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

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This Article will assess the ramifications of the country’s “war on drugs” upon its criminal justice system, but first we will examine the local murder trial of a U.S. Marine to place the Philippine criminal justice system into perspective.

An archipelago nation of more than 100 million people, the Philippines has a rich history combining Asian, European, and American influences. Its legal system is a mixture of civil, common,
Islamic, and customary law. 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. The Philippines and the United States afford similar constitutional rights to criminal defendants. 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.” The Philippine Revised Rules of Criminal Procedure sets out the rights of an accused at trial; listed
first is the right “to be presumed innocent until the contrary is proved beyond reasonable doubt.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{13}

\textsuperscript{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.


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.\textsuperscript{14} Offenses against local nationals are not typical but neither are they unusual.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{18}

\begin{footnotesize}
\begin{enumerate}
\item 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).
\item 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. \textit{Id.} at 110; Americans rank second in number. \textit{Id.}
\end{enumerate}
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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

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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.


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.

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

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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. 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. The enumerated factors are practically identical to the list of trial rights set out in the Philippine Revised Rules of Criminal Procedure. Of the commonly listed enumerated rights, the right to a speedy, impartial and public trial notably stands out. 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.

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. 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.
31 See The Four Universal Principles, WORLD JUST. PROJECT, https://worldjusticeproject.org/about-us/overview/what-rule-law [perma.cc/NY3N-BVC9] (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. The WJP survey ranked the Philippines 90th out of 126 countries in terms of how the rule of law is experienced.

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).

The Philippines performs poorly in most international corruption rankings. 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. 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...
competitive market economy. 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.

A “plunder” law was passed to deter officials from stealing high amounts of public monies. 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. Other high-profile plunder prosecutions

38 BERTELSMANN STIFTUNG, BTI 2018 COUNTRY REPORT—PHILIPPINES 4, 16 (2018), https://www.bitproject.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. The “anarchy of families” look out for each other’s interests and resist any meaningful political and economic reforms. 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.

The Philippine Constitution empowers the media and citizens to raise issues publicly without fear. 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. Over the last

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.


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. Consequently, the system is tilted towards those with power.

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. 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/CSPS-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 really is no justice, just-“tis,”—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 Raymond 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).

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

In section IV, this Article will offer reflections on the rule of law and whether the Philippine justice system is “a mess,”\textsuperscript{54} “decaying,”\textsuperscript{55} “rotten,”\textsuperscript{56} and “dysfunctional,”\textsuperscript{57} as characterized by some critics, or whether there are “glimmers of hope”\textsuperscript{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

\textsuperscript{52} Id.

\textsuperscript{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, \textit{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, \textit{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].


\textsuperscript{56} ALRC \textit{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).


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).
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
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,

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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 unpromediated murder and received 18 years); United States v. Smith, 18 M.J. 625 (N.M.C.M.R. 1984) (Sailor convicted at trial of unpromediated murder and received 40 years); United States v. Hardison, 17 M.J. 701 (N.M.C.M.R. 1983) (Marine convicted at trial of unpromediated 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.\(^{76}\)

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\(^{71}\) 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 counter-terrorism 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.).


\(^{76}\) 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”).

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.)


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.


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

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

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. Pemberton was inebriated, but friendly. He did not know they were transgender.

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. 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).

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”).


Id.

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/2016/04-us-marine-joseph-scott-pemberton-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.

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. 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. Pemberton waived his right to file a counter-affidavit.

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. 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. Homicide is punishable with a


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).


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. Justice Secretary De Lima denied his application.  

Upon a probable cause finding, the respondent is referred to as the “accused.” Cases are filed at a local courthouse and are then assigned to branches (judges) by lottery as an anti-corruption measure. Here, the assigned trial judge concurred in the probable cause finding and issued a warrant of arrest. 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.

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


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. Each judge is the sole trier of questions of fact and law; there are no juries in the Philippines. The prosecution presented its case to the judge over a series of intermittent hearing days, concluding on June 30, 2015. Although court cases rarely are closed to the media in the Philippines, reporters were banned from the courtroom.

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

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[,] [n]o 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/YEVS-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.”).


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


\(^{119}\) *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).

\(^{121}\) *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.

\(^{122}\) *People of the Phil. v. Pemberton*, CA-G.R. CR No. 38620, at 17; Trial Observer Report #26 (Dec. 1, 2015).

\(^{123}\) *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.”).

