquitted the third senator, Ramon “Bong” Revilla, Jr. (who had spent the preceding four years in detention at the Camp Crame (PNP Headquarters) Custodial Center) but convicted Ms. Napoles on the plunder charges. *People of the Phil. v. Revilla, et al.*, SB-14-CRM-0240 (Dec. 7, 2018).

⁵¹ See Asian Legal Resource Centre Editorial Board, SPECIAL REPORT: THE CRIMINAL JUSTICE SYSTEM OF THE PHILIPPINES IS ROTTEN, 6(1) ARTICLE 2 OF THE INT'L COVENANT ON CIV. AND POL. RIGHTS 4, 5 (2007), <http://alrc.asia/article2/wp-content/uploads/2015/09/v06n01.pdf> [perma.cc/R8BZ-FP26] [hereinafter ALRC SPECIAL REPORT] (presenting a comprehensive analysis by a Hong Kong-based regional rights group of the “deep institutional rot” afflicting the Philippine criminal justice system).

function properly, or other than as envisaged under the laws, then the concept of justice becomes meaningless.⁵² Thereby, Section III will analyze particular circumstances unique to police, prosecutors, and courts as currently affected by the President's war on drugs.⁵³

In section IV, this Article will offer reflections on the rule of law and whether the Philippine justice system is “a mess,”⁵⁴ “decaying,”⁵⁵ “rotten,”⁵⁶ and “dysfunctional,”⁵⁷ as characterized by some critics, or whether there are “glimmers of hope”⁵⁸ that may afford an accused a speedy and impartial trial. This article concludes that the outlook for a speedy and impartial trial, which indeed was afforded to Pemberton, is less than optimistic for the average criminal

⁵² *Id.*

⁵³ As further noted herein, a prominent figure in both the murder trial and the drug war was Laude family attorney Harry Roque. In June 2016, Roque was elected to the Philippine House of Representatives; then in November 2017, he joined the Executive Branch as Presidential Spokesman. See Carmela Fonbuena, *Harry Roque Pirouettes for Duterte*, RAPPLER (Feb. 14, 2018), <https://www.rappler.com/newsbreak/in-depth/196023-harry-roque-duterte-spokesman-profile> [perma.cc/S5CE-BJNQ] (“I speak for the President now. In this capacity, I have no personal opinions.”). After a year marked by controversy as he advocated positions contrary to his personal stances as a human rights lawyer, Roque stepped down as Spokesman in October 2018 to run for the Senate. Roque, however, did not fare well in the polls, and then he developed heart disease, forcing him to withdraw his Senate bid. Pia Ranada, *Harry Roque Withdraws from Senate Race*, RAPPLER (Feb. 1, 2019), <https://www.rappler.com/news/222429-harry-roque-withdraws-senate-bid-february-2019> [perma.cc/4AQ6-QCWU].

⁵⁴ Macon Ramos-Araneta, *Justice System in a Mess—Recto*, MANILA STANDARD (Mar. 6, 2017), <http://manilastandard.net/news/national/231008/justice-system-in-a-mess-recto.html> [perma.cc/A84L-H38Y] (quoting the Senate President *Pro Tempore* as saying “our nation [is] being plagued by a weak and overburdened criminal justice system notable for slow court procedures, weak prosecutions, and poor cooperation between police and investigators.”).

⁵⁵ Eloisa Lopez, *‘Decaying’ Justice System Aiding Crime, Corruption in PH—Lawyers*, RAPPLER (Mar. 10, 2018), <https://www.rappler.com/nation/197813-decaying-justice-system-crime-corruption-philippines-forum> [perma.cc/PT8B-R5BG].

⁵⁶ ALRC SPECIAL REP., *supra* note 48, at 4 (emphasizing that the “title [rotten] of the report is important” because the problems in the Philippines are rooted in problems of criminal justice and the institutions that should function to implement laws, namely the police, prosecutors and courts).

⁵⁷ Miguel Syjuco, *The Injustice System*, N.Y. TIMES (Apr. 26, 2017), <https://www.nytimes.com/2017/04/26/opinion/the-injustice-system.html> [perma.cc/V2HG-PXET] (characterizing the systems of law and order as “thoroughly dysfunctional” and the criminal justice system as “toothless and glacial”).

⁵⁸ Roy Valenzuela, *Glimmers of Hope: A Report on the Philippine Criminal Justice System*, 98(3) INT’L REV. OF THE RED CROSS 845 (2016), <https://www.icrc.org/en/international-review/article/glimmers-hope-report-philippine-criminal-justice-system> [perma.cc/J6KX-7U5E].

defendant. Nonetheless, there is hope for deliverance in the alternative dispute resolution systems—such as plea bargains and out-of-court financial settlements—that are already firmly enshrined in the Philippine criminal procedure.

II. CRIMINAL JURISDICTION

A. *Philippines–United States Visiting Forces Agreement (VFA)*

You may fire when you are ready, Gridley.⁵⁹

-- Commodore George Dewey, U.S. Navy

After the Philippines gained independence in 1946, United States influence continued with the lease of military bases at Subic Bay, Clark Air Base, and various minor locations in the Philippines.⁶⁰ The 1947 Bases Agreement contained a “Status of Forces Agreement” (SOFA) relating to the status and conditions, including the issue of criminal jurisdiction, under which the United States could station its military forces in the country.⁶¹ In 1951, the two nations signed a Mutual Defense Treaty (MDT), which has secured the Philippine-U.S. security alliance to this day.⁶² During the Cold War,

⁵⁹ On May 1, 1898, the Battle of Manila Bay opened when U.S. Navy Commodore George Dewey uttered his now-famous command to Captain Charles Vernon Gridley, commanding Dewey’s flagship USS Olympia. See context of quote and a vivid description of the sea battle in GREGG JONES, HONOR IN THE DUST: THEODORE ROOSEVELT, WAR IN THE PHILIPPINES, AND THE RISE AND FALL OF AMERICA’S IMPERIAL DREAM 46–49 (2012).

⁶⁰ Agreement Concerning Military Bases, Phil.-U.S., Mar. 14, 1947, 61 Stat. 4019 [hereinafter Bases Agreement]. Between 1947 and 1991, the date of its expiration, the Bases Agreement underwent at least 40 revisions, mostly returning base land to the Philippines and providing the Philippine government greater control and financial remuneration. Yeo, *supra* note 22, at 49. See Rafael Porrata-Doria, *The Philippine Bases and Status of Forces Agreement: Lessons for the Future*, 137 MIL. L. REV. 67, 68–69 (1992) (discussing the “long and sometimes stormy history” of the defense relationship between the United States and the Philippines).

⁶¹ Porrata-Doria, *supra* note 60, at 75.

⁶² Mutual Defense Treaty, Phil.-U.S., Aug. 30, 1951, 3 U.S.T. 3947-3952. During the Cold War, the United States considered the Subic Bay and Clark military bases vital to U.S. national security interests, projecting American power into the Asian mainland and guarding against potential Soviet naval attacks. Likewise, today, Philippine bases facilitate the United States’ capacity to conduct military operations in the Southwest Pacific Ocean, contain China’s naval influence in the China Sea, and provide the capability to quickly and effectively blockade China. Albert, *supra* note 5. See also George Friedman, *The Philippines’ Role in US Strategy*, GEOPOLITICAL FUTURES (Jan. 19, 2016), <https://geopoliticalfutures.com/the-philippines-role-in-us-strategy/> [<https://perma.cc/6G8R->

the United States facilities at Subic Bay constituted one of the largest naval bases in the world.⁶³

In 1965, the Philippine SOFA was amended to more closely follow Article VII of the North Atlantic Treaty Organization (NATO) SOFA's scheme of shared jurisdiction.⁶⁴ Although the Philippine SOFA provided that an accused servicemember would remain in U.S. custody until charged by the Philippines, in practice U.S. custody was permitted throughout investigation, trial, and final judgment.⁶⁵ Custody did not necessarily mean confinement or imprisonment, but merely meant that the individual would be in a hold status—namely, remain on base and not be transferred out of the country.⁶⁶

Except for homicide cases, criminal complaints invariably were resolved and dismissed through court-approved financial settlements with the complainants.⁶⁷ In homicide cases, upon

CU77] (“American power depends on U.S. dominance of the Pacific. And so the U.S. is returning to the Philippines.”).

⁶³ After World War II, Subic Bay gained prominence as the largest U.S. Naval facility in the Pacific, cherished for its deep water, sheltered spots to anchor ships, and elaborate repair infrastructure. U.S. Naval personnel, though, gained notoriety for helping turn the area into a zone of hostess bars and prostitution that fostered local crime. Ralph Jennings, *US Navy Edges Back to Subic Bay in Philippines—Under New Rules*, CHRISTIAN SCI. MONITOR (Nov. 12, 2015), <https://www.csmonitor.com/World/Asia-Pacific/2015/1112/US-Navy-edges-back-to-Subic-Bay-in-Philippines-under-new-rules> [perma.cc/XN65-PNAT].

⁶⁴ Military Bases in the Philippines: Criminal Jurisdiction Arrangements, Phil.- U.S., Aug. 10, 1965, 16 U.S.T. 1090 [hereinafter 1965 Philippine SOFA]. This tenth amendment to the Bases Agreement exchanged the heretofore nearly exclusive criminal jurisdiction by the United States to a jurisdictional scheme whereby the Philippines and U.S. exercised concurrent jurisdiction over members of the United States armed forces, their dependents, and members of the civilian components for offenses punishable by both Philippine and U.S. law, but with the primary right vesting with the Philippines. Offenses arising out of an act done in the performance of official duty, as so determined by the United States, however, came under U.S. jurisdiction. *Id.*, art. XIII, §§ (3)(a) & (3)(b).

⁶⁵ *Id.* art. XIII, § (5)(c); art. XIII, Agreed Official Minutes (5). See Porrata-Doria, *supra* note 60, at 76–78.

⁶⁶ Charles Cochran & Hungdah Chiu, *U.S. Status of Forces Agreements with Asian Countries: Selected Studies*, 7 MARYLAND SERIES IN CONTEMP. ASIAN STUD. 1, 27 (1979). To encourage the “prompt and speedy trial” guaranteed by Article XIII, § (9)(a) of the Philippine SOFA, the United States specifically agreed in the negotiations over the amendment to retain legal hold personnel in the Philippines for a “reasonable time.” *Id.* at 29.

⁶⁷ See Rev. Crim. Pro. Rule 111, § (1)(a) (“When a criminal action is instituted, the civil action for the recovery of civil liability arising from the offense charged shall be deemed instituted with the criminal action”). The military foreign liaison officers worked with local counsel to resolve the criminal cases through negotiated settlements (paid by the servicemembers) with the victims. The complainants then would sign “affidavits of desistance” (requesting that the charges be dismissed), which would be given to the local fiscal (prosecutor) for his consideration to file a motion to dismiss the criminal case. The

conclusion of a joint Philippines-U.S. investigation, the Philippine government would lift the legal hold status of the accused servicemember upon U.S. request and concurrent guarantee the defendant would be tried at general court-martial.⁶⁸

Upon the Military Bases Agreement's expiration in 1991, the Philippine Senate voted not to ratify an extension.⁶⁹ Soon thereafter began a period of Chinese aggression in the South China Sea, including the seizing of Philippine-controlled reefs.⁷⁰ Consequently,

court, in the exercise its discretionary authority, could then dismiss the case and thereby lift the legal hold. *See* Republic of the Phil. v. Hon. Sunga, G.R. No. L-38634 (June 20, 1988) (explaining the discretionary powers of the prosecutor and trial judge in dismissing criminal cases upon the complainant's signing of an affidavit of desistance). It was thus the rare servicemember who ever ended up in a Philippine prison. Tonette Orejas, *Olongapo Folk View Rape Case with Mixed Feelings*, PHILIPPINE DAILY INQUIRER (Nov. 20, 2005) (archived, available at <http://subicbaynews.blogspot.com/2005/11/uneasy-feeling-on-subic-rape-case.html>) (“[U.S. servicemembers] had Filipino lawyers who convinced the victims, their families or witnesses to settle the cases out of court or through evidence that really proved the innocence of the suspects.” (quoting an Olongapo City official)).

⁶⁸ *See* 1965 Philippine SOFA, art. XIII, § (6)(a), whereby the two countries agreed to “assist each other in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence,” and *see id.* art. XIII, § (3)(c), whereby the Philippines agreed to “give sympathetic consideration to a request” from the United States for a waiver of its jurisdiction in important matters. It has been and is U.S. policy to maximize jurisdiction to the extent permitted by the applicable SOFA. DoD DIR. 5525.1, par. 3. A search of the Military Justice Reporter reveals five cases from the 1970s to early 1990s wherein servicemembers had killed Filipino locals, were charged by the fiscal's office and placed on legal hold, yet thereafter were referred to general court-martial. *See* United States v. Snodgrass, 37 M.J. 844 (A.F.C.M.R. 1993) (Airman pled guilty to premeditated murder and received life imprisonment); United States v. Harris, 1985 CMR LEXIS 3410 (N.M.C.M.R. 1985) (Marine pled guilty to unpremeditated murder and received 18 years); United States v. Smith, 18 M.J. 625 (N.M.C.M.R. 1984) (Sailor convicted at trial of unpremeditated murder and received 40 years); United States v. Hardison, 17 M.J. 701 (N.M.C.M.R. 1983) (Marine convicted at trial of unpremeditated murder and received 30 years); United States v. Larner, 50 C.M.R. 521 (N.M.C.M.R. 1975) (Marine pled guilty to involuntary manslaughter and received 10 years).

⁶⁹ Albert, *supra* note 5. Although a majority of Filipinos were in favor of retaining the U.S. bases, in part because of the massive revenue input to the local economy, a “vocal elite” of Manila politicians and newspaper columnists believed the country “could not mature as a nation” as long as the bases remained as a reminder of the American colonial era. KARNOW, *supra* note 5, at 23–24.

⁷⁰ Friedman, *supra* note 62 (commenting that aligning with the United States over China made more sense for the Philippines, as the U.S. is the stronger power and its influence is less intrusive with the U.S. mainland being 7,000 miles away). *See also* Mark Velasco, *The Visiting Forces Agreement (VFA) in the Philippines: Insights on Issues of Sovereignty*, 3(4) ASIA PACIFIC J. OF MULTIDISCIPLINARY RES. 82, 83 (2015) (“The presence of the U.S. in the country will preserve the balance of power in the region since there is a force that has the capacity to neutralize any [Chinese] aggression.”).

in 1998, the Philippine government entered into a Visiting Forces Agreement (VFA) with the United States.⁷¹ Over vocal opposition, the Philippine Senate ratified the VFA.⁷² The VFA allowed the United States continuing access to bases in the Philippines for training and military preparedness as well as joint military exercises.⁷³ In 2014, Washington and Manila signed an Enhanced Defense Cooperation Agreement (EDCA), which sanctioned a strengthened U.S. military presence in the Philippines.⁷⁴

Similar to the NATO model and the 1965 Philippine SOFA, the Visiting Forces Agreement established a scheme for shared criminal jurisdiction over U.S. personnel.⁷⁵ The Philippines retains primary jurisdiction over U.S. personnel with respect to offenses committed in the Philippines punishable under Philippine laws.⁷⁶

⁷¹ Agreement Regarding the Treatment of United States Armed Forces Visiting the Philippines, Phil.–U.S., Feb. 10, 1998, Temp. State Dep’t No. 99-78, 1998 U.S.T. LEXIS 158 [hereinafter Visiting Forces Agreement or VFA]. A visiting forces agreement is a version of a status of forces agreement that only applies to troops temporarily in a country.

⁷² See Velasco, *supra* note 70, at 84 (noting that the VFA was “challenged and questioned in terms of its constitutionality and respect for the sovereignty of the Philippines”). In the petition filed in connection with the Smith rape case challenging U.S. custody over the accused, the Supreme Court specifically upheld the constitutionality of the VFA. *Suzette Nicolas v. Alberto Romulo et al.*, G.R. No. 175888 (Feb. 11, 2009).

⁷³ Pursuant to the VFA, Philippine, American, and Australian military forces participate in annual “shoulder-to-shoulder” exercises, known as *Balikatan*, which focus on training and capability enhancement for addressing crises or natural disasters. The United States and the Philippines also conduct Cooperation and Afloat Readiness and Training (CARAT) exercises to boost the interoperability of land, sea, and air capabilities. Albert, *supra* note 5.

⁷⁴ Enhanced Defense Cooperation Agreement, Phil.–U.S., Apr. 28, 2014, as amended April 13, 2016, T.I.A.S. 16-413.1, <https://www.state.gov/documents/organization/259256.pdf> [https://perma.cc/Q8MA-QS3B]. See Albert, *supra* note 5. The EDCA is a ten-year, automatically renewable accord that brings thousands of United States servicemembers, as well as ships, planes, and equipment, to the Philippines on a rotating basis. It grants U.S. troops access to bases at the invitation of the Philippine government; allows for the construction of new and improved facilities; and authorizes U.S. humanitarian assistance, maritime operations, and counterterrorism training. Friedman, *supra* note 62. Rejecting a challenge to the EDCA’s constitutionality, the Philippine Supreme Court held that the EDCA is an executive agreement, not a treaty, and is consistent with existing laws and treaties. *Saguisag v. Sec. Gazmin, et al.*, G.R. No. 212426 (Jan. 12, 2016) (Phil.).

⁷⁵ See John Egan, *The Future of Criminal Jurisdiction Over the Deployed American Soldier: Four Major Trends In Bilateral U.S. Status Of Forces Agreements*, 20 EMORY INT’L L. REV. 291, 325–326 (2006) (examining the revision and negotiation history of several SOFAs worldwide, including the Philippines).

⁷⁶ VFA, art. V, § 1. As in the 1965 SOFA, the VFA contains a waiver clause whereby upon U.S. request, the Philippines in its discretion can remit criminal jurisdiction to the United States. VFA, art. V, § 3(c). As previously noted herein, Department of Defense policy

The United States is authorized to keep physical custody over an accused servicemember “from the commission of the offense until completion of all judicial proceedings.”⁷⁷ If the trial proceedings are not completed within one year, the United States “shall be relieved of any obligations” to produce the accused.⁷⁸ If convicted at trial, the servicemember’s confinement “shall be carried out in facilities agreed on by appropriate Philippines and United States authorities.”⁷⁹

Social movements in the Philippines have long opposed United States influence over their country.⁸⁰ With the renewed U.S. military presence, various non-governmental organizations (NGOs) and Philippine nationalist advocates mounted considerable protests against the joint military exercises.⁸¹

calls for the United States to maximize jurisdiction to the extent permitted by the applicable SOFA. DoD DIR. 5525.1, ¶ 3.

⁷⁷ VFA, art. V, § 6. As a matter of practice worldwide, the United States seeks custody of its soldiers pending completion of all judicial proceedings inasmuch as the host country investigation, interrogation, and detention of criminal suspects may not accord with American notions of due process. Egan, *supra* note 75, at 302.

⁷⁸ VFA, art. V, § 6. The one-year cap (versus the vaguer “reasonable” period employed in the implementation of the 1965 SOFA) is in accord with the one-year limit set by the Philippine Speedy Trial Act. *See* text accompanying *infra* note 203. Due to the extreme length of time (circa five years) required to resolve the average Philippine criminal case, this provision was designed to guarantee that military personnel would not be held in the Philippines beyond the one year set by the Speedy Trial Act. *See infra* discussion on the courts in Section III.

⁷⁹ VFA, art. V, § 10.

⁸⁰ The retention by the United States of military bases in Philippine territory throughout the latter half of the twentieth century represented an extremely controversial topic for Filipinos. A significant body of Filipino public opinion views the existence of any agreement allowing a United States military presence, no matter what its terms, as a vestige of colonialism and infringement of Philippine independence. Porrata-Doria, *supra* note 60, at 90. Further, the military presence was considered the root cause of a number of social ills that had proliferated in the communities near the bases. *Id.* at 68. For President Ferdinand Marcos and his successor, Corazon Aquino, the U.S. military presence was more a lever for U.S. aid, which many viewed as “rent,” than a contribution to regional or Philippine security. Richard Fisher, *Rebuilding the U.S.–Philippine Alliance*, THE HERITAGE FOUND. (Feb. 22, 1999), <https://www.heritage.org/asia/report/rebuilding-the-us-philippine-alliance> [<https://perma.cc/CR94-GZMX>]. After the implementation of the VFA, incidents such as the LCpl Smith case, *supra* notes 23–25, and U.S. sailors assaulting a taxi-driver in Cebu, *infra* text accompanying note 351, added to the outrage. *See* STATE SOFA REP., *supra* note 17, at 3 (“SOFAs—because they entail, by definition, some compromise of the [host nation’s] sovereign rights . . . —often raise issues of national pride”).

⁸¹ *See* Albert, *supra* note 5; *Thousands March in Manila Against Military Accord with ‘Imperialist’ US*, RT NEWS (Dec. 1, 2014), <https://www.rt.com/news/210359-philippines-anti-usa-protest/> [perma.cc/U4W4-F48R]. A legal challenge against the *Balikatan* exercises argued that the Philippine Constitution forbade foreign troops from amassing on Philippine soil absent a treaty ratified by a two-thirds Senate majority. The Supreme Court disagreed,

Against this backdrop, the Pemberton case occurred.⁸² Laude's death at Pemberton's hands further inflamed anti-U.S. feelings and strained diplomatic relations.⁸³ With Pemberton kept in American custody pursuant to the Visiting Forces Agreement, activists decried the "special treatment" given to U.S. troops versus the "second-class treatment" of Filipinos in their own land.⁸⁴ Driven by perceptions of injustice and decrying neo-colonialism, there were many calls for the Philippines to cancel the VFA and its consequent military exercises.⁸⁵

Thus, in contrast to the homicide cases in Subic Bay of the 1970s and 1980s, the Philippine government—arguably for its own political viability—could and would not release its primary jurisdiction over the Pemberton case to the United States.⁸⁶

holding that the *Balikatan* exercises were not a permanent foreign military presence and were covered under the scope of both the 1951 MDT and the 1998 VFA. *Lim v. H.E. Macapagal-Arroyo*, G.R. No. 151445 (Apr. 11, 2002) (Phil.).

