# THE SUPREME COURT AND INTERNATIONAL LAW: PROBLEMS AND APPROACHES IN PHILIPPINE PRACTICE*

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## Distinction between Objective International Law and Philippine Practice in International Law

A threshold area for clarification is the distinction between international law as it operates in the international sphere, primarily in the relations of States, on one hand; and norms of international law applied as part of national law in domestic jurisdiction, on the other.

As they deal with rights and obligations in the international plane, States and other international persons are governed by norms of international law, which is referred to here as objective international law to differentiate them from their status when they are incorporated into Philippine law. The latter category of norms may be designated as Philippine practice in international law.

Objective international law holds supremacy over national law in the international sphere. Every State has the duty to carry out in good faith its obligations arising from sources of international law, and it may not invoke its Constitution or its laws as justification for failure or refusal to comply with international obligations. With respect to its treaty obligations, it is subject to the principle in general international law now codified in Article 27 of the Vienna Convention on the Law of Treaties (1969) that "A party may not invoke the provisions of its internal law as a justification for its failure to

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perform a treaty."[1] The advisory opinion of the Permanent Court of International Justice in *Treatment of Polish Nationals in Danzig*[2] has affirmed that "a State cannot adduce as against another State its Constitution with a view to evading obligations incumbent upon it under international law or treaties in force." This means that constitutional or statutory provisions of national law to the contrary notwithstanding, the obligations of a State under objective international law must be complied with, a breach of which may constitute an internationally wrongful act subject to international responsibility and, thus, the duty to make reparations, or to counter-measures. Hence, an act of State that enjoys validity or constitutionality in national law may yet constitute such wrongful conduct under objective international law.

Of a dualist character, the Philippine legal order may be interpreted to require that norms and principles of objective international law be made part of national law. The Constitution provides two methods by which this is to be done. The Incorporation Clause prescribes that the Philippines "adopt the generally accepted principles of international law as part of the law of the land."[3] By the Treaty Clause, "No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate."[4] Thus, it is by no less than constitutional mandate that customary norms and conventional rules of objective international law be internalized into national law before they may be applied in Philippine jurisdiction.

In Philippine practice, the Incorporation Clause is a formal recognition of general international law as "part of the law of the land." It is understood

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[1] The only exception to this norm is provided in Article 46 of the Vienna Convention on the Law of Treaties (1969) which allows a State to invoke a "a violation of its internal law regarding competence to conclude treaties as invalidating its consent" but only if "that violation was manifest and concerned a rule of its internal law of fundamental importance." Identical to the text of Article 27 of the Vienna Convention on the Law of Treaties, given above, is that of Article 27(1) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

[2] 1931 PCIJ (ser. A/B) No. 44, at 24.

[3] CONST. art.II, §2.

[4] CONST.art.VII, §21. In *Guerrero's Transport Services, Inc. v. Blaylock Employees Association-Kilusan,* 71 SCRA 621 (1976), it is held that a treaty becomes domestic law when so concurred in by the Senate.

to require that for principles of objective international law to become part of national law they must be of customary or general international law, *i.e.,* binding on all States, as they are so characterized by the international community of States. Domestic courts must determine that such principles have assumed that character in the international legal order, and not by their whimsical or arbitrary estimate. The Treaty Clause completes the process of transforming a treaty or international convention into national law.

From these postulates, it is necessarily implied that compliance with these constitutional methods of internalization is a condition *sine qua non* to the application of norms and principles of objective international in Philippine jurisdiction. It is under this condition that they create rights and duties in national law. On this account, they may be said to derive their validity as "part of the law of the land" from the Constitution, based on their substantive content determined by objective international law.

The methods of internalization provided in the fundamental law affirm the dualist premise of the national law in relation to the international legal order. It is by reason of constitutional prescription, not of automatic incorporation or transformation, that norms of international law are internalized into Philippine law.