\(^{124}\) *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

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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 . . . only 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.\textsuperscript{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.\textsuperscript{132} Attorney Roque denounced the Visiting Forces Agreement, denounced the “light penalty,” and emphasized the Laude family’s opposition to early release.\textsuperscript{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.\textsuperscript{134}

\textsuperscript{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. \textit{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). \textit{See Operational Law Handbook, supra note 15, at 289–290 (discussing the same).}

\textsuperscript{132} AC Nicholls, \textit{Court Affirms Pemberton’s Conviction but Reduces Sentence to up to 10 Years}, CNN \textit{Philippines} (Apr. 4, 2016),

\textsuperscript{133} \textit{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, \textit{Pemberton Camp Detention an Extension of NBP}, \textit{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 \textit{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.

\textsuperscript{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. \textit{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. 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.

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
relentless and chilling, if you will, as on the day it began.\textsuperscript{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.\textsuperscript{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.\textsuperscript{139} Required to have a four-year degree, many police officers have degrees in criminology.\textsuperscript{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.\textsuperscript{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.\textsuperscript{142}
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.” Consequently, Rodrigo Duterte campaigned for presidential office vowing to eradicate illegal drugs from Philippine society. Upon election, President Duterte encouraged police to violently crack down on illegal drug use.

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. 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.

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.” 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. In any
case, riding-in-tandem killings are nothing new in the Philippines.\textsuperscript{150}
Dating back to the Marcos administration, extrajudicial punishments
allegedly have been employed to eliminate political opposition,
avivist groups, and critical journalists.\textsuperscript{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.\textsuperscript{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
demed drug users and sellers.\textsuperscript{153} The vast majority of victims have

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\textsuperscript{150} Carlos Conde, \textit{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/LSSN-55HC] (“Over the past three decades, [such killings] have been the \textit{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. \textit{Id.}
\textsuperscript{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, \textit{PDEA
Drug List: More Than 200 Barangay Officials Linked To Illegal Drugs}, RAPPLER (May 2,
2018), https://www.rappler.com/nation/2014011-list-names-barangay-officials-linked-illegal-drugs [perma.cc/2CS5-A9PS] (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.”).
\textsuperscript{153} AMNESTY INT’L, supra note 145, at 7. \textit{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/WU5E-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.  

The police force historically has been perceived as beset by a culture of impunity. 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. Accordingly, successive generations of police commanders learned that the best way to advance their careers was to carry out the will of politicians. Although salaries have been increased under


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, 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.” Consequently, the police force has been locally regarded as one of the Philippines’ most corrupt institutions. 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.”

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. President Duterte characterized the United Nations as involved-in-drugs/463678/ (“I will give you a prize and a trip to Hong Kong.” (quoting President Duterte)).

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 (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.

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/ (commenting that the government has effectively institutionalized...
“naive and foolish” for condemning his anti-drug actions.\textsuperscript{162} In his view, realism lies in doing what has to be done, regardless of how it is done.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{167}


\textsuperscript{163} \textit{Id. See also} John Nery, \textit{Duterte: ‘We Planted Evidence . . . (and) the Intrigues}, \textit{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)).

\textsuperscript{164} \textit{Conde, supra} note 137.


\textsuperscript{166} ADB Background Note, \textit{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).

\textsuperscript{167} \textit{Id. See also} Mark Merueñas, \textit{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.
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.
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. The net effect is that only circa twenty percent of pretrial detentions lead to eventual convictions.

Legislators have submitted numerous bills to reform the criminal investigation system. 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. The skilled exercise of prosecutorial direction and discretion obviously could streamline the conduct of preliminary investigations. The bills, however, have languished in committee.

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

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180 PRISON INSIDER, PHILIPPINES: PRISON POPULATION (Mar. 2017), https://www.prison-insider.com/countryprofile/prisonsinphilippines?c=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).


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.”).


185 Syjuco, supra note 57.

186 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.\textsuperscript{188} The drug war has further exacerbated the need for more prosecutors.\textsuperscript{189} In 2018, the courts had a backlog of 780,000 criminal cases, with prosecutors individually handling an average of 500 cases.\textsuperscript{190}

As a result of case overload, prosecutors often appear in court without adequate preparation or without their witnesses.\textsuperscript{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.\textsuperscript{192} Pursuant thereto, prosecutors have delayed trials simply by not presenting witnesses.\textsuperscript{193} With witnesses absent, the presiding judge must invariably postpone the hearing.\textsuperscript{194}

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

\textsuperscript{188} Hunter, supra note 108, at 8.
\textsuperscript{190} State Human Rights 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.
\textsuperscript{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”).
\textsuperscript{193} Reyes, supra note 191 (noting that prosecutors never face sanctions and thus are “unconcerned” by their failure to present witnesses).
\textsuperscript{194} Id.
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.