⁸² See Carmela Fonbuena, *EDCA, Olongapo Murder, and the Old Case of Daniel Smith*, RAPPLER (Oct. 28, 2014), <https://www.rappler.com/nation/71871-edca-olongapo-daniel-smith> [perma.cc/CZ69-2A8R] ("The [Laude] murder also recalls a decade old case that split public opinion toward Americans in the Philippines.").

⁸³ Edu Panay, *Pemberton Seeks Downgrade of Raps*, PHIL. STAR (Dec. 20, 2014, 12:00 AM), <https://www.philstar.com/headlines/2014/12/20/1404590/pemberton-seeks-downgrade-raps> [perma.cc/BNY7-DNB2]. See CALL HER GANDA (Breaking Glass Pictures 2018), <http://www.callherganda.com> [perma.cc/EW2E-VRNH] (documentary covering Pemberton's trial and the anger the incident raised in the Philippines).

⁸⁴ Panay, *supra* note 83 (quoting a Philippine Congressman as saying that U.S. insistence on keeping custody of Pemberton was "a slap in the face of the Filipinos" and proof that the Aquino administration was "helpless in upholding the justice system and national sovereignty"). From the perspective of a host country's public, the inability of their own government to seek "justice" for crimes inflicted by a member of a foreign military violates the state's authority to consolidate political control within its own borders. Yeo, *supra* note 22, at 45.

⁸⁵ Panay, *supra* note 83. At the date of this writing, the Duterte administration is questioning the need for the Philippine–U.S. MDT in a post-Cold War world. See Jaime Yambao, *On Reviewing the US–PH Mutual Defense Treaty*, MANILA TIMES (Jan. 26, 2019), <https://www.manilatimes.net/on-reviewing-the-us-ph-mutual-defense-treaty/502217/> [perma.cc/69LJ-FVQH] (commenting that the "economic gains" made by China and the Philippines provide disincentive for attack or war); *China Wants Military Drills with ASEAN in Disputed Sea, Excluding US*, MANILA TIMES (Aug. 2, 2018), <http://www.manilatimes.net/china-wants-military-drills-with-asean-in-disputed-sea-excluding-us/425970/> [perma.cc/4LZJ-2RPS] (noting the Philippine government's amenability to having the Association of Southeast Asian Nation (ASEAN) states and China carry out regular joint military exercises).

⁸⁶ Jaime Laude, *Pemberton Detained at Aguinaldo*, PHIL. STAR (Oct. 23, 2014), <https://www.philstar.com/headlines/2014/10/23/1383412/pemberton-detained-aguinaldo> [perma.cc/RD8T-VX7D] ("We are actually exercising our jurisdiction over this heinous crime allegedly committed by a US serviceman. We have not hesitated to inform the US

B. The Pemberton Case

No amount of money could pay for the years I spent raising my child.⁸⁷

-- Julita Cabillan-Laude, Mother of Jeffrey (Jennifer) Laude

On October 11, 2014, Jeffrey (Jennifer) Laude, a transgender,⁸⁸ was found dead in a motel room in the town outside Subic Bay.⁸⁹ PFC Pemberton had checked into the motel with Laude shortly after meeting him that evening.⁹⁰ Pemberton, whose ship was docked at Subic Bay, was on shore leave after participating in a joint military exercise.⁹¹ Approximately a half-hour after checking in, Pemberton left the motel, leaving the room door ajar.⁹² Motel staff found Laude's body with his neck bruised and his head in a toilet bowl.⁹³ The autopsy determined the cause of death to be "asphyxia by drowning."⁹⁴ The joint Philippines-United States inquiry quickly

authorities that the Philippines is exercising its primary jurisdiction over the case and we are not conceding this right." (quoting the Philippines Foreign Affairs Secretary)).

⁸⁷ As quoted in *Murder Trial for US Marine Pemberton*, BBC NEWS, (Mar. 23, 2015), <https://www.bbc.com/news/world-asia-32022445> [perma.cc/YRG9-QLH5].

⁸⁸ Inasmuch as the Court of Appeals in *People of the Phil. v. Pemberton*, CA-G.R. CR No. 38620 (Apr. 3, 2017), *aff'd* on motion for reconsideration (Aug. 15, 2017), referred to Laude as "he," this article will do so likewise.

⁸⁹ *People of the Phil. v. Pemberton*, CA-G.R. CR No. 38620, at 2. Although there is widespread tolerance of gays and transgenders in the Philippines, there are nonetheless elements of disapproval. Between 2008 and April 2016, forty transgenders were killed in the Philippines, the highest rate in Southeast Asia. TVT RESEARCH PROJECT, TRANS MURDER MONITORING RESULTS (2016), https://transrespect.org/wp-content/uploads/2016/05/TvT_TMM_IDAHOT2016_Tables_EN.pdf [perma.cc/SG49-2NDX]. See also HUMAN RTS. WATCH, WORLD REPORT 2018, 432 (2017), <https://www.hrw.org/world-report/2018> [hereinafter HRW WORLD REP.] (noting that students across the Philippines experience bullying and discrimination in school because of their sexual orientation and gender identity).

⁹⁰ *People of the Phil. v. Pemberton*, CA-G.R. CR No. 38620, at 5. See Randy Datu, *Prosecution Rests Case in Pemberton Trial*, RAPPLER (June 30, 2015), <https://www.rappler.com/nation/97973-prosecution-rests-case-pemberton-trial> [perma.cc/M9VH-BBCA].

⁹¹ *People of the Phil. v. Pemberton*, CA-G.R. CR No. 38620, at 13; Datu, *supra* note 90.

⁹² *People of the Phil. v. Pemberton*, CA-G.R. CR No. 38620, at 5; Trial Observer Report #6 (Apr. 13, 2015).

⁹³ *People of the Phil. v. Pemberton*, CA-G.R. CR No. 38620, at 6–7, 31; Trial Observer Reports #7 (Apr. 14, 2015) & #11 (Apr. 28, 2015).

⁹⁴ *People of the Phil. v. Pemberton*, CA-G.R. CR No. 38620, at 11–12, 16; Trial Observer Reports #12 (May 4, 2015) & #13 (May 18, 2015). A pathology professor at the

focused on Pemberton, who had retreated to his ship and told a fellow Marine, “I think I killed a he/she.”⁹⁵

A transgender companion of Laude’s testified before a Philippine Senate foreign relations committee, which was making its own inquiry into the death, that Pemberton had been drinking in a bar with the two of them.⁹⁶ Pemberton was inebriated, but friendly.⁹⁷ He did not know they were transgender.⁹⁸

Following the death of Laude, the U.S. Navy detained Pemberton, first on his ship and then inside Camp Aguinaldo, the headquarters of the Armed Forces of the Philippines, located in Quezon City, Metro Manila.⁹⁹ The Olongapo City Prosecutor’s

University of the Philippines Medical College testified for the defense that death was the result of “asphyxia due to application of pressure on the neck,” not drowning. As such, the deceased would have died of pulmonary edema, which can be caused by natural and unnatural causes. Trial Observer Report #23 (Aug. 25, 2015).

⁹⁵ *People of the Phil. v. Pemberton*, CA-G.R. CR No. 38620, at 9; Trial Observer Report #14 (May 19, 2015). A latent print examiner from the U.S. Army Criminal Investigation Laboratory confirmed that a condom rapper recovered from the motel room contained Pemberton’s thumbprint. Trial Observer Report #18 (June 22, 2015) (“highly unlikely that the print belonged to anyone else”).

⁹⁶ ‘*Pemberton Unaware Laude a Transgender*’, MANILA TIMES (Oct. 22, 2014), <https://www.manilatimes.net/pemberton-unaware-laude-transgender/136280/perma.cc/QD8W-B3DM>].

⁹⁷ *Id.*

⁹⁸ *Id.*; *People of the Phil. v. Pemberton*, CA-G.R. CR No. 38620, at 7. See A Philnews.com Editorial, *US Marine Joseph Scott Pemberton & Cross-Dressing Filipino Homosexuals*, PHILNEWS.COM (Apr. 7, 2016), <http://www.philnews.com/2016/016-us-marine-joseph-scott-pemberton-and-cross-dressing-filipino-homosexuals.html> [perma.cc/9FDC-3UC2] (remarking that Filipino males “might just laugh it off or react mildly to such deception”). This scenario of the unsuspecting foreigner was portrayed in a novel set in Singapore in the early 1970s, PAUL THEROUX, SAINT JACK (1973): “I wish I had a nickel for every feller who told me the story about how he had picked up a pretty girl and taken her back to his hotel, only to find (‘I was flabbergasted’) that she was really a feller in a swishy dress.” *Id.* at 171.

⁹⁹ As previously noted, the VFA grants custody to the United States “from the commission of the offense until completion of all judicial proceedings.” Pretrial liberty for Pemberton in this high-profile case was not an option. As noted previously, the Revised Rules of Criminal Procedure mandate that no person charged with an offense punishable by *reclusion perpetua* or life imprisonment, shall be admitted to bail “when evidence of guilt is strong.” Rev. Crim. Pro. Rule 114, § 7. To appease public sentiment, the United States agreed to a compromise whereby Pemberton would be detained in a compound at Camp Aguinaldo, guarded by U.S. Marines with an outer ring of Filipino forces. Ayee Macaraig, *PH Won’t Fight for Pemberton Custody*, RAPPLER (Dec. 18, 2014), <https://www.rappler.com/nation/78343-ph-pemberton-custody-us> [perma.cc/U5QG-E9BT]. Attorney Harry Roque, on behalf of the Laude family, filed a motion to “Compel the Armed Forces of the Philippines to Surrender Custody of Accused to the Olongapo City Jail,” arguing, as he had previously in the *Smith* case, that the VFA should be declared unconstitutional. The trial court denied the motion, which ruling was affirmed by the

Office conducted the preliminary investigation.¹⁰⁰ In accordance with the Revised Rules of Criminal Procedure, a prosecutor will subpoena the respondent (the alleged offender) to submit within ten days a counter-affidavit, affidavits of witnesses, and any other evidence to disprove the accusations.¹⁰¹ Pemberton waived his right to file a counter-affidavit.¹⁰²

The Prosecutor's Office found probable cause to charge Pemberton with murder (vice the lesser charge of homicide) in that it determined the aggravating elements of "treachery, cruelty, and abuse of superior strength" were present.¹⁰³ Pemberton petitioned the prosecutor's resolution finding probable cause to the Secretary of Justice, asking to have the case reinvestigated and the charge downgraded to homicide.¹⁰⁴ Homicide is punishable with a

Supreme Court. *Laude v. Hon. Ginez-Jabalde, et al.*, G.R. No. 217456 (Nov. 24, 2015) (Phil.).

¹⁰⁰ *See Pemberton v. Hon. De Lima*, G.R. No. 217508 (Apr. 18, 2016) (Phil.). Conducted for offenses where the penalty prescribed by law is over four years and two months, a preliminary investigation is an "inquiry or proceeding to determine whether there is sufficient ground to engender a well-founded belief that a crime has been committed and the respondent is *probably guilty* thereof, and should be held for trial." Rev. Crim. Pro. Rule 112, § 1 (emphasis added). Provincial or City Prosecutors and their assistants are authorized to conduct preliminary investigations. *Id.*, § 2(a).

¹⁰¹ Rev. Crim. Pro. Rule 112, § 3(a)-(c).

¹⁰² *Pemberton v. Hon. De Lima*, G.R. No. 217508. So as not to reveal elements of their trial strategy, defense counsel will often advise clients not to submit the counter-affidavit. *See Rouchelle Dinglasan, Pemberton Counsel Could Be Preparing to Go Straight to Trial—Prosecutor*, GMA News (Oct. 21, 2014, 10:53 AM), <http://www.gmanetwork.com/news/news/nation/384562/pemberton-counsel-could-be-preparing-to-go-straight-to-trial-prosecutor/story/> [perma.cc/DZ3N-JNN8]. *See also* Rev. Crim. Pro. Rule 112, § 3(d) ("If the respondent cannot be subpoenaed, or if subpoenaed, does not submit counter-affidavits within the ten (10) day period, the investigating office shall resolve the complaint based on the evidence presented by the complainant.").

¹⁰³ *Pemberton v. Hon. De Lima*, G.R. No. 217508. *See* Revised Penal Code, Act. No. 3815 (1930), as amended (Phil.) [hereinafter Rev. Penal Code], art. 248 ("Murder—Any person who . . . shall kill another, shall be guilty of murder and shall be punished by *reclusion temporal* in its maximum period [20 years] to death, if committed with any of the following attendant circumstances: 1. With treachery, taking advantage of superior strength . . . 6. With cruelty."). *Compare* Rev. Penal Code art. 249 ("Homicide—Any person who . . . shall kill another without the attendance of any of the circumstances enumerated in the next preceding article [murder], shall be deemed guilty of homicide and be punished by *reclusion temporal*.").

¹⁰⁴ *See* Mark Merueñas, *Pemberton Runs to De Lima, Seeks Dismissal of Murder Case*, GMA NEWS (Dec. 22, 2014, 3:31 PM), <http://www.gmanetwork.com/news/news/nation/394398/pemberton-runs-to-de-lima-seeks-dismissal-of-murder-case/story/> [perma.cc/Z3DQ-LKPW]. If the investigating prosecutor finds cause to hold the respondent for trial, he shall prepare a "resolution" (memorandum detailing the reasons for the findings) and "information" (formal indictment to be filed in

maximum prison term of 20 years, compared to a minimum of 20 years for murder.¹⁰⁵ Justice Secretary De Lima denied his application.¹⁰⁶

Upon a probable cause finding, the respondent is referred to as the “accused.”¹⁰⁷ Cases are filed at a local courthouse and are then assigned to branches (judges) by lottery as an anti-corruption measure.¹⁰⁸ Here, the assigned trial judge concurred in the probable cause finding and issued a warrant of arrest.¹⁰⁹ At Pemberton’s arraignment on December 23, 2014 on the filed information charging murder, the court entered a not-guilty plea on Pemberton’s behalf, due to his refusal to enter a plea.¹¹⁰

Upon conclusion of preliminary pretrial hearings, the trial began on March 16, 2015 at the Olongapo City Regional Trial Court

court). In this regard, the respondent may file a motion for reconsideration with the City Prosecutor. If the motion is denied, the respondent may seek remedy from the Secretary of Justice. Rev. Crim. Pro. Rule 112, § 4.

¹⁰⁵ Rev. Penal Code art. 27 (“Reclusion temporal—The penalty [for homicide] of *reclusion temporal* shall be from twelve years and one day to twenty years.”). The penalty for murder is set out in the murder statute (Rev. Penal Code art. 248), with “*reclusion temporal* at its maximum period” being the minimum sentence. *See* text accompanying *supra* note 103. In practicality, that sets the sentence for murder anywhere within a range from 20 to 40 years. *See* People of the Phil. v. Lucas, G.R. Nos. 108172-73 (Jan. 9, 1995) (discussing, within the context of sentencing for a murder conviction, the meaning of the terms “maximum duration of *reclusion temporal*,” “*reclusion perpetua*,” and “life imprisonment”).

¹⁰⁶ Pemberton appealed the denial to the Supreme Court. *Pemberton v. Hon. De Lima*, G.R. No. 217508. Rendering its decision after the trial and verdict, the Supreme Court held that “we deny the Petition for Certiorari for lack of merit and for being moot and academic.” *Id.*

¹⁰⁷ *See* Rev. Crim. Pro. Rule 112, § 4.

¹⁰⁸ Rosemary Hunter, *Reconsidering ‘Globalisation’: Judicial Reform in the Philippines*, 6(1) L. TEXT CULTURE, Jan. 1, 2002, art. 5, at 6, <http://ro.uow.edu.au/cgi/viewcontent.cgi?article=1084&context=ltc> [perma.cc/9XKD-5D2W]. In the trial courts, each judge has his or her own set of chambers (*sala*), which consist of a clerks’ office, judge’s chamber, and courtroom. Each judge constitutes a single branch of a trial court, with branches grouped together into stations of varying sizes (smaller in the provinces, larger in Metro Manila). *Id.*

¹⁰⁹ *Pemberton v. Hon. De Lima*, G.R. No. 217508 (Apr. 18, 2016) (Phil.). *See* Rev. Crim. Pro. Rule 112, § 6 (“Within ten (10) days from the filing of the complaint or information, the judge shall personally evaluate the resolution of the prosecutor and its supporting evidence. He may immediately dismiss the case if the evidence on record clearly fails to establish probable cause. If he finds probable cause, he shall issue a warrant of arrest.”).

¹¹⁰ People of the Phil. v. Pemberton, CA-G.R. CR No. 38620 (Apr. 3, 2017), *aff’d* on motion for reconsideration (Aug. 15, 2017), at 4. *See* Rev. Crim. Pro. Rule 116, § 1(c) (“When the accused refuses to plead or makes a conditional plea, a plea of not guilty shall be entered for him”).

Branch 74.¹¹¹ Each judge is the sole trier of questions of fact and law; there are no juries in the Philippines.¹¹² The prosecution presented its case to the judge over a series of intermittent hearing days, concluding on June 30, 2015.¹¹³ Although court cases rarely are closed to the media in the Philippines, reporters were banned from the courtroom.¹¹⁴

Pemberton testified in his defense, admitting to fighting with Laude, but not to killing him.¹¹⁵ He stated that upon discovering Laude was a man, the two engaged in a fight.¹¹⁶ Pemberton claimed he acted in self-defense; he choked Laude until he stopped moving.¹¹⁷

¹¹¹ *People of the Phil. v. Pemberton*, CA-G.R. CR No. 38620, at 4–5. Motions to quash the information must be filed before arraignment. Rev. Crim. Pro. Rule 117. The court will hold, within thirty days from arraignment, a pretrial conference to consider plea bargaining; stipulations, marking of evidence, objections to admissibility, modifications of the order of trial, and “such matters as will promote a fair and expeditious trial of the criminal and civil aspects of the case.” Rev. Crim. Pro. Rule 118. After the pretrial conference, the court issues an order reciting the actions taken. *Id.* At this point, the trial “shall commence within thirty (30) days.” Rev. Crim. Pro. Rule 119, § 1.

¹¹² ADB Background Note, *supra* note 6, at 4.

¹¹³ Trial Observer Report #20 (June 30, 2015). The prosecution bears the burden of proof, so it proceeds first, presenting “evidence to prove the charge and, in the proper case, the civil liability.” Rev. Crim. Pro. Rule 119, § 11(a). At the Pemberton trial, counsel for the Laude family acted in the role of “private prosecutor” to prove civil damages. *See infra* note 127 and accompanying discussion of rules regarding private prosecutors. The trial, “once commenced shall continue from day to day as far as practicable until terminated. It may be postponed for a reasonable period of time for good cause . . . [S]o as to ensure speedy trial[,] [i]n no case shall the entire trial period exceed one hundred eighty (180) days from the first day of trial.” Rev. Crim. Pro. Rule 119, § 2 (emphasis added).

¹¹⁴ Buena Bernal, *Media Coverage of Pemberton Trial Sought*, RAPPLER (Dec. 20, 2014), <https://www.rappler.com/nation/78453-media-coverage-pemberton-trial> [perma.cc/YEV5-JG5S] (noting the trial court’s denial of Attorney Roque’s request to “allow the media to enter the court room and cover the hearings in this case”). *See* Rev. Crim. Pro. Rule 119, § 21 (“The judge may, *motu proprio*, exclude the public from the courtroom if the evidence to be produced during the trial is offensive to decency or public morals. He may also, on motion of the accused, exclude the public from the trial.”).

¹¹⁵ *People of the Phil. v. Pemberton*, CA-G.R. CR No. 38620, at 12–14; Trial Observer Report #22 (Aug. 24, 2015) (“Defense counsel presented [Pemberton] to prove that he acted in ‘defense of his life and honor’”). Pemberton denied saying “I think I killed a he/she.” *Id.* *See* Rev. Crim. Pro. Rule 119, § 11(b) (“The accused may present evidence to prove his defense.”).

¹¹⁶ *People of the Phil. v. Pemberton*, CA-G.R. CR No. 38620, at 14; Trial Observer Report #22 (Aug. 24, 2015) (“Many strikes, punches, slaps, kicks, and scratches were exchanged . . . the deceased hit [Pemberton] hard like a man . . . the deceased had the advantage in the fight because [he] was not intoxicated and [Pemberton] could barely stand straight.”).

¹¹⁷ *People of the Phil. v. Pemberton*, CA-G.R. CR No. 38620, at 14; Trial Observer Report #22 (Aug. 24, 2015) (“the fight came to a conclusion when he was able to put his arm around the deceased’s neck”). A fellow Marine who had been drinking with Pemberton that

Pemberton then brought Laude to the bathroom to revive him; failing to do so, he left Laude unconscious on the floor.¹¹⁸ Pemberton departed quietly so as not to attract attention, convinced that Laude was unconscious but alive.¹¹⁹ After the defense concluded its case, and upon closing arguments held on September 17, 2015, the court declared the case concluded and submitted for decision.¹²⁰

On December 1, 2015, the trial court rendered its decision, which was streamed live on television and the internet.¹²¹ The court acquitted Pemberton of murder but found him guilty of homicide.¹²² The court found that the killing did not meet the legal elements of murder, *i.e.*, presence of treachery, abuse of superior strength, or cruelty.¹²³ For sentencing purposes, the court ruled that Pemberton was entitled to the mitigating circumstances of “passion and obfuscation.”¹²⁴ Likewise, the trial court found a second mitigating circumstance that Pemberton was intoxicated.¹²⁵ Accordingly, the

night confirmed that the chokeholds they learned at boot camp were not designed to kill but rather to disable an opponent by having him/her pass out from lack of oxygen. Trial Observer Report #14 (May 19, 2015).

¹¹⁸ *People of the Phil. v. Pemberton*, CA-G.R. CR No. 38620, at 14; Trial Observer Report #22 (Aug. 24, 2015) (“shower did not work . . . [Pemberton] never dunked his head in the toilet bowl”).

¹¹⁹ *People of the Phil. v. Pemberton*, CA-G.R. CR No. 38620, at 14; Trial Observer Report #22 (Aug. 24, 2015) (“when [Pemberton] left, the deceased was still breathing”).