The core of dualist jurisdiction is comprised of the power of judicial review by which the courts may determine the constitutionality or validity of a treaty or executive agreement. The Constitution empowers the Supreme Court to finally "[r]eview, revise, reverse, modify, or affirm ... the judgments and orders of the lower courts ... in cases in which the *constitutionality or validity of any treaty, international or executive agreements* ... is in question."[5] (Emphasis supplied)

In contrast to the supremacy of objective international law over national law in the international plane, the Supreme Court states in *Gonzales v. Hechanova,*[6] as it interprets this review power, that "our Constitution authorizes

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[5] CONST. art.VIII, §5(2)(a).
[6] 9 SCRA 230 (1963).

the nullification of a treaty not only when it conflicts with the fundamental law, *but also when it runs counter to an act of Congress.*"

Declaring that a binding treaty constitutes part of the law of the land, *Abbas v. Commission on Elections*[7] goes on to state that as national law "it would not be superior to ... an enactment of the Congress of the Philippines, rather it would be in the same class as the latter" and irreconcilable incompatibility between them would be subject to *lex posteriori derogate priori. Philip Morris v. Court of Appeals*[8] is of the view that "[f]ollowing universal acquiescence and comity, our municipal law on trademarks regarding the actual use in the Philippines must subordinate an international agreement in as much as the apparent clash is being decided by a municipal tribunal."[9] Referring to international law in general, *Secretary of Justice v. Lantion*[10] asserts that international law "has been made part of the law of the land," but this "does not pertain to or imply the primacy of international law over national or municipal law in the municipal sphere." In fact, *Ichong v. Hernandez* goes so far as to say that "even supposing that the law infringes upon the said treaty, the treaty is always subject to qualification or amendment by a subsequent law."[11]

### *Failure to Recognize this Distinction: Crisis in the Nature of Treaties*

Where the resolution of a controversy by a domestic court requires the application of a norm or principle of international law, this may be done without a clear understanding as to whether it is to be applied as objective international law or as national law. Confusion of one with the other may produce bizarre consequences or absurd implications, even as the controversy is formally resolved.

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[7] 179 SCRA 287, 294 (1989).

[8] 224 SCRA 576 (1993). In identical language, *Philip Morris* is reiterated in *Mighty Corporation v. E & J Gallo Winery*, 243 SCRA 473 (2004).

[9] Referring to the "apparent clash" between the law on trademarks in Republic Act No. 166 and the Paris Convention for the Protection of Industrial Property.

[10] 322 SCRA 160 (2000).

[11] 101 Phil. 1156 (1957). This refers to the claim that the Retail Trade Nationalization Act is in breach of the Treaty of Amity with China.

In *Tañada v. Angara,*[12] the Supreme Court confronts the issue as to whether or not the Agreement establishing the World Trade Organization (WTO) contravenes the Constitution, in particular provisions which embody the *sovereign* powers pertaining to the national economy.[13]

In response, *Tañada* introduces a theory that goes into the basis of its *ratio decidendi*, declaring that "while sovereignty has traditionally been deemed absolute and all-encompassing on the domestic level, it is however subject to restrictions and limitations voluntarily agreed to by the Philippines, expressly or impliedly, as a member of the family of nations."[14] Elaborating on this theory, it declares:

> By their inherent nature, treaties really limit or restrict the absoluteness of sovereignty. By their voluntary act, nations may surrender some aspects of their state power in exchange for greater benefits granted by or derived from a convention or pact. After all, states, like individuals, live with coequals, and in pursuit of mutually covenanted objectives and benefits, they also commonly agree to limit the exercise of their otherwise absolute rights. [...] The sovereignty of a State therefore cannot in fact and in reality be considered absolute.[15]

One absurd feature of this theorizing is that if the status of a treaty as an inherent limitation to sovereignty is to be attributed to the WTO Agreement in a case where its very constitutionality is in question, then what is to be resolved as an issue in *Tañada* is already determined *a priori* as a premise, namely, a treaty is a restriction on state sovereignty. Given the assumption that the WTO Agreement is a restrictive attribute of Philippine sovereignty, the end-game is inevitable: a treaty is by nature a limitation to sovereignty and this theory easily translates into the conclusion that the WTO Agreement is by its nature as a

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[12] 272 SCRA 18 (1997).