\textbf{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.\(^{199}\)

\begin{quote}
-- Associate Justice Martin Villarama, Jr., Supreme Court of the Philippines
\end{quote}

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

\begin{footnotesize}
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\footnote{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. \textit{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).}}
\footnote{De Lima & Sy, supra note 176, at 386. \textit{See also MESSICK, supra note 174, at 2 (commenting that judges spend their limited time on cases that never should have been filed).}}
\footnote{As penned by Justice Villarama in \textit{Culture of Delay}, \textit{COURT OF APPEALS JOURNAL/YEARBOOK ARTICLES} (2007) (archived, on file with author).} 
\end{tabular}
\end{footnotesize}
pending before the trial courts of Philippines were criminal cases.\textsuperscript{200} This percentage has only increased with the thousands of newly filed drug cases.\textsuperscript{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.\textsuperscript{202} Therewith, a criminal case is to be completed within one year.\textsuperscript{203}

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

\section*{Delay & Congestion}

Lengthy delays in the processing of court cases are especially common in developing countries.\textsuperscript{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.\textsuperscript{206} The dismissal right, however, contains numerous exclusions, the most notable being the previously referenced delay resulting from witness unavailability.\textsuperscript{207} In addition, courts are authorized to grant continuances to serve “the ends of justice,” if, \textit{inter alia}, failure to do

\textsuperscript{200} \textit{See} \textit{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)}.

\textsuperscript{201} \textit{See} \textit{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, \textit{Locked up: Inside Manila City Jail}, \textit{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”).}

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

\textsuperscript{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. \textit{Rev. Crim. Pro. Rules 110–120}.

\textsuperscript{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. \textit{Trial Observer Report #24 (Sept. 14, 2015)}.

\textsuperscript{205} \textit{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.}

\textsuperscript{206} \textit{Rev. Crim. Pro. Rule 119, § 9}.

\textsuperscript{207} \textit{Id.} § 3(b); \textit{Rep. Act No. 8493, § 10(b)}. 
so could make the continuation of the proceeding “impossible” or result in a “miscarriage of justice.”

In practice, the courts’ application of the exclusions has rendered the dismissal right meaningless. The reality is that criminal trials in the Philippines effectively have no time limits. 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.

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

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209 Reyes, supra note 191.

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


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.\textsuperscript{213} With no urgency to finish a case quickly, judges routinely grant the inevitable motions for postponement.\textsuperscript{214} The postponements invariably are due to nonappearance of witnesses, defense lawyers, or prosecutors.\textsuperscript{215} Hearing dates can be extended for such vague reasons as the judge or counsel are “indisposed.”\textsuperscript{216} Upon conclusion of trial, judges habitually fail to comply with the ninety-day mandate to render their decisions.\textsuperscript{217} As a result, the entire process for a criminal case, excluding the appeal period, takes an average of five or six years.\textsuperscript{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.\textsuperscript{219} These management shortcomings have reinforced a legacy of the civil law system, namely trying cases on an intermittent, or ‘piecemeal’ basis.\textsuperscript{220} Evidence is heard in a series of short hearings over an extended period.

\textsuperscript{213} As previously noted, bail is a matter of right unless one is charged with an offense carrying a penalty of \textit{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.” \textit{Id.}, § 8. See Kamb, \textit{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)).

\textsuperscript{214} Neal Cruz, \textit{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#ixzz35NcoENSpQ [perma.cc/2R3T-JCBS].

\textsuperscript{215} Reyes, \textit{supra} note 191.


\textsuperscript{218} STATE HUMAN RTS. REP., \textit{supra} note 12, at 14; ABA Justice Report, \textit{supra} note 8, at 35. \textit{See also} Reyes, \textit{supra} note 191 (“many cases drag on for years”); Tadiar, \textit{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. \textit{Id.} at 1.


\textsuperscript{220} \textit{Id.} at 204; Hunter, \textit{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),

https://scholarship.law.upenn.edu/alr/vol14/iss2/3
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. As the courts became overburdened with cases, there simply were too few judges, court staff, prosecutors, and public defense attorneys to process the cases. Political differences over appointments historically have caused vacancies to remain unfilled. Thirty percent of trial court branches are vacant at any given time. 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.


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.

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].

Pugh, supra note 21, at 11.