¹²⁰ Trial Observer Report #25 (Sept. 17, 2015). *See* Rev. Crim. Pro. Rule 119, § 11(d) (“Upon admission of evidence of the parties, the case shall be deemed submitted for decision unless the court directs them to argue orally or to submit written memoranda.”). The promulgation of the decision “should be set within 90 days from the submission of the case for decision.” Supreme Court Administrative Circular 3-99, § VI (2) (Jan. 15, 1999).

¹²¹ Trial Observer Report #26 (Dec. 1, 2015).

¹²² *People of the Phil. v. Pemberton*, CA-G.R. CR No. 38620, at 15; Trial Observer Report #26 (Dec. 1, 2015). The judgment was rendered in accordance with Rev. Crim. Pro. Rule 120, § 1 (“[A judgment] shall contain clearly and distinctly a statement of the facts and the law upon which it is based”). A court may render a verdict on a lesser included offense. Rev. Crim. Pro. Rule 120, § 5.

¹²³ *People of the Phil. v. Pemberton*, CA-G.R. CR No. 38620, at 17; Trial Observer Report #26 (Dec. 1, 2015).

¹²⁴ *People of the Phil. v. Pemberton*, CA-G.R. CR No. 38620, at 17 (“[The trial court] held that Pemberton was so enraged and incensed by Laude’s misrepresentation and in the heat of passion, he arm-locked the latter, dragged him in the bathroom and dunked his head in the toilet bowl.”); Trial Observer Report #26 (Dec. 1, 2015). *See* Rev. Penal Code art. 13 (“The following are mitigating circumstances . . . 6. That of having acted upon an impulse so powerful as naturally to have produced passion or obfuscation.”).

¹²⁵ *People of the Phil. v. Pemberton*, CA-G.R. CR No. 38620, at 17 (“[Marines] get to drink only when they are on liberty”); Trial Observer Report #26 (Dec. 1, 2015). That evening Pemberton had consumed six beers and as many shots/mixed drinks. Trial Observer

court sentenced Pemberton to six to twelve years in jail, with time already spent in detention credited.¹²⁶

As previously noted, when a criminal action is instituted in the Philippines, a civil action for the recovery of civil liability arising from the charged offense is deemed to be instituted with the criminal action.¹²⁷ Accordingly, Pemberton was ordered to pay civil damages to the Laude family totaling 4.5 million Philippine pesos (\$100,000 at then exchange rates).¹²⁸ The criminal law governing punishment also contains an inducement to payment of civil liability.¹²⁹ Unless a convicted party satisfies the judgment for civil damages, he is obligated to serve additional time up to a year in prison, called “subsidiary imprisonment.”¹³⁰ Thus, unless the U.S. military

Report #22 (Aug. 24, 2015). See Rev. Penal Code art. 15 (“The intoxication of the offender shall be taken into consideration as a mitigating circumstance.”).

¹²⁶ *People of the Phil. v. Pemberton*, CA-G.R. CR No. 38620, at 15; Trial Observer Report #26 (Dec. 1, 2015). See Rev. Penal Code art. 63.5 (“When there are two or more mitigating circumstances and no aggravating circumstances are present, the court shall impose the penalty next lower to that prescribed by law, in the period that it may deem applicable, according to the number and nature of such circumstances.”).

¹²⁷ Rev. Crim. Pro. Rule 111. Subject to the approval of the regional prosecutor and the court, private lawyers hired for the civil aspects of a case may assist state prosecutors, who are often too burdened with numerous cases to give adequate attention to each one. Designated as “private prosecutors,” they may continue with the prosecution of a case even in the absence of the public prosecutor. Rev. Crim. Pro. Rule 110, § 5. In this matter, Harry Roque, as counsel for the Laude family, conducted the direct examinations of the deceased’s sister and mother about emotional impact and desired civil damages. Trial Observer Report #11 (Apr. 28, 2015). At the closing arguments, Roque argued for actual, moral, and exemplary damages. Trial Observer Report #25 (Sept. 17, 2015). See Dinglasan, *supra* note 102 (“The public prosecution has direct control of the case . . . [o]nly the civil aspect of the case can be covered by Atty. Roque.” (quoting the public prosecutor in the Pemberton trial)).

¹²⁸ Trial Observer Report #26 (Dec. 1, 2015). See Rev. Penal Code art. 100 (“Every person criminally liable for a felony is also civilly liable”); Rev. Crim. Pro. Rule 120, § 2(4) (The contents of a judgment “shall state . . . the civil liability or damages caused by his wrongful act or omission to be recovered from the accused by the offended party.”). The civil damages award was affirmed on appeal. *People of the Phil. v. Pemberton*, CA-G.R. CR No. 38620, at 43. See also *Pemberton Guilty of Homicide*, RAPPLER (Dec. 2, 2015), <https://www.rappler.com/nation/114533-pemberton-ruling-jennifer-laude> [perma.cc/76FT-P478] (“The [damages] award is given to set a public example, to serve as a deterrent to all military and civilian personnel of the United States . . . to respect every Filipino citizen.” (quoting the trial judge)).

¹²⁹ Rev. Penal Code art. 39 (“Subsidiary penalty—If the convict has no property with which to meet the fine mentioned in the paragraph 3 of the next preceding article, he shall be subject to a subsidiary personal liability at the rate of one day for each eight pesos, subject to the following rules . . . he shall remain under confinement until his fine referred to in the preceding paragraph is satisfied, but his subsidiary imprisonment shall not exceed one-third of the term of the sentence, and in no case shall it continue for more than one year.”).

¹³⁰ *Id.*

recompenses the Laude family, Pemberton, who likely does not have the financial means to pay the \$100,000, will have to serve a year's subsidiary imprisonment beyond his initial release date.¹³¹

On March 30, 2016, upon Pemberton's motion for reconsideration, the court affirmed the conviction while reducing the maximum sentence to ten years from the original twelve years.¹³² Attorney Roque denounced the Visiting Forces Agreement, denounced the "light penalty," and emphasized the Laude family's opposition to early release.¹³³ Pursuant to discussions between the Philippines and United States, Pemberton was placed into Philippine military detention at Camp Aguinaldo to serve out his sentence.¹³⁴

¹³¹ Subsequent to the filing of foreign charges, a military member in foreign custody is deemed constructively absent, and thus is not entitled to accrual of pay and allowances. See U.S. GOV'T ACCOUNTABILITY OFFICE, CLAIM FOR ACTIVE DUTY PAY AND ALLOWANCES FOR INCARCERATED ARMY MEMBER B-169366, (Nov. 29, 1977), <https://www.gao.gov/products/104342#mt=summary> [perma.cc/4WQQ-6A2R]. If Pemberton does not pay the court-ordered compensation, per the Visiting Forces Agreement, the United States is responsible "in accordance with United States law regarding foreign claims, [to] pay just and reasonable compensation in settlement of meritorious claims for damage, loss, personal injury or death caused by acts or omissions of U.S. personnel." Visiting Forces Agreement, art. 6, § 2. In accordance with the Foreign Claims Act, 10 U.S.C. § 2734(a)(3), meritorious claims up to \$100,000 for personal injury or death are specifically compensable. But the claim must be presented "within two years after it accrues." § 2734(b). See OPERATIONAL LAW HANDBOOK, *supra* note 15, at 289–290 (discussing the same).

¹³² AC Nicholls, *Court Affirms Pemberton's Conviction but Reduces Sentence to up to 10 Years*, CNN PHILIPPINES (Apr. 4, 2016), <http://cnnphilippines.com/news/2016/04/03/joseph-scott-pemberton-jennifer-laude-olongapo-regional-trial-court-decision-downgraded.html> [perma.cc/4WQQ-6A2R].

¹³³ *Id.* Not taking into account any subsidiary imprisonment, Pemberton can be paroled upon serving the minimum six-years of his sentence, including time served in pretrial detention. He will also be given credit for good conduct. See Perseus Echeminada, *Pemberton Camp Detention an Extension of NBP*, PHIL. STAR (Dec. 4, 2015), <https://www.philstar.com/headlines/2015/12/04/1529186/pemberton-camp-detention-extension-nbp> [perma.cc/RT8V-S4WQ]. The Director of Prisons grants the allowances for good conduct, calculated at approximately three months subtracted for every year served. Rev. Penal Code arts. 97 & 99. Under Philippine law, defendants who are sentenced to serve a maximum term of imprisonment of *more* than six years are not eligible for any earlier release on probation. An Act Amending Presidential Decree No. 968, Otherwise Known As The "Probation Law Of 1976," Rep. Act No. 10707, § 2, as amended (2015). Nonetheless, a prisoner can have his sentence commuted by the executive branch. Rev. Penal Code art. 96.

¹³⁴ Upon Pemberton's conviction, the trial court initially had ordered Pemberton to be detained at the New Bilibid Prison, the country's main penitentiary. Trial Observer Report #26 (Dec. 1, 2015). However, the New Bilibid as well as other Philippine prisons do not comply with international standards on prison space. See STATE HUMAN RTS. REP., *supra* note 12, at 5–6 (noting that Philippines prison conditions are harsh and potentially life threatening, including gross overcrowding (jails operating at four times their capacity), inadequate sanitary conditions and medical care, food shortages, and physical abuse). Accordingly, the judge amended the ruling to place Pemberton in the military detention

As previously noted, a three-judge division of the Court of Appeals sitting in Manila affirmed the trial court's ruling.¹³⁵ The Court rejected Pemberton's claim of self-defense, stating:

Indeed, a plea of self-defense cannot be justifiably appreciated where it is not only uncorroborated by independent and competent evidence, but also extremely doubtful by itself. Self-defense, like alibi, is a defense which can easily be concocted as it is in this case. . . . As proven by the prosecution, Pemberton did not leave Laude merely unconscious, but ensured his death by submerging his head inside the toilet bowl. Clearly, Pemberton intended the natural consequence of his wrongful act.¹³⁶

As will be seen in the next section, an investigation and trial process lasting one year, coupled with detention in military rather than civilian facilities, indeed provided Pemberton better treatment than the avowed "second-class" treatment rendered to ordinary Filipinos and other foreigners.

III. INSTITUTIONAL PECULIARITIES

A. *Police: Drug War*

Let me begin by putting it bluntly: the war against illegal drugs is far from over. This is why the illegal drugs war will not be sidelined. Instead, it will be as

facility at Camp Aguinaldo, an "extension facility" of the National Bureau of Prisons. Echeminada, *supra* note 133.

¹³⁵ *People of the Phil. v. Pemberton*, CA-G.R. CR No. 38620 (Apr. 3, 2017), *aff'd* on motion for reconsideration (Aug. 15, 2017) (Phil.). An appeal from a judgment or final order may be taken to the Court of Appeals in cases decided by the Regional Trial Court, and to the Supreme Court, in cases decided by the Court of Appeals. Rev. Crim. Pro. Rule 122, § 2. Three Justices of the Court of Appeals shall constitute a quorum for the sessions of a division, and the unanimous vote of the three is necessary for the pronouncement of a judgment. In case there is no unanimity, two additional Justices will be assigned to sit temporarily, forming a special division of five members requiring only a majority to render the pronouncement of a judgment. *Id.*, § 13.

¹³⁶ *People of the Phil. v. Pemberton*, CA-G.R. CR No. 38620, at 25, 43.

relentless and chilling, if you will, as on the day it began.¹³⁷

-- President Rodrigo Duterte, in his third State of the Nation Address

The Philippine National Police (PNP) is the largest investigative agency in the Philippines with over 170,000 officers.¹³⁸ Its members have a legal duty to protect lives and property, investigate and prevent crimes, arrest criminal offenders, bring offenders to justice and assist in their prosecution, and exercise powers of arrest, search, and seizure in accordance with the law.¹³⁹ Required to have a four-year degree, many police officers have degrees in criminology.¹⁴⁰ Although the PNP became a civilian force in 1990, it still retains many of its military characteristics, with officers living in camps and frequently rotating location and responsibilities.¹⁴¹

Historically, Philippine law enforcement and other justice sector agencies lacked sufficient resources, personnel, and effective tools to identify, investigate, and prosecute major crimes, especially those committed by drug trafficking organizations.¹⁴² The

¹³⁷ As quoted in Carlos Conde, *Duterte Vows More Bloodshed in Philippine 'Drug War'*, THE HUM. RTS. WATCH (July 23, 2018), <https://www.hrw.org/news/2018/07/23/duterte-vows-more-bloodshed-philippine-drug-war> [perma.cc/S3G2-QQBN].

¹³⁸ Cecille Felipe, *PNP to Deploy 170,000 Cops for Summer Security*, PHIL. STAR (Mar. 21, 2018), <https://www.philstar.com/nation/2018/03/21/1798726/pnp-deploy-170000-cops-summer-security#> [perma.cc/34Q3-D5TQ].

¹³⁹ An Act Establishing the Philippine National Police Under a Reorganized Department of the Interior and Local Government, Rep. Act No. 6975 (1990) (Phil.).

¹⁴⁰ See generally, PNP Regional Personnel and Records Management Division, <http://ncrpo.pnp.gov.ph/recruitment/index.php/general-qualifications> [perma.cc/3J5B-U3YS] (last visited Jan. 2, 2019); Arvin Arnilla, et al., *The Criminologists in the Police Service: Reflections from the Field*, 4(3) INT'L J. ADVANCED RES. 133–134 (2016).

¹⁴¹ See generally, PNP Commission, <http://www.napolcom.gov.ph/> [perma.cc/Z92V-UUE5] (last visited Jan. 2, 2019).

¹⁴² U.S. DEP'T OF STATE, BUREAU FOR INT'L NARCOTICS AND LAW ENFORCEMENT AFF., INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT Vol.1 (INCSR) 252–255 (2018), <https://www.state.gov/documents/organization/278759.pdf> [perma.cc/2D8C-5VJY] (noting obstacles in drug prosecutions such as legal hindrances on wire taps and plea bargaining, technicalities of custody and disposition of evidence, and failure to use drug-related asset forfeiture laws); U.N. DEV. PROGRAMME, ASSESSMENT OF THE CAPACITY OF THE PILLARS OF THE PHILIPPINE CRIMINAL JUSTICE SYSTEM 35–36 (2011), <http://www.ombudsman.gov.ph/UNDP4/wp-content/uploads/2013/02/CJS-Cap-Assmnt-FINAL.pdf> [perma.cc/5ABC-8XKU] [hereinafter UNDP CAPACITY ASSESSMENT] (listing

Comprehensive Dangerous Drugs Act of 2002 identified dangerous drugs as “one of today’s more serious social ills” and mandated the government to “pursue an intensive and unrelenting campaign against the trafficking and use of dangerous drugs.”¹⁴³ Consequently, Rodrigo Duterte campaigned for presidential office vowing to eradicate illegal drugs from Philippine society.¹⁴⁴ Upon election, President Duterte encouraged police to violently crack down on illegal drug use.¹⁴⁵

challenges and problems in the delivery of police services). *See also* Raïssa Robles, “Alabang Boys” Acquitted—Are You Surprised? *INSIDE PHIL. POL.* (Aug. 26, 2011), <https://www.raissarobles.com/2011/08/26/alabang-boys-acquitted-are-you-surprised/> [perma.cc/RAY2-9FC5] (commenting on the acquittal in a straight forward, undercover buy-bust drug (ecstasy) case where the three accused were “scions of families with wealth and influence”).

¹⁴³ The Comprehensive Dangerous Drugs Act of 2002, Rep. Act No. 9165, § 2 (2002), as amended (Phil.). The Act sets out a series of punishments for drug use and trafficking. Section 5 of the Act mandates *life* imprisonment for any person who sells, delivers, or distributes “any dangerous drug . . . regardless of the quantity and purity involved.” Also, possession of over ten grams of shabu (crystal methamphetamine—the drug of choice of over 90% of Filipino drug users) calls for life imprisonment. If the amount possessed of shabu or any other dangerous drug is less than ten grams, but more than five grams, the Act calls for imprisonment from twenty years to life. If the amount possessed is less than five grams, the Act calls for imprisonment from twelve years to twenty years. *Id.*, § 11.

¹⁴⁴ Mong Palatino, *Duterte’s Drug War in the Philippines: New Campaign, Old Problems*, *THE DIPLOMAT* (Feb. 6, 2018), <https://thediplomat.com/2018/02/dutertes-drug-war-in-the-philippines-new-campaign-old-problems/> [https://perma.cc/HW3A-PPTW]. Prior to winning the presidency, President Duterte was mayor of Davao City for over twenty years. His vocal disdain for those who contributed to the drug industry earned him the nickname “The Punisher.” While he was mayor, a militia group dubbed the “Davao Death Squad” allegedly caused 1,000 criminals and political opponents to “disappear.” Former Death Squad militiamen later testified in hearings that Duterte was involved in the deaths. *See* Mikaela Medina, *Extrajudicial Punishments to Combat the Philippine Drug War: Problem or Solution?* 14 *LOY. U. CHI. INT’L L. REV.* 155, 158-159 (2016).

¹⁴⁵ Agence France-Presse, *Duterte Vows Deadly Crime War*, *ABS-CBN NEWS* (July 1, 2016), <https://news.abs-cbn.com/nation/07/01/16/duterte-vows-deadly-crime-war> [perma.cc/K3FN-P4E4] (quoting President Duterte as saying it would make good business sense to set up funeral parlors: “I assure you you won’t go bankrupt. If your business slows I will tell the police, ‘Do it faster to help the people earn money.’”). Human rights groups claim that government-sanctioned extrajudicial killings of drug dealers and consumers commenced soon after the President took office. *See License to Kill: Philippine Police Killings in Duterte’s “War on Drugs”*, *HUM. RTS. WATCH* 14–17 (2017), <https://www.hrw.org/report/2017/03/02/license-kill/philippine-police-killings-dutertes-war-drugs> [https://perma.cc/DHE4-DQ9A] [hereinafter *HRW Police Killings*] (Human Rights Watch examined drug-related killings over a four-month period and alleged that official reports of certain incidents, which asserted self-defense to justify police killings, were contrary to eyewitness accounts. The witnesses further alleged that the police planted guns, spent ammunition, and drug packets next to the victims’ bodies.); *If You Are Poor, You Are Killed: Extrajudicial Executions In The Philippines’ “War On Drugs”*, *AMNESTY INT’L*

Over the past two years, more than 6,000 people have been killed for purportedly being drug dealers or consumers, with many of the perpetrators allegedly corrupt members of the police or vigilante groups.¹⁴⁶ But it must be taken into account that a considerable number of the deaths were from legitimate police operations that used lethal force against violent criminals.¹⁴⁷

As previously noted, there is controversy over the government's culpability in the conduct of the anti-drug campaign, with at least one NGO asserting that the country has plunged "into its worst human rights crisis since the dictatorship of Ferdinand Marcos in the 1970s and 1980s."¹⁴⁸ Over government denials, certain NGOs claim that upper-echelon PNP managers have sanctioned vigilantes, who usually "ride-in-tandem" on motorcycles, to commit anonymous executions and have encouraged police officers to shoot and kill, rather than arrest, drug suspects during drug operations.¹⁴⁹ In any

20-21 (2017), https://www.amnestyusa.org/files/philippines_ejk_report_v19_final_0.pdf [perma.cc/W8YC-D5YD] (same).

¹⁴⁶ BTI COUNTRY REPORT, *supra* note 38, at 6. Human rights groups, the media, and the police have differing tallies of how many suspects have died in a combination of police operations and vigilante killings related to the drug campaign. See Ana Santos & Rodion Ebbighausen, *Investigating Duterte's Drug War in Philippines—Facts and Fiction*, DEUTSCHE WELLE (Sept. 5, 2018), <https://www.dw.com/en/investigating-dutertes-drug-war-in-philippines-facts-and-fiction/a-43695383> [perma.cc/A9BZ-2MHB] (remarking that the death toll is high but nobody seems to know the real numbers, not even the police). See also MAP, CHARTS: *The Death Toll of the War on Drugs*, ABS-CBN NEWS, <https://news.abs-cbn.com/specials/map-charts-the-death-toll-of-the-war-on-drugs> [https://perma.cc/FWF9-NXNF] (last updated Apr. 16, 2019) (interactive map and charts showing drug-related fatalities reported since May 10, 2016).

¹⁴⁷ BTI COUNTRY REPORT, *supra* note 38, at 8. See also Hannah Ellis-Petersen, *ICC Launches Crimes Against Humanity Inquiry into Duterte's War on Drugs*, THE GUARDIAN (Feb. 8, 2018), <https://www.theguardian.com/world/2018/feb/08/icc-claims-crimes-against-humanity-duterte-philippines> [perma.cc/UW4K-HQ9J] (quoting Presidential Spokesman Harry Roque as proclaiming that "alleged deaths, if true, were because of a legitimate police exercise").

¹⁴⁸ See text accompanying *supra* note 3; HRW WORLD REP., *supra* note 89, at 429.

¹⁴⁹ AMNESTY INT'L, *supra* note 145, at 29-30 (quoting a police officer who commanded an anti-drug unit in Metro Manila as saying for killing drug traffickers, officers would be paid in cash up to 15,000 pesos (US \$300), depending on the "notoriety" of the victim). The vigilantes (hit men) were paid similar amounts. *Id.* at 33. As confirmed by one such hit man, "When we're given an order, there's an envelope. It has the person's name, a picture, the address, what the person likes to do. It's almost a complete profile." The hit man claimed they would often plant shabu received from the police to link the victim to drugs: "There was an instance when the target was crossing the street, and when the target was taken down, we just threw drugs [towards] the body." *Id.* at 37. See also HRW *Police Killings*, *supra* note 145, at 39-40 (same); Vanda Felbab-Brown, *The Human Rights Consequences of the War on Drugs in the Philippines*, BROOKINGS INST. (Aug. 8, 2017),

case, riding-in-tandem killings are nothing new in the Philippines.¹⁵⁰ Dating back to the Marcos administration, extrajudicial punishments allegedly have been employed to eliminate political opposition, activist groups, and critical journalists.¹⁵¹

The targets come from unverified lists, reportedly drawn up by local police and barangay (village or neighborhood) officials, of people suspected of using or selling drugs.¹⁵² Amnesty International asserts that often names were added arbitrarily, due to a vendetta or because of financial incentives to kill greater numbers of people deemed drug users and sellers.¹⁵³ The vast majority of victims have

<https://www.brookings.edu/testimonies/the-human-rights-consequences-of-the-war-on-drugs-in-the-philippines/> [perma.cc/XY9E-W7ED] (same).