[13] *Id.*, at 44. These provisions include CONST. art II, § 19, Article II which states: "The State shall develop a self-reliant and independent national economy effectively controlled by Filipinos;" CONST. art XIII, § 10, providing that "In the grant of rights, privileges, and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos; and CONST. art. XII, § 12, which says that "The State shall promote the preferential use of Filipino labor, domestic materials and locally produced goods, and adopt measures that help make them competitive."

[14] *Id.* at 66.

[15] *Id.* at 66–67.

treaty cannot possibly be in contravention of the Constitution. Rather, it is the Constitution as an embodiment of sovereignty that maybe restricted by the WTO Agreement! Indeed, operating *in the international sphere*, the WTO Agreement prevails over the Constitution; it provides in Article XVII (4) that "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." However, this logic is alien to the context of national law in which the very constitutionality of a treaty is under attack in a court exercising review powers vested by the Constitution, as shown above.

*Tañada* takes pain in pointing out that "sovereignty of a state ... cannot in fact and in reality be considered absolute." In the context of international law, the notion of absolute state sovereignty is nowhere; arguing against this notion is beating a dead—or better, a non-existent —juridical animal. In the international sphere, the sovereignty of one State relates itself to a large number of sovereignties such that there prevails a co-existence of sovereignties under conditions of independence.

By its theory of auto-limitation that it is in the nature of a treaty that it operates in derogation of sovereignty, *Tañada* conceptually entraps itself in an absurdity that sovereignty derogates itself by dynamizing or actualizing its own constituent powers. Treaty-making is an attribute of sovereignty; it is in fact a modality by which sovereignty realizes itself in the dynamics of international life and transforms formal sovereign powers of the State into real exchanges of political and economic advantages and, in the collective interests of the international community, builds frameworks of cooperation for resolving crises common to humankind. Every treaty is a moment of sovereignty's realization; by the nature of things, it cannot be defeated or derogated by what is merely its expression. The Permanent Court of International Justice in the *Wimbledon Case* has articulated the standpoint of International Law:

> The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or to refrain from performing a particular act an abandonment of sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereignty rights of the State *in the sense that it requires them to be exercised in*

> *a certain way.* But the right of entering into international engagement is an attribute of sovereignty.[16] (Emphasis supplied)

Indeed, the conclusion of a treaty becomes merely a modality of expressing sovereignty in a particular way, which must not be confused with the act of derogation of sovereignty itself. *Tañada* may even be suggestive of the absurdity that an increasing accretion of treaty obligations would result in the disappearance of sovereignty.

At any rate, it seems to be clear that when *Tañada* deals with treaties *vis-à-vis* sovereignty, they are treated as operating in the international sphere; it employs the concept of treaty in the relations of States under objective international law, removing it from the context of national law and transporting it to the international plane.

Whereas, the case at bar is in the nature of a constitutionality suit of the WTO Agreement and hence the treaty in question must be contextualized in the regime of national law, subject to the standards of validity under the Constitution as an embodiment of internal sovereignty. Within domestic jurisdiction, a treaty cannot in any way be transmogrified into an instrument that derogates Philippine sovereignty, or of sovereign powers under the Constitution. The supremacy of the Constitution is presupposed in the nature of judicial review involving the constitutionality or validity of a treaty or executive agreement.[17] In national law, there are no norms higher than the constitutional norms. In brief, *Tañada* illustrates a confusion of the concept of treaty under objective international law *vis-à-vis* the treaty in the context of national law. If, as *Guerrero's Transport Services*[18] affirms, a treaty becomes domestic law when concurred in by the Senate, how can a domestic law ever derogate Philippine sovereignty?