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).
Attempts at Solution

Over the past three decades, the Supreme Court often has attempted to address the delay problem. The international aid community has never been short of ideas or solutions to help the Supreme Court in these efforts. 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. It became apparent, however, that a technocratic approach to court reform could only succeed in an atmosphere of willingness to accept cultural change. Due to entrenched resistance, the pilot programs only had mixed success, with few courts ever fully implementing the continuous trial changes.

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

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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.


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. Nationwide, however, judges and lawyers view the continuous trial program as “unrealistic.” Courts simply are too burdened with heavy caseloads to be able to comply with the continuous trial mandates. 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.

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

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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/new_s/news_philippines_programs_help_reduce_case_backlog_0714.html [perma.cc/5ZSH-K3TR].


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%2025,%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. The use of judicial affidavits in lieu of direct examination of witnesses whose demeanor is not essential has been another time saving innovation. A “decongestion program” trained and hired over 600 court officers to dispose or archive over 16,000 stale cases pending in courts nationwide. 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.

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.” 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.” 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/newss/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.).


246 Bautista, supra note 226.

247 Sereno, supra note 242, at 21.

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).


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.\footnote{254} The Philippines has the most overpopulated jails and prisons in Asia.\footnote{255} Per the latest available BJMP data, 141,422 detainees (out of a jail population of 144,871) are awaiting trial or final judgment.\footnote{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.\footnote{257} And with the war on drugs continuing its “relentless and chilling” pace, drug traffickers and users daily join the already overcrowded jails.\footnote{258} The vexing problem of lengthy pretrial detention is compounded by the abysmal conditions of the jail and prison facilities.\footnote{259} Incident thereto is the

\footnote{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, \textit{United Nations Human Rts., Off. of the High Commissioner} (Apr. 28, 2016), \url{https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19899&LangID=E} [perma.cc/5DHV-U7JR] (commenting, \textit{inter alia}, on the “chronic” overcrowding of prisons in the Philippines).

\footnote{255} See Abadines, \textit{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); \textit{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 \textit{Prison Insider, supra} note 180.

\footnote{256} For current figures, see BJMP website, \textit{supra} note 18 (select “Jail Population Data”).


\footnote{258} \textit{Prison Insider, supra} note 180; Abadines, \textit{supra} note 33.

\footnote{259} See \textit{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, \textit{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, \textit{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.\textsuperscript{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.\textsuperscript{261} Foreigners arrested on drug charges can expect lengthy prison sentences to be served in the general prison population, followed by deportation.\textsuperscript{262}

\section*{IV. FINAL OBSERVATIONS}

\subsection*{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?\textsuperscript{263}

\begin{flushright}
-- Harry Roque, then Presidential Spokesman
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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.

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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.”).


Economists have repeatedly found that the better the rule of law, the richer the nation.\textsuperscript{264} Some economists believe of most importance is that laws provide stability, \textit{i.e.} upholding property rights and the efficient administration of justice, but do not necessarily have to be moral or promote human rights.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{267} International rights groups, however, view rule of law through the lens of the second economic theory.\textsuperscript{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.\textsuperscript{269}

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\item \textsuperscript{264} \textit{Order in the Jungle}, \textsc{The Economist} (May 13, 2008), https://www.economist.com/briefing/2008/03/13/order-in-the-jungle [perma.cc/UE7S-C866].
\item \textsuperscript{265} Id.
\item \textsuperscript{266} Id.; Co., supra note 49, at 2.
\item \textsuperscript{267} Jason Gutierrez, \textit{Philippines Wins New Term on U.N. Rights Council, Drawing Outrage}, \textsc{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.).
\item \textsuperscript{269} Teddy Casino, \textit{Confronting Extrajudicial Killings Under Duterte}, \textsc{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, \textit{Duterte Did Not Admit Guilt—Palace}, \textsc{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”).
\end{itemize}
\end{footnotesize}
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. 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.

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.

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.

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.”).


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

Upon an executive branch petition, the Supreme Court ousted Chief Justice Sereno from her seat on the bench. Notwithstanding, judicial independence in the Philippines traditionally has been strong, particularly in the Supreme Court. 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. This ruling would seemingly test

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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-killlings [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.


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. 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.

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. In a letter addressed to the UN Secretary-General, the Philippine government gave formal notification it was pulling out of the Rome Statute. 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


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).


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.” 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.

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. 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.” 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.’

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. Arguably, nations that do not demand strong security and justice systems within a framework of respect for human rights are


[^294]: La Viña, *supra* note 278.


[^297]: See Talabong, *supra* note 152.
condemned to live in a spiral of chronic violence and insecurity. 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. 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.”

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.”