¹⁵⁰ Carlos Conde, *The Philippines' Scourge of Killers on Motorbikes*, THE HUMAN RTS. WATCH (June 19, 2018), <https://www.hrw.org/news/2018/06/19/philippines-scourge-killers-motorbikes> [perma.cc/L8SN-55HC] (“Over the past three decades, [such killings] have been the *modus operandi* of a variety of hired assassins, criminal organizations, rogue policemen, communist insurgents, and agents of politicians.”). The PNP proposed that an official sticker be affixed to each of the country’s millions of motorcycles to identify the owner. The efficacy of this solution aside, the police have arrested only c. 50 suspects over the past two years. *Id.*

¹⁵¹ Al Parreño, *Report on the Philippine Extrajudicial Killings*, THE ASIA FOUND. & USAID (2011),

<https://www.asiafoundation.org/resources/pdfs/ReportonPhilippineEJK20012010.pdf> [perma.cc/6YUV-QKNX] (detailing how the Philippines became a “world leader in extrajudicial killings”); PHILIP ALSTON, REP. OF THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS, U.N. HUMAN RTS. COUNCIL (2008), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/130/01/PDF/G0813001.pdf> [perma.cc/V5B4-JVF6] (detailing how extrajudicial killings have “eliminated civil society leaders, including human rights defenders, trade unionists and land reform advocates, intimidated a vast number of civil society actors, and narrowed the country’s political discourse”). *See also* Medina, *supra* note 144, at 157.

¹⁵² AMNESTY INT’L, *supra* note 145, at 7 (claiming that barangay officials and police draw up drug watch lists that identify and locate targets for arrest or execution. Inclusion on the list is often based on hearsay and community rumor or rivalry, with little to no verification); *HRW Police Killings*, *supra* note 145, at 7 (same). Ironically, over 200 barangay officials themselves have been put on drug watch lists. Rambo Talabong, *PDEA Drug List: More Than 200 Barangay Officials Linked To Illegal Drugs*, RAPPLER (May 2, 2018), <https://www.rappler.com/nation/201401-list-names-barangay-officials-linked-illegal-drugs> [perma.cc/2C5E-A9P8] (quoting the Chief Director of the Philippine Drug Enforcement Administration as saying that “if those reports contain mistakes, [we] will apologize” but admitting that “if that were the case, the harm had already been done.”).

¹⁵³ AMNESTY INT’L, *supra* note 145, at 7. *See also* Lynzy Billing & Regine Cabato, ‘*This Is Manila*’, WASHINGTON POST (Feb. 22, 2019),

<https://www.washingtonpost.com/graphics/2019/world/philippines-manila-body/> [https://perma.cc/WUE5-2L9W] (“The drug war and the fact that many of the related murders remain uninvestigated has made it a lot easier to eliminate people these days. This violent environment enables extrajudicial killings, whether related to the drug campaign or not.” (quoting Carlos Conde)).

been young males from typically crime-prone, low-income neighborhoods.¹⁵⁴

The police force historically has been perceived as beset by a culture of impunity.¹⁵⁵ For decades, poor training and a dysfunctional criminal justice system made it difficult for police officers to successfully gather evidence, secure eyewitness testimonies, and file cases.¹⁵⁶ Accordingly, successive generations of police commanders learned that the best way to advance their careers was to carry out the will of politicians.¹⁵⁷ Although salaries have been increased under

¹⁵⁴ Patrick Quintos, *Poor Filipinos Most Vulnerable in Duterte's Drug War: Study*, ABS-CBN NEWS (June 25, 2018), <http://news.abs-cbn.com/focus/06/25/18/poor-filipinos-most-vulnerable-in-dutertes-drug-war-study> [perma.cc/3AGR-7ZBC]; Sheila Coronel, *'Have We Opened the Gates of Hell with Our Images?'*, THE ATLANTIC (Feb. 25, 2017), <https://www.theatlantic.com/international/archive/2017/02/rodrigo-duterte-philippines-drugs-reporters-siaron/517650/> [perma.cc/624V-FEGJ] (describing the fear in Manila's "shantytowns").

¹⁵⁵ Impunity (the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account) is the cause and effect of the problems—lack of rule of law, corruption, violence, insecurity, and even social inequality—that many countries face. GLOBAL IMPUNITY DIMENSIONS, GLOBAL IMPUNITY INDEX 2017 14, 21 (2017), https://www.udlap.mx/cesij/files/IGI-2017_eng.pdf?9369 [perma.cc/2D84-RH86] (ranking the Philippines and India with the highest impunity index in the Asia-Pacific Region. In contrast, Japan and Singapore are ranked with the lowest impunity index in the region). See Victoria Wah, *Duterte Suspends His War on Drugs: What is Going on in the Philippine National Police?*, ASEAN TODAY (Jan. 31, 2017), <https://www.aseantoday.com/2017/01/lies-damned-lies-and-statistics-corruption-in-the-philippine-police-force/> [perma.cc/9MF5-V5KH] (commenting that “the violence shown by some police officers stems from a culture of impunity that once plagued previous administrations while martial law was in place”). See also ALRC SPECIAL REPORT, *supra* note 51, at 7 (arguing that impunity is all but guaranteed in the Philippine criminal justice system due to the historical pattern of the perpetrators of killings either themselves coming from the police/military or have been armed groups working on their behalf).

¹⁵⁶ STATE INCSR, *supra* note 142, at 252–255; Nicole Curato, *The Deeper Dynamics of Duterte's Drug War*, EAST ASIA FORUM (Sept. 8, 2017), <http://www.eastasiaforum.org/2017/09/08/the-deeper-dynamics-of-dutertes-drug-war/> [perma.cc/SC8A-PEAZ]. Some allege the police fabricate evidence to overcome evidentiary gaps. *A Long History of Corruption in Philippine Police Force*, SOUTH CHINA MORNING POST (Jan. 18, 2017, 11:03 AM), <https://www.scmp.com/news/asia/southeast-asia/article/2063245/long-history-corruption-philippine-police-force> [perma.cc/36RB-8FH2] (commenting, *inter alia*, on a case against an Australian accused by the police of drug trafficking. The judge ruled that the police officers had “fabricated” evidence and their testimonies had “no integrity.” The police claimed the Australian was arrested in a raid on a Manila street with ecstasy tablets, but CCTV footage showed the police forcibly removing him from his hotel room, not the street.)

¹⁵⁷ Curato, *supra* note 156. See, e.g., Catherine Valente, *Duterte to Reward Policemen Who Will Kill Superiors Involved in Drugs*, MANILA TIMES (Nov. 7, 2018), <https://www.manilatimes.net/duterte-to-reward-policemen-who-will-kill-superiors->

President Duterte, in the past, to supplement their minimal salaries, the police often were left with little choice but to find “entrepreneurial opportunities.”¹⁵⁸ Consequently, the police force has been locally regarded as one of the Philippines’ most corrupt institutions.¹⁵⁹ With illegal behavior already embedded in their collective psyche, and under pressure to demonstrate progress in the war on drugs, some small, but widespread and well-connected elements of the police allegedly “offered a ready, willing, and able killing machine.”¹⁶⁰

Only three police officers have been charged and convicted of involvement in the drug war killings, and then only because the incident, the execution of a teenager, was captured on video-camera.¹⁶¹ President Duterte characterized the United Nations as

involved-in-drugs/463678/ [perma.cc/DPG5-C2H7] (“I will give you a prize and a trip to Hong Kong.” (quoting President Duterte)).

¹⁵⁸ Curato, *supra* note 156. *See also* Philippines 2019 Crime & Safety Report, U.S. Dep’t of State, Bureau of Diplomatic Sec. (Feb. 25, 2019), <https://www.osac.gov/Pages/ContentReportDetails.aspx?cid=25636>

[<https://perma.cc/JL2Y-GN2J>] (warning of police “harassing or extorting” foreign travelers); BERLOW, *supra* note 39, at 245 (noting “petty extortion schemes”). *Cf.* Wah, *supra* note 155 (“Training has been stepped up . . . and police employees have some of the best salaries and benefits in the government service”). Historically, 60% of lower-level police officers lived below the poverty line and many lived in “squalid slums.” ADB Background Note, *supra* note 6, at 44; UNDP CAPACITY ASSESSMENT, *supra* note 142, at 36.

¹⁵⁹ *A Long History*, *supra* note 156 (citing among examples of police abuse the 2009 “Maguindanao massacre,” wherein 58 people, including 32 journalists, were killed in election-related violence by political rivals allegedly aided by police and military officers). One of the private attorneys for the Maguindanao victims is Harry Roque. *See 9 Years After: Verdict On Maguindanao Massacre To Be Out Soon*, UNTV NEWS (Nov. 22, 2018, 5:49 PM), <https://www.untvweb.com/news/9-years-after-verdict-on-maguindanao-massacre-to-be-out-soon/> [<https://perma.cc/86SL-HP8A>].

¹⁶⁰ Curato, *supra* note 156. Even President Duterte called the police “corrupt to the core” and suspended them from participating in the war on drugs for several weeks after Manila police officers abducted a South Korean businessman on false drug charges and then strangled him in the back seat of a car parked at Camp Crame. He apparently had not only refused to pay protection money to police officers keeping tabs on his office, but he also counseled fellow Korean businessmen not to pay either. A few months later, in August 2017, President Duterte once again suspended the police for several weeks after several officers were captured on a security video dragging away a teenager in the northern Manila neighborhood of Caloocan, moments before they executed him. In both cases, Duterte’s displeasure was temporary, given that the police are part of his “political base.” Christopher Caldwell, *The Killa in Manila*, WEEKLY STANDARD (May 22, 2018, 5:53 AM), <https://www.weeklystandard.com/christopher-caldwell/understanding-the-popularity-of-philippines-president-rodriigo-duterte> [perma.cc/2WMM-G8BT].

¹⁶¹ *See* Param-Preet Singh, *Philippines Murderous ‘Drug War’ in ICC Crosshairs*, THE HUMAN RTS. WATCH (Feb. 8, 2018, 4:07 PM), <https://www.hrw.org/news/2018/02/08/philippines-murderous-drug-war-icc-crosshairs> [perma.cc/6PFS-VWZR] (commenting that the government has effectively institutionalized

“naive and foolish” for condemning his anti-drug actions.¹⁶² In his view, realism lies in doing what has to be done, regardless of how it is done.¹⁶³ Thus, human rights observers viewed the above-cited quote by President Duterte in his third State of the Nation Address as signifying “the perpetuation of impunity and zero accountability.”¹⁶⁴

Philippine police and drug enforcement agents have arrested tens of thousands of suspected drug users and traffickers, further filling the country’s already overcrowded jails.¹⁶⁵ Beyond the inherent problems associated with processing so many criminal cases, many law enforcement officers believe that a case is solved upon arrest; thereafter, it is the prosecutor’s responsibility to secure a conviction.¹⁶⁶ This belief is reinforced by performance measures that allocate performance points based on the number of arrests made, not the number of successful prosecutions resulting from arrests.¹⁶⁷

impunity for police involvement in serious rights violations). Human Rights Watch speculated that Duterte would pardon the three convicted officers (referenced in the Caloocan matter, *supra* note 160), per his repeated promises to pardon police officers convicted for crimes committed in the line of duty. The Presidential Spokesman demurred, stating the Caloocan execution was done with “intention to kill,” not in line of duty. Dharel Placido, *Palace Lauds Conviction of Cops in Kian’s Slay*, ABS-CBN NEWS (Nov. 29, 2018, 11:57 AM), <https://news.abs-cbn.com/news/11/29/18/palace-lauds-conviction-of-cops-in-kians-slay> [perma.cc/DNX7-5BLZ].

¹⁶² *Philippines: Failed Justice System Cause for Extrajudicial Killings*, ASIAN HUMAN RTS. COMMISSION (Aug. 30, 2016), <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-128-2016> [perma.cc/AW4T-4GFD].

¹⁶³ *Id.* See also John Nery, *Duterte: ‘We Planted Evidence . . . (and) the Intrigues*, PHILIPPINE DAILY INQUIRER (Aug. 21, 2016, 9:01 AM), <https://newsinfo.inquirer.net/808126/duterte-we-planted-evidence-we-first-planted-the-intrigues> [perma.cc/YW58-BCJ2] (“I’ve learned a lot during my prosecution days. We planted evidence. We arrested persons but we released them [so as to follow them].” (quoting President Duterte)).

¹⁶⁴ Conde, *supra* note 137.

¹⁶⁵ Ayee Macaraig, *Slow Justice in Philippines As Drug War Rages*, ABS-CBN NEWS (Sept. 5, 2017, 4:58 PM), <http://news.abs-cbn.com/focus/09/05/17/slow-justice-in-philippines-as-drug-war-rages> [perma.cc/MF48-QBAL]; Andrew Marshall, *Duterte’s War on Drugs Turns Teeming Jail into Haven*, ABS-CBN NEWS (Nov. 9, 2016, 1:55 AM), <https://news.abs-cbn.com/news/v2/11/08/16/dutertes-war-on-drugs-turns-teeming-jail-into-haven> [perma.cc/UUM7-5X7X] (“It’s safer here. Outside, if the police want to shoot you, they shoot you, and then say you’re a drug pusher.” (quoting a Quezon City Jail inmate)).

¹⁶⁶ ADB Background Note, *supra* note 6, at 47 (noting that police concentrate their efforts on arresting wrongdoers at the expense of collecting and submitting the evidence required by prosecutors to obtain convictions).

¹⁶⁷ *Id.* See also Mark Merueñas, *Low Conviction Rate in Drugs Cases Filed by PDEA Hit*, GMA NEWS (Sept. 6, 2016, 5:04 PM), <http://www.gmanetwork.com/news/news/nation/580337/low-conviction-rate-in-drugs-cases-filed-by-pdea-hit/story/> [perma.cc/QC6V-6FEY].

Accordingly, this article will next turn to the prosecution services.

B. Prosecutors: Overwhelmed

Public office is a public trust. Public officers and employees must, at all times, be accountable to the people, serve them with utmost responsibility, integrity, loyalty, and efficiency; act with patriotism and justice, and lead modest lives.¹⁶⁸

-- Constitution of the Republic of the Philippines

The Department of Justice, which is headed by the Secretary of Justice, is responsible through its National Prosecution Service to investigate and prosecute violations of penal laws.¹⁶⁹ In the discharge of their duties, prosecutors are guided by the above-quoted constitutional mandate that “a public office is a public trust.”¹⁷⁰

Unlike other Asian countries where law enforcement agencies are integrated with the prosecutorial arm of the government, in the Philippines the prosecutor relies on other parties to provide the evidence to prove a criminal case.¹⁷¹ During preliminary investigation, either the private complainant or the police officer submits to the prosecutor the respective evidence to establish the existence of probable cause.¹⁷² In theory, the preliminary

¹⁶⁸ CONST. (1987), art. XI, § 2 (Phil.).

¹⁶⁹ Presidential Decree 1275 of 1978 established the National Prosecution Service (NPS) under direct supervision of the Secretary of Justice. The NPS is empowered to investigate and prosecute all crimes under the penal code, prepare legal opinions or queries about code violations, review appeals to resolutions of cases by prosecutors, and investigate administrative cases against its own officers. See Menrado Valle-Corpuz, *The Role and Function of the Prosecution in the Philippine Criminal Justice System*, UNITED NATIONS INST.: 107TH INT’L TRAINING COURSE PARTICIPANTS’ PAPERS 273 (1997), https://www.unafei.or.jp/publications/pdf/RS_No53/No53_27PA_Corpuz.pdf [perma.cc/8TFU-ES3Y].

¹⁷⁰ *Id.* at 275.

¹⁷¹ Severino Gana, Jr., *Building a Criminal Case in the Philippines*, UNITED NATIONS INST.: 158TH INT’L TRAINING COURSE VISITING EXPERTS’ PAPERS 32 (2015), https://www.unafei.or.jp/publications/pdf/RS_No95/No95_VE_Gana1.pdf [perma.cc/3CHG-VS2L].

¹⁷² *Id.* at 33; Lilia Lopez, *Towards a Responsive Criminal Justice System in the Philippines*, UNITED NATIONS INST.: 111TH INT’L TRAINING COURSE VISITING EXPERTS’ PAPERS 295 (1998),

investigation, under the prosecutor's scrutiny, is designed to deter hasty and malicious prosecutions.¹⁷³ In practice, prosecutors have been reluctant to screen out seemingly weak cases, given the pressure from crime victims wanting action, and given the fear of sanctions if the case later turns out to be meritorious.¹⁷⁴

The lengthy, complex procedures for the determination of probable cause are a recognized cause of delay in the criminal justice arena.¹⁷⁵ The preliminary investigation stage carries at least two distinct disadvantages: First, prosecutors generally believe they should not be involved in the investigative stage because it would destroy their neutrality.¹⁷⁶ Second, cases are automatically processed to the trial court with the bare minimum of probable cause, an evidentiary standard well below the much higher requirement of reasonable doubt needed for conviction at trial.¹⁷⁷ Only when pressured by the media will a prosecutor direct the police to collect more evidence to shore up a case.¹⁷⁸ Consequently, two thirds of all criminal case filings eventually are dismissed due to this evidentiary

https://www.unafei.or.jp/publications/pdf/RS_No55/No55_26VE_Lopez.pdf [perma.cc/U36W-FJT2] (“The prosecutor is, as a general rule, a passive subject, with the prosecution of the case being dependent largely on the efforts and determination of the complainant or the aggrieved party.”).

¹⁷³ VALLE-CORPUZ, *supra* note 169, at 273.

¹⁷⁴ Richard Messick, *Uncorking the Bottlenecks: Using Political Economy Analysis to Address Court Delay*, U4 BRIEF 2 (Aug. 2015), <https://www.u4.no/publications/uncorking-the-bottlenecks-using-political-economy-analysis-to-address-court-delay.pdf> [https://perma.cc/8K5U-BD6L].

¹⁷⁵ ADB Background Note, *supra* note 6, at 58.

¹⁷⁶ Because the preliminary investigation historically began as a judicial process conducted by a judge to determine probable cause, the present preliminary investigation under Rev. Crim. Pro. Rule 112 by the prosecutor effectively disallows the cooperation of the police and prosecutors in case build-up and investigation. Instead of guiding and directing the police to gather permissible evidence and ensure the preservation of the chain-of-custody, prosecutors are expected to act with the “cold neutrality” of a judge in ascertaining whether the evidence is sufficient to indict a respondent. Prosecutors as “key law enforcers well-versed in law and jurisprudence” are taken out of the investigation process. Leila De Lima & Geronimo Sy, *A Short History of Preliminary Investigation*, 88 PHIL L.J. 375, 385 (2014).

¹⁷⁷ *Id.* at 386–387 (commenting that the present system does not work because the prosecutor simply has no discretion to decline any case where probable cause has been met, even if the likelihood of conviction is exceedingly slim).

¹⁷⁸ LOPEZ, *supra* note 172, at 296. This hesitation or predisposition not to direct the police to further investigate the case stems from the fact that prosecutors and police belong to different departments of the executive branch, and thus the police do not consider themselves subordinate to prosecutors. *Id.*

gap.¹⁷⁹ The net effect is that only circa twenty percent of pretrial detentions lead to eventual convictions.¹⁸⁰

Legislators have submitted numerous bills to reform the criminal investigation system.¹⁸¹ The bills would authorize police-prosecutor cooperation, and upon the prosecutorial filing of charges, the trial judge, applying a preponderance of the evidence standard, would be tasked with conducting a preliminary hearing to determine whether a full trial is warranted.¹⁸² The skilled exercise of prosecutorial direction and discretion obviously could streamline the conduct of preliminary investigations.¹⁸³ The bills, however, have languished in committee.¹⁸⁴

As previously noted, police officers are assessed not by the number of successful convictions but by the number of suspects charged by prosecutors.¹⁸⁵ The prosecutors' working relationship with police officers has made prosecutors hesitant to reject cases for lacking merit.¹⁸⁶ Even when the police arrest the correct perpetrators, the prosecutors, already carrying a heavy case load, struggle with the unfamiliar cases.¹⁸⁷ Given the historical low pay, there never have

¹⁷⁹ Leila De Lima, *Speech, The Imperative for Philippine Criminal Justice System Reform, Achieving Effectiveness and Equity*, POLYTECHNIC U. OF THE PHIL. COLL. OF L. 9 (Aug. 8, 2015), <https://www.doj.gov.ph/files/2015/speeches/Seminar%20Hosted%20by%20the%20PUP%20College%20of%20Law.pdf> [perma.cc/DZ8D-L2NP]; MESSICK, *supra* note 174, at 2 (remarking that this is “an extraordinarily high percentage”).

¹⁸⁰ PRISON INSIDER, PHILIPPINES: PRISON POPULATION (Mar. 2017), <https://www.prison-insider.com/countryprofile/prisonsinphilippines?s=la-population-carcerale#la-population-carcerale> [perma.cc/ECZ8-LWKT] (last visited Feb. 15, 2019); Syjuco, *supra* note 57 (noting that many accused, after being pressed for bribes and languishing in jail for years, end up being released because the police do not attend trials to testify, the prosecutor is absent, or the evidence proves insufficient).

¹⁸¹ S. 369, 17th Cong. (2016); S. 2670, 16th Cong. (2015); H.R. Res. 08, 17th Cong. (2016); H.R. Res. 2032, 16th Cong. (2013).

¹⁸² *See id.* (four bills).

¹⁸³ MESSICK, *supra* note 174, at 2; ADB Background Note, *supra* note 6, at 58 (“Allowing simplified, rapid determinations of probable cause with safeguards against obvious abuse, together with broad discretion to decline prosecution in cases with poor prospects for conviction, could leave prosecutors with more manageable workloads and relieve the courts of large volume of criminal cases in which there is no active prosecution.”).

¹⁸⁴ *See* Senate of the Philippines 17th Congress, BILLS, http://www.senate.gov.ph/lis/leg_sys.aspx [perma.cc/N4ZK-EZYH] (adjust “Type:” to applicable bill type, then search for bill number in “No:” box).