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[16] PCIJ (ser A)no. 1, at 205..
[17] CONST. art. VIII, §5(2)(a).
[18] 71 SCRA 621 (1976).

***The Flight of a Treaty, from National Law to International Law***

*Bayan v. Executive Secretary*[19] engages the Supreme Court in the constitutionality suit regarding the Visiting Forces Agreement between the Philippines and the United States (VFA), which calls for the application of section 25, Article XVIII of the Constitution, thus:

> After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases, foreign military bases, troops or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and *recognized as a treaty by the other contracting State.* (Emphasis supplied)

As synthesized in *Bayan*, foreign military bases, facilities, or troops fall within the constitutional prohibition, unless the following conditions are sufficiently met: (a) The agreement must be under a *treaty*; (b) the treaty must be *duly concurred in by the Senate;* and (c) *recognized as a treaty* by the other contracting State.[20] It is significant that the focal point in the issue as phrased by the Court pertains to the usage of the term *treaty* in the constitutional text of section 25, Article XVIII, as follows:

(1) It is required that the foreign military bases, troops, or facilities be "under a treaty," as provided in this constitutional provision.

(2) The term *treaty* is to be understood as subject to concurrence by the Senate under Section 25, Article XVIII of the fundamental law.

(3) The term *treaty* is to be interpreted as requiring concurrence by the Senate by a vote of at least two-thirds of all the members of the Senate under Section 21, Article VII of the Constitution.

(4) The agreement is mandated to be recognized as a *treaty* by the other contracting State.

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[19] 342 SCRA 449 (2000). .

[20] *Id.* at 486.

Combined with this reaffirmation of the term *treaty* as a constitutional requisite is the fact that on the side of the Philippines the VFA had already been concurred in by the Senate as a *treaty* at the time the *Bayan* petition was filed with the Supreme Court.

All this should come home to the fundamental point that the term *treaty* in every instance indicated above is to be interpreted in the same sense as used in the Constitution, with the necessary implication that its meaning cannot be transported from any other legal regime outside of the fundamental law. In brief, it is a treaty of the category as known in national law as controlled by a specific constitutional provision.

The decisive issue as to the constitutionality of the VFA pertains to the last requirement under section 25, Article XVIII of the Constitution: whether the VFA has been "recognized as a treaty by the other contracting State," considering that on the side of the United States it is *concluded as an executive agreement.* In the light of the premises derived from national law, as pointed out above, inevitably the VFA fails to comply with such constitutional requirement since an executive agreement does not qualify as a treaty as understood in national law. Clearly, when the Constitution specifies that the agreement on "foreign military bases, facilities or troops" be recognized as a treaty by the other contracting State, the term *treaty* is used in the constitutional sense, *i.e.,* an international agreement concurred in by the Senate under the Treaty Clause and section 25 Article XVIII of the Constitution. Moreover, as explained in the deliberations of the Constitutional Commission which framed the 1987 Constitution, it is intended that the agreement in question be a treaty under section 2, Article II of the US Constitution, i.e., a treaty with the advice and consent of the US Senate.[21]

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[21] Reflecting the prevailing view in the Constitutional Commission is the following statement of Commissioner Joaquin Bernas as reported in the records of the Commission:

> **Fr. Bernas.** ....[S]ince this certainly would refer only to the United States, because it is only the United States that would have the possibility of being allowed to have treaties here, then we would have to require that the Senate of the United States concur in the treaty because under American constitutional law, there must be concurrence on the part of the Senate of the United States to conclude treaties. [....]