Yet, there is reason for cautious optimism. The crime rate for eight focus crimes in Metro Manila decreased by 21 percent over 2018. The newly appointed Chief Justice is motivated to destroy the perception that justice is only for the powerful, influential, and wealthy. 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.” 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).


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.


304 Id.
revisions in the Rules of Court, reforms in legal education, and innovations to the bar examinations.\textsuperscript{305}

\textbf{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.\textsuperscript{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.\textsuperscript{307} The same holds true today.\textsuperscript{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.\textsuperscript{309} A Supreme Court task force on prison decongestion found

\begin{itemize}
  \item \textsuperscript{305} Id.
  \item \textsuperscript{307} Cochran & Chiu, supra note 66, at 2.
  \item \textsuperscript{308} See, e.g., Hill, supra note 14, at 143.
  \item \textsuperscript{309} Syjuco, supra note 57. See Cynthia Alkon, \textit{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 \textit{The Increased Use of “Reconciliation” in Criminal Cases in Central Asia}].
\end{itemize}
that “an innocent man is jailed for at least five years before he is eventually acquitted.”

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. Further, acquittal or conviction may hinge on the predilections or bias of the sole judge hearing the case.

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. Undeniably, the Philippines needs a methodology to handle its large number of cases efficiently. 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. The solution only can be found in procedures alternative to trial, such as plea bargaining and/or restorative justice.

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.
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.\textsuperscript{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.\textsuperscript{319}

Plea bargaining, as a rule and a practice, is well established in the Philippines.\textsuperscript{320} The choice of whether and how a case will be plea bargained is left entirely up to the prosecutor’s discretion.\textsuperscript{321} No rule prescribes any quantitative or qualitative criteria for plea bargaining.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{324} Final approval then lies with the trial court.\textsuperscript{325}

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

\textsuperscript{318} Stephen Thaman, \textit{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.”).

\textsuperscript{319} Alkon, \textit{Plea Bargaining as a Legal Transplant}, supra note 313, at 405.

\textsuperscript{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.).


\textsuperscript{322} \textit{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).

\textsuperscript{323} Balisacan, supra note 321, at 391.

\textsuperscript{324} \textit{Id.} at 392.

\textsuperscript{325} \textit{Id.}
bargaining. The Supreme Court, conversely, held that this bar was contrary to the “rule-making authority” granted to it by the Constitution. 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. This authorization, however does not apply to cases involving possession over ten grams or any drug sales. 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.

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. 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. This process commonly relies on rules and

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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.
331 Alkon, The Increased Use of “Reconciliation” in Criminal Cases in Central Asia, supra note 309, at 66.
procedures that are deeply rooted in the social, cultural, and spiritual contexts and values of the community. 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.

President Marcos formalized this process through the “barangay justice system” (Katarungang Pambbarangay), a community mechanism based on traditional (pre-Spanish) methods of village dispute resolution. The barangay is the smallest political unit in the Philippines, and everyone in the country belongs to one of the over 42,000 barangays. The system rules were slightly amended in 1991. 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. Misdemeanor crimes are likewise brought under the barangay’s jurisdiction. The system is overseen by the barangay captain (punong barangay), the highest elected official of the barangay and its executive.

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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.
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. 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.). Similarly, the civil code mandates the judge “to persuade the litigants in civil cases to agree upon some fair compromise.”

Justice in the Philippines is not about revenge; rather, justice is about maintaining or restoring a social balance. To be sure, some complainants are motivated purely by revenge or extortion. But most complainants are not interested in punishing the other party with a serious jail sentence or a fine. 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. Apologies offer the opportunity for reconciliation and healing, which is viewed by many victims as being as important as financial compensation.

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.

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.
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.
rarely will press the criminal case. Given the strains on the justice system’s resources, a compromised case is one less case in the clogged dockets. 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. At the court hearing, the victim formally accepted the sailors’ apology and acknowledged the sailors had agreed to pay “some amount” for his damages.

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. 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.


350 Balisacan, supra note 321, at 405.


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{358}

As the above-cited quote from Julita Cabillan-Laude demonstrates, sincere remorse and apology has impact.\textsuperscript{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).

\textsuperscript{355} Aust in, 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://jocam.com/2016/05/26/community-based-progress-the-barangay-rules/[perma.cc/KB7G-T5SW] (opining that barangays rule the Philippines).

\textsuperscript{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).

\textsuperscript{357} See ABA Justice Report, supra note 8, at 41.

\textsuperscript{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/8UZJ-6DN9] (quoting an Olongapo City Councilor as saying that local residents were “ready to move on—starting with normalizing relations with U.S. troops”).

\textsuperscript{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. 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.

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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.