¹⁸⁵ *See* ADB Background Note, *supra* note 6, at 47.

¹⁸⁶ Syjuco, *supra* note 57.

¹⁸⁷ Ang See, *supra* note 49 (commenting that police and prosecutors “end up pointing fingers at each other once the fiascos begin piling up”).

been enough prosecutors to process all the cases in the criminal justice system in a timely manner.¹⁸⁸ The drug war has further exacerbated the need for more prosecutors.¹⁸⁹ In 2018, the courts had a backlog of 780,000 criminal cases, with prosecutors individually handling an average of 500 cases.¹⁹⁰

As a result of case overload, prosecutors often appear in court without adequate preparation or without their witnesses.¹⁹¹ The Speedy Trial Act exempts the “absence or unavailability of the accused or any essential witnesses” in computing delays in the trial of cases.¹⁹² Pursuant thereto, prosecutors have delayed trials simply by not presenting witnesses.¹⁹³ With witnesses absent, the presiding judge must invariably postpone the hearing.¹⁹⁴

Prosecutors’ salaries were substantially increased in 2018 so as to be generally comparable with the private sector.¹⁹⁵

¹⁸⁸ Hunter, *supra* note 108, at 8.

¹⁸⁹ STATE HUMAN RTS. REP., *supra* note 12, at 13; Evelyn Macairan, *DOJ Needs 1,000 Prosecutors*, PHIL. STAR (Sept. 2, 2017, 4:00 PM), <https://www.philstar.com/headlines/2017/09/02/1735388/doj-needs-1000-prosecutors> [perma.cc/G9JT-H2PY].

¹⁹⁰ STATE HUMAN RTS. REP., *supra* note 12, at 12; Ramos-Araneta, *supra* note 54 (noting also that every public defender is responsible for roughly 5,000 clients). Caseload statistics for prosecutors have been steadily increasing over the past decade. See UNDP CAPACITY ASSESSMENT, *supra* note 142, at 54–55 (noting that a prosecutor’s heavy workload [averaging 180 preliminary investigations and 500 court cases per year] is exacerbated by the severe personnel deficiency); ADB Background Note, *supra* note 6, at 50.

¹⁹¹ Danilo Reyes, *Prosecution in the Philippines*, ARTICLE 2 (Mar. 13, 2008), <http://alrc.asia/article2/2008/03/prosecution-in-the-philippines/> [perma.cc/E2AB-PSLY].

¹⁹² Speedy Trial Act, Rep. Act No. 8493, § 10(b) (1998) (Phil.). See also Rev. Crim. Pro. Rule 119, § 3(b), which mirrors the Speedy Trial Act (“[a witness] shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence”).

¹⁹³ Reyes, *supra* note 191 (noting that prosecutors never face sanctions and thus are “unconcerned” by their failure to present witnesses).

¹⁹⁴ *Id.*

¹⁹⁵ Ang See, *supra* note 49 (commenting on “overworked, underpaid, and unmotivated fiscals”). Per Executive Order No. 20 (Feb. 19, 2016) (modifying the government salary schedule), monthly salaries now range from 92,000 – 102,000 pesos (\$1,700–\$1,900) for entry-level prosecutors to 128,000–159,000 pesos (\$2,400–\$2,900) for upper-level. See Dep’t of Budget and Mgmt., National Budget Circular No. 572 (Jan. 3, 2018), <https://www.dbm.gov.ph/wpcontent/uploads/Issuances/2018/National%20Budget%20Circular/NBC-No572.pdf> [https://perma.cc/Q39Q-L4AW] (setting current pay amounts for salary grades). See also Department of Budget and Management’s website at https://www.dbm.gov.ph/wp-content/uploads/OPCCB/ios/15-LJ_2006.pdf [perma.cc/5ZSC-55UC] (last visited Jan. 2, 2019) (setting occupational service codes with corresponding salary grades). The average monthly salary for a private attorney is 101,300 pesos (\$1,930) per month. See *Legal Average Salary in Philippines 2019*, SALARY EXPLORER, <http://www.salaryexplorer.com/salary-survey.php?loc=171&loctype=1&sty=20>

Nevertheless, prosecutors are stymied by the lack of sufficient resources to perform their duties effectively.¹⁹⁶ It is also important to recognize that prosecutors act with great courage under trying circumstances, oftentimes at grave personal risk.¹⁹⁷

Unquestionably, the indiscriminate filing of cases clogs the court system.¹⁹⁸ Accordingly, this article next turns to the courts and the issue of speedy trial.

C. Courts: Speedy Trial

“Filipino Time”, “Mamaya na” [Later] and “Saka na bahala na” [Come what may] translates into all kinds of manifestation of inefficiency in government such as red tape and bureaucratic fiascos. Delivery of government services nationwide suffers from constant delays and the judiciary is no exception.¹⁹⁹

-- Associate Justice Martin Villarama, Jr., Supreme Court of the Philippines

Before the commencement of the war on drugs, Supreme Court statistics indicated that seventy-seven percent of all cases

18&jobtype=1&job=35 [perma.cc/7SPY-DBPG] (last visited Jan. 2, 2019).

¹⁹⁶ Due to fiscal constraints, justice sector agencies historically have had inadequate physical and limited logistical resources, as well as internal management constraints and weaknesses negatively affecting performance. See ADB, PHILIPPINES: COUNTRY PARTNERSHIP STRATEGY (2011–2016), SUPP. DOC. NO 19, PUBLIC SECTOR MGMT. SUBSECTOR ASSESSMENT: LEGAL AND JUDICIARY REFORMS 1–2 (2011), <https://www.adb.org/sites/default/files/linked-documents/cps-phi-2011-2016-oth-03.pdf> [perma.cc/5E95-E74Z] [hereinafter ADB SUBSECTOR ASSESSMENT]; UNDP CAPACITY ASSESSMENT, *supra* note 142, at 55; Reyes, *supra* note 191 (noting minimal DOJ budget appropriations).

¹⁹⁷ See Ted Regencia, *34 Lawyers Killed Since Duterte Became President*, AL JAZEERA (Nov. 7, 2017), <https://www.aljazeera.com/news/2018/11/philippines-human-rights-lawyer-shot-dead-negros-island-181107072451909.html> [perma.cc/UZ47-WSBT] (referencing the killings of three judges and seven prosecutors).

¹⁹⁸ De Lima & Sy, *supra* note 176, at 386. See also MESSICK, *supra* note 174, at 2 (commenting that judges spend their limited time on cases that never should have been filed).

¹⁹⁹ As penned by Justice Villarama in *Culture of Delay*, COURT OF APPEALS JOURNAL/YEARBOOK ARTICLES (2007) (archived, on file with author). See also Luisito Batongbakal, Jr., *The Intriguing History of ‘Filipino Time’*, MANILA BULL. (Oct. 20, 2016), <https://newsbits.mb.com.ph/2016/10/11/the-intriguing-history-of-filipino-time/> [perma.cc/D8KJ-PEJK].

pending before the trial courts of Philippines were criminal cases.²⁰⁰ This percentage has only increased with the thousands of newly filed drug cases.²⁰¹ In 1998, the Speedy Trial Act was enacted to expedite the disposition of criminal cases by specifying the time limits for the various stages of criminal proceedings.²⁰² Therewith, a criminal case is to be completed within one year.²⁰³

As seen in Section II, the Pemberton case proceeded precisely in conformity with that timetable.²⁰⁴

Delay & Congestion

Lengthy delays in the processing of court cases are especially common in developing countries.²⁰⁵ If a criminal case does not proceed timely in the Philippines, an accused may move to dismiss the information for denial of the right to speedy trial.²⁰⁶ The dismissal right, however, contains numerous exclusions, the most notable being the previously referenced delay resulting from witness unavailability.²⁰⁷ In addition, courts are authorized to grant continuances to serve “the ends of justice,” if, *inter alia*, failure to do

²⁰⁰ See Re: Adopting the Guidelines for Continuous Trial of Criminal Cases in Pilot Courts, Supreme Court Resolution, A.M. No. 15-06-10-SC (July 30, 2015).

²⁰¹ See Macaraig, *supra* note 165 (“There is a tidal wave flooding the judiciary. [But] there is no attendant increase in the number of courts, judges, prosecutors and public attorneys.” (quoting a Southern Illinois University professor)); Karishma Vyas, *Locked up: Inside Manila City Jail*, AL JAZEERA (Dec. 17, 2018), <https://www.aljazeera.com/indepth/features/locked-manila-city-jail181212103432270.html> [perma.cc/G2XD-6JTG] (estimating the current number of drug arrestees at 160,000, resulting in “over-stretched courts”).

²⁰² Rep. Act No. 8493; See also Supreme Court OCA Circular No. 38-1998 (Aug. 11, 1998) (providing guidance on implementation).

²⁰³ The arraignment is required to be held within 30 days of arrest; 30 days are then permitted until the pretrial conference; to the commencement of trial, another 30 days; the trial itself another 180 days; and thereafter the court’s decision is to be rendered within 90 days. Rev. Crim. Pro. Rules 110–120.

²⁰⁴ Albeit the court stated it was mindful to conclude all proceedings prior to the end of the year in order to abide by the one-year cap dictated by the Visiting Forces Agreement. Trial Observer Report #24 (Sept. 14, 2015).

²⁰⁵ MESSICK, *supra* note 174, at 1. Surveys from the Philippines, South Africa, and Peru, among other countries, show that the courts are clogged with cases, imposing long waits for resolution. The Indian High Court in Delhi has tens of thousands of cases pending, some 600 of which have been awaiting adjudication for more than 20 years. To resolve a simple commercial dispute in Singapore takes only five months, but in Egypt it takes 33 months, in Colombia and Liberia 43 months, and in Bangladesh over 48 months. *Id.*

²⁰⁶ Rev. Crim. Pro. Rule 119, § 9.

²⁰⁷ *Id.* § 3(b); Rep. Act No. 8493, § 10(b).

so could make the continuation of the proceeding “impossible” or result in a “miscarriage of justice.”²⁰⁸

In practice, the courts’ application of the exclusions has rendered the dismissal right meaningless.²⁰⁹ The reality is that criminal trials in the Philippines effectively have no time limits.²¹⁰ In denying petitions requesting dismissal for speedy trial violations, the Supreme Court has consistently taken the approach that the time limits set by the Speedy Trial Act are “flexible”:

Thus, in spite of the prescribed time limits, jurisprudence continues to adopt the view that the concept of “speedy trial” is a relative term and must necessarily be a flexible concept.

. . . . It cannot be definitely said how long is too long in a system where justice is supposed to be swift, but deliberate. [Speedy trial] is consistent with delays and depends upon circumstances. It secures rights to the accused, but it does not preclude the rights of public justice. Also, it must be borne in mind that the rights given to the accused by the Constitution and the Rules of Court are shields, not weapons; hence, courts are to give meaning to that intent.

[Prior case law] summons the courts to maintain a *delicate balance* between the demands of due process and the strictures of speedy trial on the one hand, and the right of the State to prosecute crimes and rid society of criminals on the other.²¹¹

The average time to arraignment and pretrial conference, let alone the commencement of trial, is eighteen months.²¹² Few accused

²⁰⁸ Rev. Crim. Pro. Rule 119, § 3(f) & 4(a). Regardless, no “ends of justice” continuance may be granted due to congestion of the court’s calendar, or due to lack of diligent preparation or failure to obtain available witnesses by the prosecutor. Rev. Crim. Pro. Rule 119, § 4.

²⁰⁹ Reyes, *supra* note 191.

²¹⁰ STATE HUMAN RTS. REP., *supra* note 12, at 14.

²¹¹ Olbes v. Hon. Buemio, G.R. No. 173319 (Dec. 4, 2009) (Phil.) (emphasis added) (noting the “excessive caseload of respondent judge”).

²¹² STATE HUMAN RTS. REP., *supra* note 12, at 12–13; Reyes, *supra* note 191.

are released on bail as they either are ineligible—due to the severe nature of the offense—or do not have the financial resources to post bail.²¹³ With no urgency to finish a case quickly, judges routinely grant the inevitable motions for postponement.²¹⁴ The postponements invariably are due to nonappearance of witnesses, defense lawyers, or prosecutors.²¹⁵ Hearing dates can be extended for such vague reasons as the judge or counsel are “indisposed.”²¹⁶ Upon conclusion of trial, judges habitually fail to comply with the ninety-day mandate to render their decisions.²¹⁷ As a result, the entire process for a criminal case, excluding the appeal period, takes an average of five or six years.²¹⁸

Another major contributor to the court system delay has been the inability of trial judges to effectively control proceedings at trial and properly manage trial calendars.²¹⁹ These management shortcomings have reinforced a legacy of the civil law system, namely trying cases on an intermittent, or ‘piecemeal’ basis.²²⁰ Evidence is heard in a series of short hearings over an extended period

²¹³ As previously noted, bail is a matter of right unless one is charged with an offense carrying a penalty of *reclusion perpetua* or life imprisonment. Rev. Crim. Pro. Rule 114, § 4. Then, bail is in the court’s discretion. The prosecution need only show that “evidence of guilt is strong.” *Id.*, § 8. See Kamb, *supra* note 11 (“Unfortunately, I would say that being detained for long periods of time while awaiting trial in the Philippines is fairly typical.” (quoting Carlos Conde)).

²¹⁴ Neal Cruz, *PH Has Slowest Justice System in the World*, PHIL. DAILY INQUIRER (Nov. 24, 2014), <http://opinion.inquirer.net/80394/ph-has-slowest-justice-system-in-the-world-2#ixzz5NcoENSpQ> [perma.cc/2R3T-JCBS].

²¹⁵ Reyes, *supra* note 191.

²¹⁶ Alfredo Tadiar, *Paper Presented in the Symposium on Economic Policy Agenda: Unclogging the Court Dockets 2*, INNOTECH (June 1, 1999), <http://dirp4.pids.gov.ph/ris/taps/tapspp9926.pdf> [https://perma.cc/8TA4-7YTE].

²¹⁷ See Reyes v. Judge Cruz, A.M. No. RTJ-08-2152 (Jan. 18, 2010) (“This [Supreme] Court has incessantly admonished members of the bench to administer justice without undue delay, for justice delayed is justice denied . . . [u]ndue delay in the disposition of cases amounts to a denial of justice”). See, e.g., Ador Mayol, *SC Fines Retired Judge for ‘Undue Delay in Rendering Decisions’*, PHIL. DAILY INQUIRER (Oct. 21, 2014, 10:06 AM), <http://newsinfo.inquirer.net/646005/sc-fines-retired-judge-for-undue-delay-in-rendering-decisions> [perma.cc/75GT-62MP].

²¹⁸ STATE HUMAN RTS. REP., *supra* note 12, at 14; ABA Justice Report, *supra* note 8, at 35. See also Reyes, *supra* note 191 (“many cases drag on for years”); Tadiar, *supra* note 216, at 4 (noting that it takes several years before decisions are rendered in criminal cases, both in trial and guilty plea situations). Some civil cases have taken as long as a generation to resolve. *Id.* at 1.

²¹⁹ Emmanuel Caparas & Florentino Feliciano, *The Problem of Delay in the Philippine Court System*, 62 PHIL. L.J. 201, 204 (1987).

²²⁰ *Id.* at 204; Hunter, *supra* note 108, at 6.

of time, rather than as a continuous oral proceeding.²²¹ The piecemeal system lends itself to influences that encourage delay, such as the aforementioned absence or tardiness of lawyers and judges, the leniency of judges in granting postponements, abuse by the lawyers of the procedural rules, and laxity by the judges in the rules' enforcement.²²² Due to the repeated postponements and prolonged trials—all requiring adjustments in trial calendars—piecemeal trials became even further entrenched.²²³

There is nothing new about the inordinate delay in the court system; it has been a serious problem in the Philippines since the last century.²²⁴ Over time, as the courts were unable to dispose of more cases than were filed, congestion of court dockets became the natural consequence of delay.²²⁵ An unusually high proportion of criminal cases go to trial in the Philippines.²²⁶ The civil component of criminal

²²¹ Pugh, *supra* note 21, at 15 (“[A]fter one or two witnesses are heard, the trial is often continued until a later date, and this process seems to go on and on.”); Cruz, *supra* note 214 (commenting that most judges conduct trials for only half-a-day. The trial of each case lasts for only one hour, after which it is scheduled again for a month later. Postponements usually last longer, up to 60 days, after which there may be another motion for postponement based on some insubstantial excuse. Many judges and government prosecutors absent themselves during scheduled trials, forcing still more postponements.)

²²² Caparas & Feliciano, *supra* note 219, at 204. Attorneys' absence or tardiness and abuse of rules of procedure, if not intentional (in the hope that a client's position may improve with the passage of time), is due in part to the sheer number of clients and volume of work. *Id.* at 205. *See also* Hunter, *supra* note 108, at 8 (noting that lawyers fail to appear in court, regularly seek adjournments, resist settlement, and engage in dilatory tactics).

²²³ Caparas & Feliciano, *supra* note 219, at 206. *See also* Pugh, *supra* note 21, at 22 (“It may be, however, as has been suggested to the writer by a prominent Filipino, that the practice [of piecemeal trials] is due in part to cultural factors. Filipinos do not seem as pressed for time as Americans; they seem more willing to wait for “solutions,” and delay allows time for “cooling off,” time for hard feelings to soften. Another factor may be in judicial attitudes, greater willingness on the part of the judge to let the parties take their time, a desire to delay the ultimate day when one of the contestants must be declared the loser.”).

²²⁴ *See* Pugh, *supra* note 21, at 20–21 (“In 1961, an editorial in a leading professional journal lamented, ‘The judicial system of the country is almost paralyzed.’ In 1945, the year before independence, there was a backlog in the Court of First Instance of 8,471 cases, rising to 70,556 by 1957, and to some 80,000 in 1961. The condition of the dockets today [1965] seems little improved.”).

²²⁵ Caparas & Feliciano, *supra* note 219, at 206; Hunter, *supra* note 108, at 7 (noting that annual case-flow monitoring by the Supreme Court shows an increasing number of cases filed, combined with static or decreasing disposition rates, resulting in ever growing backlogs in almost all courts).

²²⁶ Hunter, *supra* note 108, at 7 (commenting that far fewer civil cases settle and criminal cases plead than in Western common law systems). Because victims can bring complaints, there is a tendency to have criminal actions in what would otherwise be business disputes. Andy Bautista, *It's About Time: Clogged Dockets and Judicial Delay (Part III)*, PHIL. STAR (July 2, 2011, 12:00 AM),

cases involving victims has had a disincentive effect on guilty pleas, because without an agreed-upon settlement, the accused's plea admits full civil liability.²²⁷ As the courts became overburdened with cases, there simply were too few judges, court staff, prosecutors, and public defense attorneys to process the cases.²²⁸ Political differences over appointments historically have caused vacancies to remain unfilled.²²⁹ Thirty percent of trial court branches are vacant at any given time.²³⁰ Further, due to pay freezes, extremely hard work requirements, and not a great deal of respect or prestige, judicial appointment at the trial court level has not always been a desirable option for many lawyers.²³¹

<https://www.philstar.com/opinion/2011/07/02/701468/its-about-time-clogged-dockets-and-judicial-delay-part-iii> [perma.cc/9F3Y-C2HD] (noting that the courts are “teeming with frivolous matters awaiting resolution”).

²²⁷ Hunter, *supra* note 108, at 7. Under article 365 of the Philippine Revised Penal Code, any act which would be criminal if committed intentionally is also criminal if committed by either negligence or reckless imprudence. The penal sanction, however, is reduced with the less blameworthy state-of-mind. The fact that injury to person and property caused by simple imprudence is actionable criminally, when coupled with the procedure for civil-criminal joinder, means in effect that the vast majority of what in the U.S. would be ordinary tort litigation, in the Philippines is subject to adjudication as an adjunct of criminal proceedings. Pugh, *supra* note 21, at 18.

²²⁸ Valenzuela, *supra* note 58, at 845. Statistics from 2005 to 2010 show that lower courts averaged an annual caseload of more than 1 million, or 4,000 cases daily. Thus, each trial judge handled an annual average caseload of 644 cases, or about three cases to be resolved each day. Jose Albert, *The Philippine Criminal Justice System: Do We Have Enough Judges to Act on Filed Cases?* NAT'L STATISTICAL COORDINATION BOARD (2013), http://nap.psa.gov.ph/beyondthenumbers/2013/06132013_jrga_courts.asp [perma.cc/29JB-UNYJ].

²²⁹ Pugh, *supra* note 21, at 21.

²³⁰ STATE HUMAN RTS. REP., *supra* note 12, at 13; ABA Justice Report, *supra* note 8, at 44. *See also* Hunter, *supra* note 108, at 7 (observing that the consistent court vacancies result in enormous caseloads for judges who have to maintain responsibility for both their own and the vacant branches).

²³¹ Hunter, *supra* note 108, at 7; *Freedom in the World 2018: Philippines Country Report F1 (2018)*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2018/philippines> [https://perma.cc/N3FK-QQ2A] (last visited Feb. 19, 2019) (commenting that the efforts of the judiciary are stymied by inefficiency, low pay, intimidation, corruption, and high vacancy rates. Judges and lawyers often depend on local power holders for basic resources and salaries, which can lead to compromised verdicts.). *See also* BTI COUNTRY REPORT, *supra* note 38, at 11 (noting that “[r]elatively low salaries for judicial officials perpetuate the problems of bribery and interference in court proceedings.”).

Attempts at Solution

Over the past three decades, the Supreme Court often has attempted to address the delay problem.²³² The international aid community has never been short of ideas or solutions to help the Supreme Court in these efforts.²³³ For example, with assistance from the U.S. Agency for International Development (USAID), American Bar Association (ABA), and The Asia Foundation, the Supreme Court initiated regional and national pilot programs to implement continuous, vice piecemeal trials.²³⁴ It became apparent, however, that a technocratic approach to court reform could only succeed in an atmosphere of willingness to accept cultural change.²³⁵ Due to entrenched resistance, the pilot programs only had mixed success, with few courts ever fully implementing the continuous trial changes.²³⁶

The latest national rollout of a continuous trial system commenced in September 2017, following pilot testing in fifty-two trial courts in Metro Manila.²³⁷ International donors declared the pilot program showed “remarkable and significant improvement” in reducing the duration of criminal proceedings.²³⁸ Statistics

²³² Bautista, *supra* note 226.