Concurrence by the Philippine Senate becomes integral to the definition of a treaty under the Constitution—an element which distinguishes it from an executive agreement.[22] Whereas an executive agreement may source its validity from presidential prerogative alone, a status recognized by the jurisprudence of the Supreme Court itself.[23]

Inevitably, pursuant to the concept of a treaty as recognized in national law, the constitutionality of VFA cannot be sustained. In resolving the controversy, *Bayan* instead transports the meaning of "treaty" to the international plane; it shifts the paradigm from the law of treaties under the Constitution to the law of treaties in objective international law. In doing so, *Bayan* entails a double shift in fact, thus:

1. The first shift consists in the interpretation of the term "treaty" from its constitutional meaning to its "ordinary" meaning, as follows:

> This Court is of the firm view that the phrase *"recognize as a treaty"* means that the other contracting party accepts or acknowledges the agreement as a treaty.[24] To require the other contracting state, the United States of America in this case, to submit the VFA to the United States Senate for concurrence pursuant to its constitution, is to accord strict meaning to the phrase.
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> Well-entrenched is the principle that the words used in the Constitution are to be given their ordinary meaning except where technical terms are employed, in which case the significance thus attached to them prevails. Its language should be understood in the sense they have in common use.[25]

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**Fr. Bernas.** When I say that the other contracting state must recognize it as a treaty, by that I mean it must perform all the acts required for the agreement to reach the status of a treaty under their jurisdiction. (IV Record of the Constitutional Commission, pp. 780–783 (1986).

[22] *USAFFE Veterans Association v. Treasurer of the Philippines*, 105 Phil. 1030 (1959); *Commissioner of Customs v. Eastern Sea Trading*. 3 SCRA 35 (1961).

[23] *Id.*

[24] This is footnoted in *Bayan*: "Ballantine's Legal Dictionary, 1995." *See* 343 SCRA 449, at 488.

[25] 343 SCRA 449 at 488.

2. The second shift is the transference of interpretation of the concept of treaty from national law to objective international law, thus:

> Moreover, it is inconsequential whether the United States treats the VFA only as an executive agreement because, under international law, an executive agreement is as binding as a treaty.[26] To be sure, as long as the VFA possesses the elements of an agreement under international law, the said agreement is to be taken equally as a treaty.
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> A treaty, as defined by the Vienna Convention on the Law of Treaties, is "an international instrument [sic] concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation."[...]
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> Article 2(2) of the Vienna Convention provides that "the provisions of paragraph 1 regarding the use of the terms in the present Convention are without prejudice to the use of those terms, or to the meanings which may be given to them in the internal law of any State."
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> Thus, in international law, there is no difference between treaties and executive agreements in their binding effect upon States concerned, as long as the negotiating functionaries have remained within their powers. International law continues to make no distinction between treaties and executive agreements: they are equally binding obligations upon nations.[27]

The first shift begins with the assumption that "treaty" should be understood in its "ordinary meaning", *i.e.,* in the sense it has "in common use." This means a *treaty* is an agreement, pursuant to the "principle that the words used in the Constitution are to be given their ordinary meaning except where technical terms are employed." On this understanding, the Court "is of the view that the phrase '*recognized as a treaty*' means that the other contracting party accepts or acknowledges the agreement as a treaty."

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[26] *Id.*, at 489.

[27] *Bayan v. Executive Secretary,* 342 SCRA 449, 490.

In this interpretation, *Bayan* is confused as to the meaning to be given to the term "treaty". It is misplaced to use the so-called "ordinary meaning" of 'treaty' as lifted from Ballantine's Legal Dictionary and to impute it to this term as used in Section 25, Article XVIII of the Constitution. Under this provision, "treaty" is not a term "in common use," it is of special signification in that it is an agreement concurred in by the Philippine Senate subject to a procedure required by the Constitution. Its special nature is emphasized all the more not only by Senate concurrence but as well by another category of agreement classified as executive agreement which is executed by the President alone or with congressional authority, but acquiring validity without need of Senate concurrence. That an executive agreement by nature does not require Senate concurrence disqualifies it from the requirements of Section 25, Article XVIII of the Constitution, with the result that the VFA falls within the prohibition of that provision.

It is utterly a misconception to disregard the special character of a "treaty" in this constitutional sense, more so because it is replaced by the notion that it is to be understood in its "ordinary meaning" applied "in common use." The misconception acquires a sharper focus owing to the clear implication that "treaty" taken in its ordinary meaning in common use, as explained by the Court, eliminates the difference between a treaty and executive agreement. The ordinary meaning of "treaty" embraces an executive agreement; a treaty and an executive agreement are both agreements understood as treaty in ordinary meaning. This misguided usage becomes a fundamental premise of *Bayan's ratio decidendi*, considering that the United States, the other contracting party, executed the VFA as a mere executive agreement. Under the Constitution, there cannot be a distinction between an ordinary and technical meaning of the term "treaty" since only one singular sense can be attributed to it under the Treaty Clause which controls the meaning of "treaty" as used in Sections 4 and 5, Article VIII and in Section 25, Article XVIII of the Constitution.

This line of reasoning then brings the interpretation of the term "treaty" along the logic of the other contracting party, the United States of America, which argues that it recognizes the VFA as a treaty although it has executed it

as an executive agreement. By this reasoning in the misconceived context provided in *Bayan*, the constitutional difference between a treaty and executive agreement disappears. In effect, *Bayan* throws overboard the obvious constitutional usage of the term "treaty" and then adopts in its place the following interpretation.

The records reveal that the United States Government, through Ambassador Thomas C. Hubbard, has stated that the United States government has fully committed to living up to the terms of the VFA. For as long as the United States of America accepts or acknowledges the VFA as a treaty, and binds itself further to comply with its obligations under the treaty, he affirmed that there is marked compliance with the mandate of the Constitution.[28]

These assertions are based on the letter of U.S. Ambassador Hubbard to Senator Miriam Defensor-Santiago, which is read into the record of the case. It appears that this reasoning in *Bayan* conforms to Hubbard's letter, thus:

> As a matter of both US and international law, an international agreement like the Visiting Forces Agreement is legally binding on the US Government. In international legal terms, such an agreement is a 'treaty' [....][29] (Emphasis supplied)

In the same paragraph of the Hubbard letter the following sentence is a clear admission that the United States Government does not recognize the VFA as a treaty, in contravention of Section 25, Article XVIII of the Constitution:

> However, as a matter of US domestic law, an agreement like the VFA is an 'executive agreement', *because it does not require the advice and consent of the Senate under II, Section 2 of our Constitution.*[30] (Emphasis supplied)

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[28] The entire letter is in note 42 in 342 SCRA 449, at 490–491.

[29] *Id.*

[30] *Id.*

As to the second shift, *Bayan* upholds the constitutionality of the VFA by means of the reasoning that transports the interpretation of the term *treaty* to the regime of objective international law, wrenching it away from its proper context set in section 25, Article XVIII of the Constitution. *Bayan* makes use of the term treaty in Article 2(1)(a) of the Vienna Convention on the Law of Treaties (1969) in which it is understood as "international agreement concluded between States in written form and *governed by international law*, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[31] (Emphasis supplied) In this usage, the term "executive agreement" is merely a designation of an international agreement within the scope of that usage. Thereby, the distinction between "treaty" and "executive agreement" in Philippine national law is eliminated and accommodates the position of the United States Government that although the VFA is concluded on its side as an "executive agreement", in the language of U.S. Ambassador Hubbard, "[i]n international legal terms, such agreement is a 'treaty'."