²³³ Hunter, *supra* note 108, at 8. International solutions to increase clearance rates and reduce delay and congestion include: (1) increasing judicial time—through the appointment of more judges, the creation of additional courts, and/or extra effort on the part of individual judges; (2) making more efficient use of judicial time—through the availability of more prosecutors and public attorneys, better facilities for service and notification, the institution of judicial case management (including case processing timetables and firm court dates), computerized records and forms, high quality staff and physical facilities, and judicial training; and (3) reducing the number of cases in the courts—through higher proportions of settlements in civil cases and guilty pleas in criminal cases. *Id.*

²³⁴ See Revised Guidelines for Continuous Trial of Criminal Cases Resolution, Supreme Court Resolution, A.M. No. 15-06-10-SC (Apr. 25, 2017) [hereinafter Revised Guidelines, A.M. No. 15-06-10-SC] (ordering a nationwide rollout of continuous trial following a 52-court pilot program initiated in June 2015 with support from the ABA). See also Supreme Court Administrative Circular 3-90 (Jan. 31, 1990) (ordering “all trial courts in the Philippines [to] adopt the mandatory continuous trial system”); ADB Background Note, *supra* note 6, at 27 (commenting on the pilot programs initiated in 1989-1990).

²³⁵ Hunter, *supra* note 108, at 6, 10 (noting that lawyers’ resistance to cultural change doomed reform efforts); Villarama, *supra* note 199 (characterizing Philippine justice as beset by a “culture of delay”).

²³⁶ Hunter, *supra* note 108, at 6. See, e.g., Supreme Court OCA Circular 158-2018 (July 20, 2018) (chiding prosecutors for their intransigence and opposition to continuous trials while noting that speedy trial “has been honored in breach more than practice”).

²³⁷ Revised Guidelines, A.M. No. 15-06-10-SC.

²³⁸ *Id.*

demonstrated faster case processing time and immediate action on priority cases in the Metro Manila trial courts over the duration of the pilot project.²³⁹ Nationwide, however, judges and lawyers view the continuous trial program as “unrealistic.”²⁴⁰ Courts simply are too burdened with heavy caseloads to be able to comply with the continuous trial mandates.²⁴¹ Further, courts are dependent on the presence of government prosecutors to move criminal cases, but there are too few prosecutors available to make that a reality.²⁴²

Other court innovations to deal with court backlogs include an “e-Court” program, an automated case management information system that allows judges to electronically monitor their cases and

²³⁹ *SC Wants All Courts to Observe Continuous Trial System*, MANILA TIMES (May 8, 2017), <https://www.manilatimes.net/sc-wants-courts-observe-continuous-trial-system/326075/> [perma.cc/56VQ-WDML] (“Under the system, trials are held from Monday to Thursday and courts must call the cases at exactly 8:30 a.m. for morning hearings and 2 p.m. for afternoon hearings. The project is designed to cut trial duration in criminal cases from three to five years to just around three months.”); *Pilot Programs Help to Reduce Case Backlog in Quezon City Courts*, AM. BAR ASS’N (July 2014), https://www.americanbar.org/advocacy/rule_of_law/where_we_work/asia/philippines/news/news_philippines_programs_help_reduce_case_backlog_0714.html [perma.cc/5Z5H-K3TR].

²⁴⁰ Eileen Nazareno-Ballesteros, *New SC Trial Guidelines Draw Mixed Comments*, PHIL. STAR (May 15, 2017), <https://www.philstar.com/the-freeman/region/2017/05/15/1700416/new-sc-trial-guidelines-draw-mixed-comments> [perma.cc/2U5K-WVRH].

²⁴¹ *See id.* (“[C]ontinuous trial of criminal cases can still be done, ‘provided court is not burdened with heavy case load.’” (quoting a trial court judge)). *See Sara De Guzman, Justice Is Doomed in This Country*, PHIL. STAR (July 2, 2017), <https://www.philstar.com/opinion/2017/07/02/1715880/justice-doomed-country> [perma.cc/FP3J-3WAD] (noting that it is unlikely that continuous trial will ever succeed as there are simply too many pending cases, with more being filed every day; in some courts, about 30 to 50 criminal cases are set for hearing in a day, meaning about two-thirds of these would have to be indefinitely postponed). *See Ceballos, supra* note 16, at 1:11–1:12 (emphasizing that due to the huge caseloads, a court “apportions the time for every hearing, every case, 20-minutes maximum,” and therefore if the mandate of continuous trial is implemented, “it would be unfair for other cases to follow it in line, not to be heard by the court in that particular year.”).

²⁴² C.J. Maria Lourdes Sereno, *Speech During the Management Association of the Philippines 68th Inaugural Meeting and Induction of Officers* (Jan. 25, 2017), transcript available at <http://sc.judiciary.gov.ph/aboutsc/justices/cj-sereno/2017/CJ%20Sereno,%20January%202025,%202017,%20MAP%20Inaugural%20Meeting%20and%20Induction%20of%20Officers,%20Manila%20Peninsula,%20Makati.pdf> [perma.cc/D2RF-H3AN] (“[D]o remember that many times the judge cannot help but postpone a case if the prosecutor or policeman is absent. While we have started to be strict with the postponements requested by the prosecutors, we cannot but give them leeway considering that there are so few prosecutors in relation to the number of courts and the number of pending criminal cases.”).

receive reminders for deadlines.²⁴³ The use of judicial affidavits in lieu of direct examination of witnesses whose demeanor is not essential has been another time saving innovation.²⁴⁴ A “decongestion program” trained and hired over 600 court officers to dispose or archive over 16,000 stale cases pending in courts nationwide.²⁴⁵ Also, an “enhanced justice on wheels” program employs buses to serve as mobile courts for prisoners who have been detained for longer periods than what they would have received had they been formally convicted.²⁴⁶

In commenting on the foregoing innovations, as well as measures to relieve congestion in civil cases, then Supreme Court Chief Justice Sereno stated, “On the part of the judiciary, I can assure you that the effort to reform has been relentless.”²⁴⁷ The Supreme Court’s latest report to the President and Congress declared that the judiciary was “institutionalizing these reforms from one-time success stories to mainstream practice.”²⁴⁸ Although the reforms are indeed crucial, the court dockets are arguably too congested for the reforms

²⁴³ See AM. BAR ASS’N, *Pilot Programs Help to Reduce Case Backlog in Quezon City Courts*, *supra* note 239 (noting that in the courts where it was implemented, the automated case management system “increased transparency and efficiency while boosting courts’ monitoring and tracking capacity”).

²⁴⁴ Judicial Affidavit Rule, A.M. No. 12-8-8-SC (S.C., Sept. 4, 2012) (Phil.). See *Philippine Supreme Court Adopts Judicial Affidavit Rule to Decrease Trial Time*, AM. BAR ASS’N (Sept. 7, 2012), https://www.americanbar.org/advocacy/rule_of_law/where_we_work/asia/philippines/news/news_philippines_supreme_court_adopts_judicial_affidavit_rule_0912.html [perma.cc/T6EA-23YQ] (explaining that attorneys only need to cross-examine witnesses based on the submitted affidavits, thereby cutting the presentation of witnesses by fifty percent). *But see* Ceballos, *supra* note 16, at 31:30–33:00, 42:00–45:00 (noting that many attorneys are dissatisfied with this change in procedure because not all facts necessarily are known at the commencement of trial, when their affidavits must be submitted. Unless the cross-examiner “opens-the-door,” the attorneys are barred from supplementing the witness with those facts.).

²⁴⁵ *Judicial Reform Initiatives Gain Momentum in the Philippines*, AM. BAR ASS’N (June 14, 2017), https://www.americanbar.org/advocacy/rule_of_law/where_we_work/asia/philippines/news/news-philippines-judicial-reform-initiatives-gain-momentum-0617.html [perma.cc/T6EA-23YQ].

²⁴⁶ Bautista, *supra* note 226.

²⁴⁷ Sereno, *supra* note 242, at 21.

²⁴⁸ SUPREME COURT OF THE PHILIPPINES, JUDICIARY ANNUAL REP. (2016–JUNE 2017), at 3, http://sc.judiciary.gov.ph/pio/annualreports/SC_Annual_2016-2017_narrative%20report.pdf [https://perma.cc/VE2Y-PLPQ].

to make much of a difference.²⁴⁹ Sustainable reforms in the justice system require an increased budget in order to boost manpower, construct more courts, and enhance legal systems for productivity.²⁵⁰ But with the judiciary annually receiving less than one percent of the national budget, an increased budget has never been realized.²⁵¹

The Resultant Overcrowded Prisons

Overcrowded prisons are the most visible result of a clogged court system.²⁵² But, prolonged detention without charge or trial violates international human rights instruments such as the International Covenant on Civil and Political Rights (UNICCPR), which the Philippines ratified in 1986.²⁵³ Further, prison overcrowding is considered “cruel, inhuman, or degrading treatment”

²⁴⁹ ADB SUBSECTOR ASSESSMENT, *supra* note 196, at 2. (An analysis of available data shows that, given the enormity of the problem and with the current reform measures being implemented, it might take more than 20 years before the courts can be cleared of the pending cases.). See also Ceballos, *supra* note 16, at 1:08–1:09 (questioning whether the reforms are too “tepid” to clear up congestion in the jails and clogged court lists).

²⁵⁰ Abadines, *supra* note 33. See also Ang See, *supra* note 49 (commenting that in order to prevent miscarriages of justice, the court administrators need to be given enough resources to monitor cases and hire more judges).

²⁵¹ Abadines, *supra* note 33 (noting that 0.97% of the 2017 national budget went to the judiciary, only a slight increase from the previous year of 0.78%); Macaraig, *supra* note 165 (“What we need are institutional solutions like adding courts and funding them, which require the support of congress and the executive.” (quoting the Supreme Court Administrator)); Ceballos, *supra* note 16, at 1:13 (commenting that the judiciary does not receive the necessary budget to implement reform). See also Pia Ranada, *2019 Budget Deadlock? Roque Points to New House Leadership*, RAPPLER (Aug. 15, 2018, 2:42 PM), <https://www.rappler.com/nation/209529-2019-budget-deadlock-points-to-house-representatives-new-leadership> [perma.cc/G2UC-NWSC] (noting the Executive Branch’s intent to instill fiscal discipline for 2019).

²⁵² Abadines, *supra* note 33; Emil Sumangil, et al., *JUSTIIS?*, GMA NEWS (Aug. 8, 2018), <https://www.gmanetwork.com/news/specials/content/6/justiis-the-long-wait-for-justice/> [https://perma.cc/S6JB-EVKB] (reporting on financially poor Filipinos who must “endure suffering” as a result of the monumental case backlog and severe jail congestion); Carlos Conde, *Injustice and Misery in PH Jails*, PHIL. DAILY INQUIRER (Mar. 8, 2016), <http://opinion.inquirer.net/93566/injustice-and-misery-in-ph-jails#ixzz5Nct688xt> [perma.cc/G2UC-NWSC] (commenting on the “broken judicial system in which tens of thousands of people in the Philippines are detained for long periods without ever seeing a judge, or whose perfunctory court appearances stretch over years”).

²⁵³ United Nations, International Covenant on Civil and Political Rights [UNICCPR], art. 9(3) T.I.A.S. No. 92-908, 999 U.N.T.S. 171 (ratified by Philippines Oct. 23, 1986, entered into force Jan. 23, 1987) (“Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody.”).

under both the UNICCPR and the Convention against Torture (UNCAP), which the Philippines also ratified in 1986.²⁵⁴

The Philippines has the most overpopulated jails and prisons in Asia.²⁵⁵ Per the latest available BJMP data, 141,422 detainees (out of a jail population of 144,871) are awaiting trial or final judgment.²⁵⁶ Every month that a case is postponed—whether for a legitimate reason or not—ensures that an accused will be detained a month longer in the crowded holding jails.²⁵⁷ And with the war on drugs continuing its “relentless and chilling” pace, drug traffickers and users daily join the already overcrowded jails.²⁵⁸ The vexing problem of lengthy pretrial detention is compounded by the abysmal conditions of the jail and prison facilities.²⁵⁹ Incident thereto is the

²⁵⁴ UNICCPR, art. 10(1) (“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”); United Nations, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 16(1), T.I.A.S. 94-1120.1, 1465 U.N.T.S. 85 (ratified by Philippines on June 18, 1986, entered into force June 26, 1987) (“Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”). See *Committee Against Torture Considers the Report of the Philippines*, UNITED NATIONS HUMAN RTS., OFF. OF THE HIGH COMMISSIONER (Apr. 28, 2016), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19899&LangID=E> [perma.cc/5DHV-U7JR] (commenting, *inter alia*, on the “chronic” overcrowding of prisons in the Philippines).

²⁵⁵ See Abadines, *supra* note 33 (commenting that the Philippines has the highest number of pretrial detainees in Southeast Asia and the second highest in all of Asia); STATE HUMAN RTS. REP., *supra* note 12, at 5–6 (explaining that pre-trial detainees are held in facilities (jails) managed by BJMP, whereas convicted prisoners are held in prisons managed by the Bureau of Corrections.). See also PRISON INSIDER, *supra* note 180.

²⁵⁶ For current figures, see BJMP website, *supra* note 18 (select “Jail Population Data”).

²⁵⁷ Severino Gaña Jr., *Justice Delayed Is Justice Denied: Ensuring Efficient And Speedy Trials In The Philippines*, U. N. ASIA AND FAR EAST INST. [UNAFEI]: RESOURCE MATERIAL 95 (Mar. 2015), https://www.unafei.or.jp/publications/pdf/RS_No95/No95_VE_Gana2.pdf [perma.cc/T4AB-CJTV].

²⁵⁸ PRISON INSIDER, *supra* note 180; Abadines, *supra* note 33.

²⁵⁹ See STATE HUMAN RTS. REP., *supra* note 12, at 5–6 (noting that prisons and penal farms operate over two times their designated capacity, and municipal and provincial jails operate four times their designated capacity); Conde, *Injustice and Misery in PH Jails*, *supra* note 252 (noting that detention centers in the Philippines fail to meet the minimum United Nations standards, including inadequate amounts of food, poor nutrition, and unsanitary conditions, with torture and other forms of ill-treatment common). See also Vyas, *supra* note 201 (video depicting “inmates sleeping side-by-side on every inch of floor space”).

associated increase in illnesses and consequently the number of deaths among prisoners.²⁶⁰

Foreigners, including Americans, are not immune; although often kept in separate facilities, the length of pretrial detention and the conditions of detention are little better.²⁶¹ Foreigners arrested on drug charges can expect lengthy prison sentences to be served in the general prison population, followed by deportation.²⁶²

IV. FINAL OBSERVATIONS

A. *The Rule of Law*

Filipinos support killing drug suspects because the legal system does not work. There is no alternative to the rule of law, but what can you do? The justice system in the Philippines has so many pitfalls, no?²⁶³

-- Harry Roque, then Presidential Spokesman

This article commenced with the observation that President Duterte's goal of economic development was to be accomplished, in part, by dramatically reducing illegal drug use, crime, and corruption.

²⁶⁰ Valenzuela, *supra* note 58, at 846 (citing BJMP statistics that 221 prisoners died in 2013; followed by 261 deaths in 2014; and 319 deaths among 105,647 prisoners in 2015); Vyas, *supra* note 201 ("Illnesses like tuberculosis and skin diseases are rampant.").

²⁶¹ See Parry, *supra* note 14 (noting that foreign inmates detained at the Manila Immigration Detention Centre are "packed into tiny rooms, there is no privacy, nowhere to exercise, and nowhere to escape the oppressive humidity and the stench of fetid close-quarter living"). See also M G Martin, *American Locked Up by Bureau of Immigration Since 2013 Dies of Tuberculosis*, PHIL. LIFESTYLE NEWS (Feb. 4, 2019), <http://philippineslifestyle.com/tuberculosis-american-bicutan/> [https://perma.cc/PWK9-6GNW]; Timothy Walker, *American Man Dies in Cebu Prison after Telling Guards He Couldn't Breathe*, PHIL. LIFESTYLE NEWS (Nov. 25, 2015), <http://philippineslifestyle.com/american-tourist-dies-cebu-prison/> [perma.cc/SX8X-QNC4].

²⁶² See M G Martin, *Three Americans and two Britons Arrested for Drug Possession in Cebu*, PHIL. LIFESTYLE NEWS (June 1, 2018), <http://philippineslifestyle.com/drug-raid-cebu-americans-britons/> [perma.cc/R45W-NLVT]; *Canadian Gets Life Sentence for Selling Drugs in PH*, ABS-CBN NEWS (Oct. 6, 2016, 8:25 PM), <https://news.abs-cbn.com/news/10/06/16/canadian-gets-life-sentence-for-selling-drugs-in-ph> [perma.cc/8XY4-8CEH].

²⁶³ As quoted in Emily Rauhala, *Duterte's Philippine Drug War Has A New Defender—Whose Former Colleagues Are Aghast*, WASHINGTON POST (Dec. 23, 2017), https://www.washingtonpost.com/world/asia_pacific/dutertes-philippine-drug-war-has-a-new-defender--whose-former-colleagues-are-aghast/2017/12/23/19a18158-e024-11e7-b2e9-8c636f076c76_story.html [perma.cc/RW68-NU26].

Economists have repeatedly found that the better the rule of law, the richer the nation.²⁶⁴ Some economists believe of most importance is that laws provide stability, *i.e.* upholding property rights and the efficient administration of justice, but do not necessarily have to be moral or promote human rights.²⁶⁵ Others believe a country can be spoken of as being ruled by law only if the state's power is constrained and the basic rights and freedoms guaranteed by a constitution are protected.²⁶⁶

By the fact of the Philippines' recent reelection to the United Nations Human Rights Council, an inter-governmental body responsible for the promotion and protection of human rights around the globe, the Philippine government affirmed "vindication" of its human rights record and its vision of "keeping each and every Filipino safe and secure."²⁶⁷ International rights groups, however, view rule of law through the lens of the second economic theory.²⁶⁸ They claim that the administration has bypassed the judicial system through extrajudicial killings while voicing no regrets or concerns over lengthy pretrial detentions in dangerously overcrowded prisons.²⁶⁹

²⁶⁴ *Order in the Jungle*, THE ECONOMIST (May 13, 2008), <https://www.economist.com/briefing/2008/03/13/order-in-the-jungle> [perma.cc/UE7S-C866].

²⁶⁵ *Id.*

²⁶⁶ *Id.*; Co, *supra* note 49, at 2.

²⁶⁷ Jason Gutierrez, *Philippines Wins New Term on U.N. Rights Council, Drawing Outrage*, N.Y. TIMES (Oct. 13, 2018),

<https://www.nytimes.com/2018/10/13/world/asia/philippines-united-nations-rights-council.html> [perma.cc/4EDA-LXGF] (By a vote of 192 to 165, the Philippines won a three-year term on the 47-seat council. Departing U.S. Ambassador Nikki Haley was quoted as saying that the "lack of standards continues to undermine the organization and demonstrates again why the United States was right to withdraw" from the Council in June 2018.).

²⁶⁸ Matikas Santos, *International Rights Groups: 'Philippines Unfit for Seat on UN Human Rights Council'*, PHIL. STAR (Oct. 11, 2018, 11:41 PM), <https://www.philstar.com/headlines/2018/10/11/1859452/international-rights-groups-philippines-unfit-seat-un-human-rights-council> [perma.cc/R46G-ZZQP].

²⁶⁹ Teddy Casino, *Confronting Extrajudicial Killings Under Duterte*, RAPPLER (Sept. 29, 2016), <http://www.rappler.com/thought-leaders/146642-confronting-extrajudicial-killings-duterte> [https://perma.cc/DMW4-3UYE] (discussing the public acceptance of extrajudicial killings as a natural consequence of drug users and traffickers' criminal activities); Macaraig, *supra* note 165 ("I prefer that [inmates] sleep standing." (quoting President Duterte) [perma.cc/VQ2P-VBX7]. *But see* Catherine Valente, *Duterte Did Not Admit Guilt—Palace*, MANILA TIMES (Sept. 30, 2018), <https://www.manilatimes.net/duterte-did-not-admit-guilt-palace/446757/> [perma.cc/AA23-PUN2] (quoting Presidential Spokesman Harry Roque as stating that President Duterte made "no admission" of guilt in saying the unlawful executions of suspected drug conspirators were his "only sin").

Doubtless, the guiding values and ethical climate tone for a judicial system and adherence to rule of law begins and ends with the chief executive.²⁷⁰ Whether serious or in jest, President Duterte has been consistent in setting a certain tone:

Forget the laws on human rights. If I make it to the presidential palace, I will do just what I did as mayor. You drug pushers, hold-up men and do-nothings, you better go out. Because I'd kill you. I'll dump all of you into Manila Bay, and fatten all the fish there.²⁷¹

In my country there is no law that says I cannot threaten criminals. I do not care what the human rights guys say. I have a duty to preserve the generation. If it involves human rights, I don't give a shit. I have to strike fear.²⁷²

If you're a big-time [drug] player, I will not forgive you. In front of human rights [advocates], I will slit your throat. I don't care. I'm telling you not to do that to my country. I will really finish you off.²⁷³

Police, soldiers, and even barangay captains were offered immunity from prosecution if they shot suspected criminals in the

²⁷⁰ See *Tone at the Top: The First Ingredient in a World-Class Ethics and Compliance Program*, DELOITTE 3 (2015), <https://www2.deloitte.com/us/en/pages/risk/articles/tone-at-the-top-the-first-ingredient-in-a-world-class-ethics-and-compliance-program.html> [<https://perma.cc/LTP7-U77P>] (“The tone at the top sets an organization’s guiding values and ethical climate. Properly fed and nurtured, it is the foundation upon which the culture of an enterprise is built. Ultimately, it is the glue that holds an organization together.”).

²⁷¹ As quoted in *Factbox—Rodrigo Duterte on Crime and Punishment*, REUTERS (May 12, 2016, 8:07 PM), <https://af.reuters.com/article/worldNews/idAFKCN0Y400G> [perma.cc/6G8G-QMDJ].