But even as *Bayan* emphasizes the usage of "treaty" in the international sphere as provided in paragraph 1(a) of Article 2 of the Vienna Convention on the Law of Treaties, it fails to take into account its companion provision in paragraph 2 of the same article, which reads:

> The provisions of paragraph 1 regarding the use of terms in the present Convention are *without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.*[32] (Emphasis supplied)

While under paragraph 1, as given above, an executive agreement may be categorized as a treaty and therefore no distinction is to be made between a treaty and an executive agreement in objective international law, in paragraph 2 of the same Article as quoted above, the Convention recognizes the distinction which the national law gives to a "treaty" and an "executive agreement." Hence, the usage of the term "treaty" under the Convention may refer to the application of either paragraph 1 or 2 of Article 2, depending on whether the

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[31] Vienna Convention on the Law of Treaties, May 23, 1969, art. II, para.1(a).
[32] Vienna Convention on the Law of Treaties, May 23, 1969, art 2(a) para.2

context of the issue deals with the operation of "treaties" in the international sphere or in the context of national or internal law – before the jurisdiction of a domestic court. Certainly, *Bayan* pertains to the latter context and, accordingly, calls for the application of "treaty" as used in the Constitution, i.e., as distinguished from "executive agreement."

In Philippine constitutional law, the jurisprudence of the Supreme Court has established that an executive agreement is to be distinguished from a treaty in that it acquires validity and effectiveness without the concurrence of the Senate. "While treaties are required to be ratified by the Senate under the Constitution," affirms the Supreme Court in *Commissioner of Internal Revenue v. John Gotamco & Sons, Inc.,* "less formal types of international agreements may be entered into by the Chief Executive and become binding without the concurrence of the legislative body," referring to executive agreements.[33] *Commissioner of Customs v. Eastern Sea Trading* has pronounced that "the right of the Executive to enter into binding agreements without the necessity of subsequent congressional approval has been confirmed by long usage."[34] Earlier, in *USAFFE Veterans Association v. Treasurer of the Philippines,*[35] the Court has declared that "Executive agreements may be entered into with other states and are effective even without the concurrence of the Senate." Hence, "treaty" as used in the Treaty Clause of the Constitution, being subject to Senate concurrence, does not contemplate executive agreements. In requiring Senate concurrence in Section 25, Article XVIII, the Constitution precludes executive agreements from the meaning of the term "treaty." What the Constitution rejects, *Bayan* legitimizes.

By the nature of the controversy involved in *Bayan*, the Supreme Court is not engaged in the adjudication of rights and duties of States parties to the VFA in the international sphere. Certainly *Bayan* has nothing to do with treaty enforcement or breach of obligation in objective international law. *By itself alone*, therefore, paragraph 1 in Article 2 of the Vienna Convention does not

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[33] 148 SCRA 36 (1987).
[34] 3 SCRA 35 (1961).
[35] 105 Phil. 1030 (1959).

apply. Accordingly, as it is made pursuant to this paragraph, it is out of place for *Bayan* to assert that "an executive agreement is as binding as a treaty ... [and that] international law continues to make no difference between treaties and executive agreements."

Rather, *Bayan* is a constitutionality suit addressed to the interpretation of the term "treaty" as this is used in Section 25, Article XVIII of the Constitution. It is this specific context in national law that calls for resolution. Based on the fact that Philippine law makes a distinction between "treaty" and "executive agreement", under the Vienna Convention on the Law of Treaties, the controlling provision is paragraph 2, not paragraph 1, of Article 2. Hence, if at all this Convention is to be applied, the distinction between "treaty" and "executive agreement" in national law shall prevail, striking down the thesis of the Hubbard letter pursued by the majority of the Court.

Remarkably, the Court's perspicacity has recognized the correlation of the rules set out in paragraph 1 and in paragraph 2, Article 2 of the Vienna Convention on the Law of Treaties about a decade before that Convention came into being. In *USAFFE Veterans Association,*[36] the Court after stressing the distinction between a treaty and an executive agreement in Philippine practice, in contrast to their unity in objective international law, has come to the following conclusion:

> The distinction between so-called executive agreements and "treaties" is purely a constitutional one and has no international legal significance.