²⁷² As quoted in Oliver Holmes, *Duterte Says Children Killed in Philippines Drug War are ‘Collateral Damage’*, THE GUARDIAN (Oct. 17, 2016, 2:53 AM), <https://www.theguardian.com/world/2016/oct/17/duterte-says-children-killed-in-philippines-drug-war-are-collateral-damage> [perma.cc/5L5V-NWMN].

²⁷³ As quoted in Catherine Valente, *Duterte Warns Big-Time Drug Personalities Will Die in Remainder of Term*, MANILA TIMES (Jan. 4, 2019), <https://www.manilatimes.net/duterte-warns-big-time-drug-personalities-will-die-in-remainder-of-term/491735/> [perma.cc/5ZR9-PNNQ].

performance of their duty.²⁷⁴ A year into Duterte's presidency, reports arose that fishermen were throwing bodies of drug suspects into Manila Bay.²⁷⁵ In a televised national address, Duterte named over 150 government officials, including judges and members of Congress, for having drug links and granted them twenty-four hours to turn themselves in for investigation, or risk becoming targets of a police hunt.²⁷⁶ Self-surrender, though, was no guarantee of survival.²⁷⁷ By the same token, the arrest and imprisonment of Senator and former Justice Minister De Lima on drug conspiracy charges has been perceived by human rights groups as a politically motivated action to silence a vocal critic of his policies.²⁷⁸

Filipino surveys show that the longtime failure of the justice system is at the root of Duterte's popularity and a broad popular

²⁷⁴ 'Barangay Captain Should Fight Drugs and Crime': Philippines to Arm Community Leaders as Crackdown Widens, SOUTH CHINA MORNING POST (June 13, 2018, 4:48 PM), <https://www.scmp.com/news/asia/southeast-asia/article/2150604/barangay-captain-should-fight-drugs-and-crime-philippines> [perma.cc/X7WR-JZ9Q].

²⁷⁵ Lindsay Murdoch, *Philippine Fishermen Say They Are Dumping Bodies in Duterte's War on Drugs*, SYDNEY MORNING HERALD (July 31, 2017, 12:02 AM), <https://www.smh.com.au/world/philippine-fishermen-say-they-are-dumping-bodies-in-dutertes-war-on-drugs-20170730-gxlmhz.html> [perma.cc/X6S8-GAFM].

²⁷⁶ *Full Transcript: Duterte's Exposé vs Drug-Tagged Officials*, ABS-CBN NEWS (July 31, 2017, 9:26 AM), <https://news.abs-cbn.com/focus/08/07/16/full-transcript-dutertes-expos-vs-drug-tagged-officials> [<https://perma.cc/W7WD-HNN2>] (containing the complete text of President Duterte's speech).

²⁷⁷ *See Albuera Mayor Espinosa Shot Dead Inside Jail Cell*, ABS-CBN NEWS (Nov. 5, 2016, 7:52 AM), <http://news.abs-cbn.com/news/11/04/16/albuera-mayor-espinosa-shot-dead-inside-jail-cell> [perma.cc/39FB-QYGR].

²⁷⁸ STATE HUMAN RTS. REP., *supra* note 12, at 15; Tony La Viña, *Duterte, De Lima and Lascañas: Not a Love Triangle*, RAPPLER (Mar. 20, 2017, 11:07 AM), <https://www.rappler.com/thought-leaders/163448-duterte-de-lima-lascañas-not-love-triangle> [perma.cc/AMK5-GY49] (When De Lima was head of the Philippine Human Rights Commission, she supervised an investigation into the "Davao Death Squad" killings. After stepping down as Justice Secretary, she was elected to the Senate and became a staunch critic of President Duterte's war on drugs. In February 2017, she was jailed for allegedly receiving money from drug dealers incarcerated in New Bilibid Prison in exchange for protection and certain perks. Probable cause, resting on the inmates' testimonies, was "a mere formality and a foregone conclusion."). *See also* Camille Elemia, *De Lima: One Year of Living and Surviving in Jail*, RAPPLER (Feb. 23, 2018, 5:37 PM), <https://www.rappler.com/newsbreak/in-depth/196340-de-lima-life-prison-first-year> [perma.cc/DKX3-RGJX] (describing her daily routine at Camp Crame Custodial Center). At the date of this writing, De Lima remains in pretrial custody. *See* Reina Tolentino, *Parliamentarians Renew Call for De Lima's Release*, MANILA TIMES (Feb. 24, 2019), <https://www.manilatimes.net/parliamentarians-renew-call-for-de-limas-release/516394/> [<https://perma.cc/9G44-J3BL>].

acceptance of the alleged extrajudicial killings.²⁷⁹ Accordingly, unyielding to international criticism, President Duterte pledged to continue the war on drugs up through the end of his six-year presidential term.²⁸⁰

Upon an executive branch petition, the Supreme Court ousted Chief Justice Sereno from her seat on the bench.²⁸¹ Notwithstanding, judicial independence in the Philippines traditionally has been strong, particularly in the Supreme Court.²⁸² For example, in an assertion of judicial power, the Supreme Court ordered the release of a drug suspect convicted for possession and sale of 0.02 grams of shabu (crystal meth) and admonished law enforcement to be more careful in investigating and filing cases.²⁸³ This ruling would seemingly test

²⁷⁹ Caldwell, *supra* note 160 (noting that Duterte's drug war is an important element of his popularity). See also Felbab-Brown, *supra* note 148 (commenting that 80% of Filipinos "trust" Duterte despite the high death toll of his drug war). A Social Weather Stations (a nonprofit Filipino social research institution) survey conducted in March 2019, found "79% of adult Filipinos satisfied, 8% undecided, and 13% dissatisfied with [Duterte's] performance." For the latest statistics tracking Duterte's performance, see the Social Weather Stations website at <https://www.sws.org.ph/> [<https://perma.cc/NJG5-M596>] (last updated Apr. 10, 2019).

²⁸⁰ Philip Tubeza & Tonette Orejas, *Duterte: War on Drugs to Continue Until 2022*, PHIL. DAILY INQUIRER (Dec. 9, 2017, 7:00 AM), <http://newsinfo.inquirer.net/950878/rodrigo-duterte-war-on-drugs-drug-killings-extrajudicial-killings> [perma.cc/NZG2-8RCD] (quoting Duterte as saying that foreigners and human right advocates should "leave us alone"); c.f. Daniel Sawey, *Vigilante "Justice": The Need for An International Response to End President Duterte's Lawless Antidrug Campaign in the Philippines*, 6 PENN. ST. J.L. & INT'L AFF. 242, 247 (2018) (arguing that Duterte's actions are not "a 'war' or 'armed conflict' within the scope of International Humanitarian Law").

²⁸¹ Republic of the Phil. v. C.J. Sereno, G.R. No. 237428 (May 11, 2018, *aff'd* on motion for reconsideration, June 19, 2018). The Chief Justice is nominated by the President and confirmed by the Senate. The Supreme Court by a vote of 8-6 (the Court is composed of one Chief Justice and fourteen Associate Justices) granted a government *quo warranto* petition to cancel Sereno's appointment to the bench for her alleged failure to disclose assets in the appointment process. Impeachment proceedings had been underway in Congress but the Supreme Court decision preempted the proceedings. She is the first Chief Justice ever to be removed by her peers. *Id.*

²⁸² FREEDOM HOUSE, *supra* note 231. See also Lian Buan, *UN Rapporteur: Judicial Independence in PH Under Attack*, RAPPLER (June 2, 2018), <https://www.rappler.com/nation/203903-un-diego-garcia-sayan-judicial-independence-philippines-under-attack> [perma.cc/PJ28-E229] ("[T]he President's dislike of the ousted Chief Justice [Sereno] is not an attack to the judiciary or an affront to judicial independence." (quoting Presidential Spokesman Harry Roque)).

²⁸³ People of the Phil. v. Lim, G.R. No. 231989 (Sept. 4, 2018) (Phil.). Arrested during a buy-bust operation in 2010, Lim was convicted of drug possession and distribution and sentenced to life. The Court of Appeals affirmed the conviction and sentence. The Supreme Court reversed, holding that the accused should be acquitted on reasonable doubt. The Court

President Duterte's vow to declare martial law if the judiciary intervened with his anti-drug war policy.²⁸⁴ Under the Philippine Constitution, the President may not suspend the writ of *habeas corpus* or proclaim martial law "except in cases of invasion or rebellion, when the public safety requires it."²⁸⁵ Thus, with respect to the drug war, specific requirements would have to be met (*i.e.*, concurrence of Congress and review by the Supreme Court) before a Philippine President can declare martial law.²⁸⁶

In April 2017, a Filipino attorney filed a formal complaint with the International Criminal Court (ICC) requesting it to investigate the senior executive branch for crimes against humanity through mass murder, as defined under Article 7 of the Rome Statute of the International Criminal Court.²⁸⁷ As the basis for the ICC's

characterized the case as poorly built-up, noting that mandatory procedural guidelines for custody and disposition of confiscated drugs were not met. *Id.*

²⁸⁴ Ted Regencia, *Duterte Threatens Martial Law if 'Drug War' Is Blocked*, AL JAZEERA (Aug. 10, 2016), <https://www.aljazeera.com/news/2016/08/duterte-threatens-martial-law-drug-war-blocked-160805170518830.html> [<https://perma.cc/F65M-DMFK>].

²⁸⁵ CONST. (1987), art. III, § 15 (Phil.). Duterte placed Mindanao under martial law in May 2017. Presidential Proclamation No. 216, Declaring a State of Martial Law and Suspending the Privilege of the Writ of Habeas Corpus in the Whole of Mindanao (May 23, 2017). Islamic State-inspired terrorists, aiming to establish an ISIS stronghold in Mindanao, laid a five-month siege on the predominantly Muslim city of Marawi. Given the continuing violence in the region, Congress, as affirmed *en banc* by the Supreme Court, has extended martial law three times. See Jomar Canlas, *Third Martial Law Extension Legal—SC*, MANILA TIMES (Feb. 20, 2019), <https://www.manilatimes.net/third-martial-law-extension-legal-sc/514417/> [<https://perma.cc/6F3E-3LSK>].

²⁸⁶ No declaration of martial law or the suspension of the writ of habeas corpus can last for more than 60 days unless a majority in Congress, again voting jointly, votes to extend it. See CO, *supra* note 50, at 6 (listing numerous checks on martial law powers, *e.g.*, the writ of *habeas corpus* is suspended *only* for those who are judicially charged with offenses directly related to invasion or rebellion); Jonathan de Santos, *Constitution Explained: Can Duterte Declare Martial Law?* PHIL. STAR (Aug. 10, 2016, 10:00 AM), <https://www.philstar.com/other-sections/news-feature/2016/08/10/1611972/1987-constitution-explained-can-duterte-declare-martial-law> [perma.cc/3YJM-LX59]. *But see* Medina, *supra* note 144, at 161 (fearing that with Duterte's approval ratings consistently over 80%, the likelihood of the Philippine Congress sanctioning Duterte's possible declaration of and extending martial law to the drug war "should he ask for [Congressional] support seems extremely likely").

²⁸⁷ Jude Sabio, *The Situation of Mass Murder in the Philippines* (Apr. 25, 2017), <https://www.nytimes.com/interactive/2017/04/24/world/asia/duterte-icc-complaint.html> [perma.cc/YUG3-ZB9S]. In his ICC complaint, Attorney Sabio averred that the "repeated, unchanging and continuous commission of mass murder carried out as part of a systematic or widespread attack against a civilian population falls within the definition of a crime against humanity through murder." *Id.* at 15. The seat of the ICC is established at The Hague, Netherlands, with 124 countries being States Parties to the Rome Statute. Notably, the United States, Russia, China, and India are not States Parties. United Nations, Rome Statute of the

jurisdiction, the complaint alleged that the Philippine government was incapable of investigating and prosecuting, let alone convicting any high-level officials for extrajudicial executions committed in the war on drugs.²⁸⁸ A year after the filing, the ICC Chief Prosecutor announced the Court's decision to conduct a preliminary examination into killings linked to the Philippine government's war on drugs.²⁸⁹

Replying that any deaths arose as a result of "violent resistance of the suspects" and thus were "a direct result of a lawful exercise of a police duty," President Duterte asserted violations of due process and stated the Philippines would withdraw from the ICC.²⁹⁰ In a letter addressed to the UN Secretary-General, the Philippine government gave formal notification it was pulling out of the Rome Statute.²⁹¹ The government stated that its decision to withdraw was a "principled stand against those who politicize and weaponize human rights," and it "assure[d] the community of nations that [it] continues to be guided by the rule of law embodied in its

International Criminal Court, 2187 U.N.T.S. 90, adopted July 17, 1998 (signed by Philippines Dec. 28, 2000, ratified Aug. 30, 2011), <https://iccforum.com/rome-statute> [perma.cc/BP4Y-CU4D]. See also Michael Sullivan, *Philippine Lawyer Faces Death Threats after Filing Case at the Hague against Duterte*, NAT'L PUB. RADIO (May 5, 2018, 8:43 AM), <https://www.npr.org/sections/parallels/2018/05/05/608440198/philippine-lawyer-faces-death-threats-after-filing-case-at-the-hague-against-dut> [perma.cc/BP4Y-CU4D].

²⁸⁸ Sabio, *supra* note 287, at 19 (claiming that although the Philippine judicial system is functioning, it is dependent on investigations carried out by the police, and, even if the courts convict, the President may pardon, as President Duterte has repeatedly promised to do). Cf. Ellis, *supra* note 147 ("The domestic courts are functioning and willing to entertain this matter." (quoting Presidential Spokesman Harry Roque)).

²⁸⁹ *Statement of the Prosecutor of the International Criminal Court, Mrs. Fatou Bensouda, on Opening Preliminary Examinations into the Situations in the Philippines and in Venezuela*, INT'L CRIM. CT., (Feb. 8, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat> [perma.cc/BP4Y-CU4D] (explaining that a preliminary examination is not an investigation but a process of examining available information to determine whether there is a reasonable basis to proceed with an investigation. Under article 53(1) of the Rome Statute, the Prosecutor must consider issues of jurisdiction, admissibility, and the interests of justice in making this determination).

²⁹⁰ See *Full Text: Duterte's Statement on Int'l Criminal Court Withdrawal*, RAPPLER (Mar. 20, 2018, 7:13 PM), <https://www.rappler.com/nation/198171-full-text-philippines-rodrigo-duterte-statement-international-criminal-court-withdrawal> [perma.cc/8HU6-N9K3] (containing the complete text of President Duterte's 15-page statement).

²⁹¹ *ICC Statement on The Philippines' Notice of Withdrawal: State Participation in Rome Statute System Essential to International Rule of Law*, INT'L CRIM. CT. (Mar. 20, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1371> [perma.cc/3BTE-J22J]. According to ICC rules, it takes one year for the withdrawal to take effect. Regardless, the ICC can prosecute any international crimes committed while the Philippines was still an ICC member. *Id.*

Constitution.”²⁹² Adamant about its stance, the government informed the ICC Chief Prosecutor she would be arrested if she came to the Philippines to investigate the war on drugs.²⁹³

The Senate’s Committee on Justice and Human Rights, when chaired by Senator De Lima, heard testimony that Duterte had financed the “Davao Death Squad,” which targeted not just drug dealers but also his critics and personal enemies.²⁹⁴ Denying the allegations, Duterte proudly noted that he transformed Davao into “a pleasant place for a law-abiding person to live—even a business hub.”²⁹⁵ A former Filipino Congressman provided a “darker theory”:

The strategic aim of the [extrajudicial killing] campaign is not to win the war on drugs. It is to promote a broader authoritarian agenda by establishing a climate of intimidation and fear that will make the destruction of democratic political institutions and political rights and their remaking in an authoritarian direction a ‘walk in the park.’²⁹⁶

To paraphrase the Chief Director of the Philippine Drug Enforcement Administration, if mistakes were made, the government will apologize, but if that were the case, the harm already has been done.²⁹⁷ Arguably, nations that do not demand strong security and justice systems within a framework of respect for human rights are

²⁹² Patricia Lourdes Viray, *Philippines Formally Informs UN of ICC Withdrawal*, PHIL. STAR (Mar. 16, 2018), <https://www.philstar.com/headlines/2018/03/16/1797330/philippines-formally-informs-un-icc-withdrawal> [perma.cc/FY6Q-WNYU].

²⁹³ *Duterte Warns ICC Prosecutor: ‘I Will Arrest You’*, MANILA TIMES (Apr. 13, 2018), <https://www.manilatimes.net/duterte-warns-icc-prosecutor-i-will-arrest-you/392357/> [perma.cc/5NUH-JZHP]. Since the Philippines never retreated from its stance over the year, the withdrawal went into formal effect on March 17, 2019. *President of the Assembly of States Parties Regrets Withdrawal from the Rome Statute by the Philippines*, INT’L CRIM. CT. (Mar. 18, 2019), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1443> [https://perma.cc/YWJ4-37MD].

²⁹⁴ La Viña, *supra* note 278.

²⁹⁵ Caldwell, *supra* note 160.

²⁹⁶ Professor Walden Bello, as quoted in Caldwell, *supra* note 160. *See, e.g.*, Aurora Almendral, *In Duterte’s Philippines, Having a Beer Can Now Land You in Jail*, N.Y. TIMES (July 21, 2018), <https://www.nytimes.com/2018/07/21/world/asia/philippines-duterte-crackdown.html> [perma.cc/Z96C-RE6E] (reporting that the government’s campaign against crime has taken a new turn with the police arresting 50,000 people for such minor infractions as drinking in the streets, public urination, and being outdoors without a shirt).

²⁹⁷ *See* Talabong, *supra* note 152.

condemned to live in a spiral of chronic violence and insecurity.²⁹⁸ A 2002 USAID study determined that the prospect for reform within the formal justice system had changed little since the Marcos years, due to insufficient political will and the corrosive influence of deeply ingrained habits of personal favoritism.²⁹⁹ A 2011 USAID study argued that a culture of killing with impunity coupled with the systematic failure of justice institutions “may ultimately lead down the slippery slope towards anarchy and the failure of the rule of law.”³⁰⁰ The 2018 State Department Human Rights Report concluded that the “[p]rolonged delays in the justice system reinforced the perception of impunity for national, provincial, and local government actors accused of human rights abuses.”³⁰¹

Yet, there is reason for cautious optimism. The crime rate for eight focus crimes in Metro Manila decreased by 21 percent over 2018.³⁰² The newly appointed Chief Justice is motivated to destroy the perception that justice is only for the powerful, influential, and wealthy.³⁰³ He has ordered the Court Administrator to “purge” judges nationwide who are not “protecting the rights of every Filipino, upholding and applying the law equally whether rich or poor.”³⁰⁴ He vowed to “institutionalize changes that are designed to expedite the administration of justice,” including introducing

²⁹⁸ GLOBAL IMPUNITY DIMENSIONS, *supra* note 155, at 13. *See also Failed Justice System*, *supra* note 162 (arguing that by opting to act outside the law, the government has set a negative pattern of conduct resulting in the very measures supposed to reduce crimes having the opposite effect, deepening instability, and creating a political and social environment legitimizing illegal and criminal means to solve matters).

²⁹⁹ OFF. OF DEMOCRACY AND GOVERNANCE, USAID OCCASIONAL PAPERS SERIES: ACHIEVEMENTS IN BUILDING AND MAINTAINING THE RULE OF LAW: THE PHILIPPINES 164 (2002), https://pdf.usaid.gov/pdf_docs/pnacr220.pdf [perma.cc/72QF-MQ7X].

³⁰⁰ PARREÑO, *supra* note 151, at 72 (“The culture of killing with impunity is slowly being cultivated within our shores”). *See also Lopez*, *supra* note 55 (opining that extrajudicial killings are “symptoms” of a failing justice system).

³⁰¹ STATE HUMAN RTS. REP., *supra* note 12, at 11.

³⁰² *Metro Manila Crime Rate Down in 2018—NCRPO*, MANILA TIMES (Jan. 2, 2019), <https://www.manilatimes.net/metro-manila-crime-rate-down-in-2018-ncrpo/490720/> [perma.cc/NV6M-LW63] (“A total of 14,633 incidents of murder, homicide, physical injury, rape, robbery, theft, carnapping of motor vehicles, and carnapping of motorcycles was recorded in 2018, which is 21.01 percent lower than the 18,524 recorded in 2017.”).

³⁰³ Jomar Canlas, *Bersamin Orders Purge of Corrupt Judges*, MANILA TIMES (Jan. 2, 2019), <https://www.manilatimes.net/bersamin-orders-purge-of-corrupt-judges/490508/> [perma.cc/QPF7-6T4C].

³⁰⁴ *Id.*

revisions in the Rules of Court, reforms in legal education, and innovations to the bar examinations.³⁰⁵

B. Resolutions

If he will admit what he did to my child, we are ready to forgive him. But it does not mean that we will not seek justice.³⁰⁶

-- Julita Cabillan-Laude

Studies undertaken in the 1970's noted that trials of U.S. military personnel in Asia generally were very fair and the sentences lighter than might have been expected through court martial convictions.³⁰⁷ The same holds true today.³⁰⁸ The Pemberton case arguably demonstrates that prioritization, proper attention, and resources can go a long way to rectify the Philippine prosecution crisis. Pemberton received a speedy trial, a fair trial, and a well thought-out and relatively favorable resolution. The trial court was not influenced by anti-U.S. bias. The Court of Appeals timely and carefully considered Pemberton's arguments. Even though the appeal was denied, the Court's rationale was based solidly on the facts and law. With respect to the previous rape trial of LCpl Smith, although his guilty verdict rested on uncorroborated testimony given in an atmosphere of anti-U.S. bias, the Court of Appeals' reversal cured the error. In both cases, the system worked.

Still, the foregoing narrative has shown a troubled justice system. With rights such as speedy trial not respected, in the absence of adequate money or connections, an accused can wither in jail for years.³⁰⁹ A Supreme Court task force on prison decongestion found

³⁰⁵ *Id.*

³⁰⁶ As quoted in Christine Avendaño & Jerome Aning, *Pemberton Must Show Up Tuesday—De Lima*, PHIL. DAILY INQUIRER (Oct. 21, 2014, 1:07 AM), <https://globalnation.inquirer.net/113050/pemberton-must-show-up-tuesday-de-lima> [perma.cc/5YY6-FMMH].

³⁰⁷ Cochran & Chiu, *supra* note 66, at 2.

³⁰⁸ *See, e.g.*, Hill, *supra* note 14, at 143.

³⁰⁹ Syjuco, *supra* note 57. *See* Cynthia Alkon, *The Increased Use of "Reconciliation" in Criminal Cases in Central Asia: A Sign of Restorative Justice, Reform or Cause for Concern?*, 8(1) PEPP. DISP. RESOL. L.J. 41, 59 (2007) [hereinafter *The Increased Use of "Reconciliation" in Criminal Cases in Central Asia*].

that “an innocent man is jailed for at least five years before he is eventually acquitted.”³¹⁰ Although westerners have been acquitted of criminal charges in the trial courts, the standard five years spent in pretrial detention between arrest and judgment is its own form of torment.³¹¹ Further, acquittal or conviction may hinge on the predilections or bias of the sole judge hearing the case.³¹²

Given the lack of developed bail systems to secure pretrial release and given the dire detention conditions, the overcrowded dockets create serious human rights problems.³¹³ Undeniably, the Philippines needs a methodology to handle its large number of cases efficiently.³¹⁴ On a practical level, the question in most criminal cases is not whether the accused committed the crime, but what is the fairest way to handle the particular offense and offender.³¹⁵ The solution only can be found in procedures alternative to trial, such as plea bargaining and/or restorative justice.³¹⁶

Plea Bargaining

Plea bargaining is defined as a form of negotiation by which the prosecutor and defense counsel enter into an agreement resolving one or more criminal charges against the defendant without a trial.³¹⁷

³¹⁰ Macaraig, *supra* note 165. See also citations listed in *supra* note 218.

³¹¹ See, e.g., Teresa Cerojano, *US Man Cleared of Rape after 5 Years in Philippine Jail*, PHIL. STAR (Aug. 2, 2016), <https://www.philstar.com/headlines/2016/08/02/1609345/us-man-cleared-rape-after-5-years-philippine-jail> [perma.cc/V68Q-QNN8] (reporting that a court in Metro Manila acquitted a U.S. citizen [referenced in Kamb, *supra* note 11] after finding “no clear evidence that he committed rape, as a Filipino woman alleged”). See also M G Martin, *Australian Detained without Trial Since 2013 Faces Further Delays to Justice*, PHIL. LIFESTYLE NEWS (Jan. 27, 2019), <http://philippineslifestyle.com/australian-detained-without-trial-2013/> [https://perma.cc/MXK4-RTUP] (describing the ongoing hearings of an Australian in pretrial detention on charges of human trafficking and illegal recruitment of workers wherein the evidence seemingly exonerates the accused).

³¹² See, e.g., *Australian Falsely Accused in Philippine Drug War: Court*, ABS-CBN NEWS (Oct. 14, 2016), <https://news.abs-cbn.com/news/10/14/16/australian-falsely-accused-in-philippine-drug-war-court> [perma.cc/SSU4-ZAPP] (noting that in one case a judge dismissed narcotics trafficking charges upon finding the police fabricated evidence [referenced in *A Long History*, *supra* note 156], yet another judge jailed for life another foreigner arrested in the same police operation [referenced in *Canadian*, *supra* note 262]).

³¹³ See Cynthia Alkon, *Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems*, 19 TRANSNAT’L L. & CONTEMP. PROBS. 355, 404 (2010) [hereinafter *Plea Bargaining as a Legal Transplant*].

³¹⁴ *Id.* at 384.

³¹⁵ *Id.* at 391.

³¹⁶ *Id.* at 384.

³¹⁷ *Id.* at 355, 385.

There is a worldwide trend favoring increased use of plea bargaining to shortcut the procedure of formal trials, with a resultant substantial reduction of the burden on courts and prisons.³¹⁸ Plea bargaining provides greater flexibility in sentencing by allowing the prosecution and the defense to construct more individualized sentences through the informal negotiation process, and thus giving the accused a say in his ultimate fate.³¹⁹

Plea bargaining, as a rule and a practice, is well established in the Philippines.³²⁰ The choice of whether and how a case will be plea bargained is left entirely up to the prosecutor's discretion.³²¹ No rule prescribes any quantitative or qualitative criteria for plea bargaining.³²² In deciding whether to enter into a plea bargain, the prosecutor may consider the sufficiency of the evidence and such concepts as whether the plea will "redound to the benefit of the public."³²³ Although the victim may not initiate a plea bargain, the victim may participate in the negotiations and must give his/her consent to the final resolution.³²⁴ Final approval then lies with the trial court.³²⁵

Although most criminal cases in the trial courts are drug-related, the Dangerous Drugs Act expressly prohibits plea

³¹⁸ STEPHEN THAMAN, *WORLD PLEA BARGAINING: CONSENSUAL PROCEDURES AND THE AVOIDANCE OF THE FULL CRIMINAL TRIAL*, xvii (2010) ("The 'full-blown' trial with 'all the guarantees' is no longer affordable. With the rise in crime and the more cost- and labor-intensive procedures required by modern notions of due process, legislatures and courts around the world are gradually giving priority to the principle of procedural economy and introducing forms of consensual and abbreviated criminal procedure to deal with overloaded dockets.").

³¹⁹ Alkon, *Plea Bargaining as a Legal Transplant*, *supra* note 313, at 405.

³²⁰ Rev. Crim. Pro. Rule 116, § (2). "Plea of guilty to a lesser offense—At arraignment [or before trial], the accused, *with the consent of the offended party* and the prosecutor, may be allowed by the trial court to plead guilty to a lesser offense which is necessarily included in the offense charged." (Emphasis added). See the Supreme Court's discussion and endorsement of plea bargaining in *Estipona v. Hon. Lobrigo & People of the Phil.*, G.R. No. 226679 (*en banc*) (Aug. 15, 2017) (Phil.).

³²¹ Ryan Balisacan, *Towards an Accountability Framework for the Exercise of Prosecutorial Discretion in Plea Bargaining*, 59 *ATEONEO L.J.* 379, 390–391 (2014).

³²² *Id.* at 392. Senator De Lima filed a bill entitled "An Act Providing for Rules on Plea Bargaining Agreement in Criminal Cases," proposing that in all cases, the penalty for the lesser offense to which the accused may be allowed to plead guilty shall not be more than two degrees lower than the imposable penalty for the offense charged. The bill is pending in Committee. S. 1677, 17th Cong. (2018).

³²³ Balisacan, *supra* note 321, at 391.

³²⁴ *Id.* at 392.

³²⁵ *Id.*

bargaining.³²⁶ The Supreme Court, conversely, held that this bar was contrary to the “rule-making authority” granted to it by the Constitution.³²⁷ Therewith, the Court issued a Resolution setting forth a plea bargaining framework authorizing an accused charged with possession of an illegal drug to plead guilty to a lesser offense for a lighter penalty.³²⁸ This authorization, however does not apply to cases involving possession over ten grams or any drug sales.³²⁹ Regardless, this latest measure taken by the Supreme Court should help declog court dockets and address the added jail congestion caused by the over 82,000 petty drug offenders currently incarcerated in prisons nationwide.³³⁰

Restorative Justice

Restorative justice is a process that, by involving those who have a stake in the specific offense, collectively identifies and addresses harms, needs, and obligations in order to heal and restore to the extent possible.³³¹ In customary justice contexts, disputes tend to be resolved under the authority of local, clan, or other types of community leaders through a process of consultation, mediation, and reconciliation.³³² This process commonly relies on rules and

³²⁶ Rep. Act No. 9165, § 23.

³²⁷ Art. 8, § 5(5) of the 1987 Constitution guarantees “protection and enforcement of constitutional rights, pleading, practice and procedure in all courts.” In *Estipona v. Hon. Lobrigo & People of the Phil.*, G.R. No. 226679 (*en banc*) (Aug. 15, 2017) (Phil.), the Supreme Court ruled that this language gave it the authority to allow plea bargaining: “Such [plea bargaining] rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade and shall not diminish, increase or modify substantive rights.”

³²⁸ Adoption of the Plea Bargaining Framework in Drugs Case, Supreme Court Resolution, A.M. No. 18-03-16-SC (Apr. 10, 2018). Where the quantity possessed is less than five grams (of shabu, etc.), which calls for a penalty of 12 to 20 years, the accused can bargain it down to six months to four years. Where the quantity is five to ten grams, which calls for a penalty of 20 years to life, the accused can bargain it down to 12 to 20 years. *Id.*

³²⁹ *Id.*

³³⁰ See Edu Punay, *Plea Bargain Eases Drug Case Backlog*, PHIL. STAR (July 9, 2018, 12:00 AM), <https://www.philstar.com/headlines/2018/07/09/1831871/plea-bargain-eases-drug-case-backlog> [perma.cc/XK8M-UK69].

³³¹ Alkon, *The Increased Use of “Reconciliation” in Criminal Cases in Central Asia*, *supra* note 309, at 66.

³³² *Id.* at 80; U.S. DEP’T OF STATE: BUREAU OF INT’L NARCOTICS AND LAW ENFORCEMENT AFF., INL GUIDE TO JUST. SECTOR ASSISTANCE 33 (2018), <https://www.state.gov/documents/organization/222048.pdf> [perma.cc/FE2R-L6M3] (discussing the process of customary justice).

procedures that are deeply rooted in the social, cultural, and spiritual contexts and values of the community.³³³ In this sense, customary justice is viewed as being more legitimate and relevant to aspects of daily life and promoting social harmony and reconciliation than retributive justice.³³⁴

President Marcos formalized this process through the “barangay justice system” (*Katarungang Pambarangay*), a community mechanism based on traditional (pre-Spanish) methods of village dispute resolution.³³⁵ The barangay is the smallest political unit in the Philippines, and everyone in the country belongs to one of the over 42,000 barangays.³³⁶ The system rules were slightly amended in 1991.³³⁷ Under both regimes, all disputes between and among residents of the same municipality are to be brought to the barangay first for conciliation and mediation, before they are brought before regular courts.³³⁸ Misdemeanor crimes are likewise brought under the barangay’s jurisdiction.³³⁹ The system is overseen by the barangay captain (*punong barangay*), the highest elected official of the barangay and its executive.³⁴⁰

³³³ INL GUIDE, *supra* note 332, at 33.

³³⁴ *Id.* See *Restorative Justice: Legal Framework and Practices in the Philippines*, PHILRIGHTS (2017), <http://philrights.org/human-rights-resources/research-outputs/restorative-justice/> [perma.cc/2RQ9-69SV] (“The prevailing justice system in the country is punitive and retributive in nature. As such, it allows little room for genuine healing. On the other hand, the restorative justice system, while recognizing that crimes are wrong and should be prevented, also acknowledges that these are primarily offenses against human relationships. The fact that these are violations of existing laws comes as only secondary to this consideration.”).

³³⁵ Establishing a System of Amicably Settling Disputes at the Barangay Level, Presidential Decree No. 1508 (June 11, 1978). The objectives of the Decree are to perpetuate and recognize the “time-honored tradition” of amicably settling disputes among family and barangay members without judicial resources, and thereby preserve and develop Filipino culture and relieve the courts of docket congestion. *Id.* at Preamble. Matters under dispute are to be brought for mediation and amicable settlement before a body called the *Lupong Tagapayapa*, composed of the barangay captain, as chairman, and ten to twenty members of the community with reputations for integrity, fairness, and probity. *Id.* at §§ 1–4.

³³⁶ An Act Providing for a Local Government Code, Rep. Act 7160, § 384 (1991), as amended (Phil.) (establishing the role of the barangay as the basic political unit to plan and implement government policies and projects in the community, to serve as a community forum, and to settle disputes amicably). See also ABA Justice Report, *supra* note 8, at 16–17.

³³⁷ Rep. Act 7160, §§ 399–422.

³³⁸ *Id.*, § 408.

³³⁹ *Id.*, § 408(c).

³⁴⁰ ABA Justice Report, *supra* note 8, at 17; Tadiar, *supra* note 216, at 6. See also Rep. Act 7160, § 389(b)(10) (establishing the *punong barangay* as the chief executive of the

As noted previously, when a criminal action is instituted, the civil action for the recovery of civil liability arising from the offense charged is deemed instituted with the criminal action.”³⁴¹ Thereby, the criminal procedural rules allow for reconciliation through civil settlement of private prosecution cases (*i.e.*, larceny, robbery, estafa (fraud), assault, rape, homicide, etc.).³⁴² Similarly, the civil code mandates the judge “to persuade the litigants in civil cases to agree upon some fair compromise.”³⁴³

Justice in the Philippines is not about revenge; rather, justice is about maintaining or restoring a social balance.³⁴⁴ To be sure, some complainants are motivated purely by revenge or extortion.³⁴⁵ But most complainants are not interested in punishing the other party with a serious jail sentence or a fine.³⁴⁶ Rather, the aggrieved party desires to ventilate his/her grievance, explore the cause of the problem, and save face through assurances the offending conduct will not be repeated.³⁴⁷ Apologies offer the opportunity for reconciliation and healing, which is viewed by many victims as being as important as financial compensation.³⁴⁸

Significantly, if a case is settled pretrial with the complainant signing an affidavit of desistence, an overworked public prosecutor

barangay government with duties to include administering the operation of the *Katarungang Pambarangay*).

³⁴¹ Rev. Crim. Pro. Rule 111, § (1)(a).

³⁴² *Id.* See Republic of the Phil. v. Hon. Sunga, G.R. No. L-38634 (June 20, 1988). See also Alkon, *The Increased Use of “Reconciliation” in Criminal Cases in Central Asia*, *supra* note 309, at 104.

³⁴³ Civil Code, § 2029, Rep. Act 3185 (1950), as amended (Phil). See Tadiar, *supra* note 216, at 8.

³⁴⁴ See Grimwald, *Pemberton vs. Laude: A Classic Case of Pinoy Injustice*, GETREALPOST (Aug. 25, 2015), <http://www.getrealphilippines.com/blog/2015/08/pemberton-vs-laude-classic-case-pinoy-injustice/> [perma.cc/9QZS-QE9C] (discussing the Pemberton case and noting that a harmonious community relationship is imperative).

³⁴⁵ See, e.g., Kamb, *supra* note 11 (reporting on a U.S. citizen who was detained for five years on a rape charge based solely on the testimony of a woman apparently bent on retaliation. Her representative repeatedly visited the accused in jail, trying to persuade him to pay money in exchange for her dropping the rape claim. No physical evidence was ever produced that a rape occurred; rather, the evidence showed that at the time of the commission of the alleged crime, the accused was an eight-hour drive away.). The accused was acquitted at trial. See also Cerojano, *supra* note 311.

³⁴⁶ Tadiar, *supra* note 216, at 13.

³⁴⁷ *Id.*

³⁴⁸ Margareth Etienne & Jennifer Robbennolt, *Apologies and Plea Bargaining*, 91 MARQ. L. REV. 295, 297 (2007).

rarely will press the criminal case.³⁴⁹ Given the strains on the justice system's resources, a compromised case is one less case in the clogged dockets.³⁵⁰ For example, a trial court in Cebu dismissed the criminal charges against three U.S. Navy personnel who had beaten a taxi-driver over a dispute involving the amount of cab fare.³⁵¹ At the court hearing, the victim formally accepted the sailors' apology and acknowledged the sailors had agreed to pay "some amount" for his damages.³⁵²

Although the barangay justice system was established to settle disputes between and among residents of the *same* barangay, the principles behind enlisting the barangay captain and/or other trusted elders of the same community as the victim to participate in and guide reconciliation and settlement, could apply equally to any criminal/civil matter under dispute.³⁵³ Although there is no requirement, let alone authority for a barangay captain to involve himself in serious criminal matters occurring outside his barangay, there is little to be lost and much to be gained for an attorney for an accused to appeal to the barangay captain, either voluntarily or for a fee, to bring about "the time-honored tradition" of conciliation.³⁵⁴

³⁴⁹ Pugh, *supra* note 21, at 19; Sabha McManus & Sophie C. Millner, *Reflections on Restorative Justice in the Philippines*, HUMAN RIGHTS F. 32 (2016), <http://philrights.org/wp-content/uploads/2010/10/Reflections-on-restorative-justice-in-the-Philippines.pdf> [<https://perma.cc/K65B-44SQ>] ("Prosecution only proceeds if the offender fails to make sufficient reparation."). See *supra* note 67 and accompanying discussion of affidavits of desistence.

³⁵⁰ Balisacan, *supra* note 321, at 405.

³⁵¹ *Filipino Taxi Driver Drops Charges Against U.S. Servicemen*, THE FREE LIBR.: ASIAN ECON. NEWS (Mar. 30, 2000), <https://www.thefreelibrary.com/Filipino+taxi+driver+drops+charges+against+U.S.+service+men.-a061655198> [perma.cc/Z79P-JHJE].

³⁵² *Id.* (attributing the settlement amount to be \$5,000).

³⁵³ In his capacity as a Navy foreign liaison officer, the author often enlisted barangay captains to help settle criminal cases. See Presidential Decree No. 1508, Preamble ("time-honored tradition of amicably settling disputes"). Cf. James Fallows, *A Damaged Culture*, THE ATLANTIC (Nov. 1987), <https://www.theatlantic.com/magazine/archive/1987/11/a-damaged-culture/505178/> [perma.cc/UK5U-6YBM] (arguing that loyalty to the residents of one's barangay overcomes the Filipino nationalistic spirit and proclivity for reconciliation).

³⁵⁴ A feature of Filipino culture at the community level is the desire to extend assistance without it being requested and offer aid when asked. W. TIMOTHY AUSTIN, BANANA JUSTICE: FIELD NOTES ON PHILIPPINE CRIME AND CUSTOM 32 (1999) (the title referring to the village tradition of resolving disputes in a secluded area sitting on banana leaves and/or under a banana tree). If barangay captains are to preserve their credibility as strong and efficient leaders, they must be able to resolve disputes: "A good captain is able to take care of things." *Id.* at 21. Barangay captains are able to retain a sense of autonomy by bending rules to suit village-level needs rather than explicitly following national guidelines. *Id.* at 23. It is

Mediation makes most sense in the more severe cases and is a style of informal control familiar to Filipinos of the provinces.³⁵⁵

Conclusion

The twin instruments of plea bargaining and restorative justice thus can be intertwined to mitigate both the charged offense and the punishment. Of course, serious crimes such as homicide, rape, and robbery usually will be fully prosecuted at the criminal trial level, regardless of apology or reconciliation.³⁵⁶ Nonetheless, as has been extensively argued herein, it is only through expressions of remorse and acceptance of responsibility, including compensation of the victim, that the police, prosecution, and judge will be encouraged to divert an offender out of the formal system.³⁵⁷ Were Pemberton to have timely accepted responsibility, preferably under the aegis of Julita Cabillan-Laude's barangay captain, doubtless his remorse could have diluted anti-U.S. sentiment and concluded his case with a more favorable sentencing resolution.³⁵⁸

As the above-cited quote from Julita Cabillan-Laude demonstrates, sincere remorse and apology has impact.³⁵⁹ The lesson

considered customary and acceptable, albeit not technically legal, for one of the parties to pay the mediator a fee for his services. *Id.* at 46. Simply, locals are influenced, even if subtly, by the presence of high-status individuals in their matters. *Id.* at 105. *See also* ABA Justice Report, *supra* note 8, at 41 (noting that studies show that barangay mediators usually persuade the parties to settle their dispute).

³⁵⁵ AUSTIN, *supra* note 354, at 114. Community spirit flourishes not only in the remote barrios but also in the middle of Manila because of the nationwide networking and interconnectivity of the barangay systems. *Id.* at 151. *See also* Karl Garcia, *Community-Based Progress: The Barangay Rules*, THE SOCIETY OF HONOR: THE PHIL. (May 26, 2016), <https://joeam.com/2016/05/26/community-based-progress-the-barangay-rules/> [perma.cc/KB7G-T5SW] (opining that barangays rule the Philippines).

³⁵⁶ Balisacan, *supra* note 320, at 409 (commenting that the chief prosecutor is presumed to have a clear understanding of the community's criminal justice needs).

³⁵⁷ *See* ABA Justice Report, *supra* note 8, at 41.

³⁵⁸ *See* AUSTIN, *supra* note 354, at 19 (noting that rural Filipinos "prefer more traditional pathways to justice"). Notably, Julita Cabillan-Laude is a resident of a remote village in Leyte. CALL HER GANDA, *supra* note 83 (select "Subjects" for a biography of Julita Cabillan-Laude). *See also* Meredith Talusan, *The Aftermath of a Marine's Conviction in the Death of a Philippine Trans Woman*, BUZZFEEDNEWS (Jan. 3, 2016), <https://www.buzzfeednews.com/article/meredithtalusan/the-aftermath-of-jennifer-laude-and-joseph-scott-pemberton#> [https://perma.cc/8UJZ-6DN9] (quoting an Olongapo City Councilor as saying that local residents were "ready to move on—starting with normalizing relations with U.S. troops").

³⁵⁹ Pemberton never exhibited any remorse or accepted responsibility for the crime, thus the Laude family was not interested in settlement. *See Murder Trial for US Marine*

to be learned is that the “speedy administration of justice” in the Philippines occurs upon settlement of the civil case through the well-skilled application of restorative justice, as then the criminal case follows.³⁶⁰ In so doing, the common Filipino cultural traits of *utang na loob* (reciprocity) and *pakikisama* (togetherness) can combine to restore social balance and thereby realize an otherwise elusive justice.³⁶¹

Pemberton, *supra* note 87. *See also* Etienne & Robbennolt, *supra* note 348, at 296–297 (commenting that victims who receive apologies are more likely to forgive and prefer more lenient punishment for the wrongdoer).

³⁶⁰ *See, e.g.*, Ceballos, *supra* note 16, at 1:02–1:05 (commenting that an accused’s criminal sentence depends in large part on the “good will” of the complainant in accepting a financial settlement).

³⁶¹ *See* BTI COUNTRY REPORT, *supra* note 38, at 14.