As it does to Article 2 of the Vienna Convention, *Bayan* has severed the two parts of this *USAFFE* formulation from each other, it applies only the second part pertaining to international law and disregards the first part pertaining to national law, thus doing violence to its own principled formulation.

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[36] 105 Phil. 1030 (1959).

An alternative approach to *Bayan* requires simply the formulation of the issue, namely, what does the Constitution in section 25, Article XVIII mean when it uses the term "treaty" as emphasized below, in providing that "foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate [...] and recognized as a *treaty* by the other contracting State"? What is the nature of the instrument which the Constitution requires the United States Government to recognize? This provision already determines the legal character of the agreement in question: it is imperative that it be a treaty concurred in by the Philippine Senate and by the US Senate. From this constitutional provision, five points must be obvious to the United States Government or any other contracting party when entering into agreement of this nature with the Philippine Government:

(1) The requirements under section 25, Article XVIII of the Constitution are in the nature of imperative conditions and are prohibitory; if these conditions are not complied with, the agreement falls within the prohibition and are constitutionally void. This involves the application of the legal principle in Article 5 of the Civil Code that "Acts executed against the provisions of mandatory or prohibitory laws shall be void."

(2) It is imperative that such foreign military presence "shall not be allowed ... except under a treaty duly concurred in by the Senate," i.e., a treaty of a special character.

(3) The other contracting State is charged with knowledge that in Philippine constitutional law an executive agreement is not a treaty, and it is therefore aware that in the light of the constitutional prohibition an executive agreement, not being a treaty, fails to comply with the conditions set forth in section 25, Article XVIII of the Constitution.

(4) The fact that the agreement is embodied in an executive agreement on the part of the other contracting State, not in a treaty, is a rejection, not recognition, of the agreement as a treaty. It becomes a defiance of the Philippine Constitution, which is reflected in the aforementioned Hubbard letter. *Bayan* gives it a blessing of constitutionality, even as it deserves to be struck down as a nullity.

(5) That the agreement is recognized by the other contracting State as an execution agreement, not a treaty, constitutes a central violation of constitutional mandate, resulting in the illegality of the agreement as it falls under the constitutional prohibition against foreign military bases, troops, or facilities in the Philippines.

If the logic of *Bayan* is to be pursued on the concept of a treaty as applied in the international plane, the risk of absurdity becomes apparent. It appears to apply the principle that in the international plane *a treaty overrides the national law including the Constitution*, and yet the issue at bar is *whether the VFA is in contravention of the Constitution or not. Bayan* is engaged in deciding the question whether the VFA contravenes the Constitution and yet it has resolved this problem in the context of international law operating on the international sphere where treaty is supreme over the Constitution.

Obviously referring to the obligations under the VFA, *Bayan* sounds a warning that the Philippines will be subject to international responsibility should it violate such obligations, implying that it is its duty as a State to interpret and apply the Constitution and the laws to the end that these will not defeat its international obligations. Again, applying international law as operative on the international plane, *Bayan* reasons out:

> As a member of the family of nations, the Philippines agrees to be bound by generally accepted rules for the conduct of its international relation. While the international obligation devolves upon the State and not upon any particular branch, institution, or individual member of its government, the Philippines is nonetheless responsible for violations committed by any branch or subdivision of its government or any official thereof. As an integral part of the community of nations, *we are responsible to assure that our government, Constitution and laws will carry out our international obligations. Hence, we cannot readily plead the Constitution as a convenient excuse for non-compliance with our obligations, duties and responsibilities under international law.*[37] (Emphasis supplied)

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[37] 342 SCRA 449, at 493.

From this vantage point, *Bayan* may have created the need to remind the Court that it is not sitting as an international tribunal which subordinates the Constitution to treaty obligations and, in doing so, does violence to the nature of the case at bar which is instituted for the purpose of determining whether the treaty in question—the VFA—contravenes the Constitution. *Bayan* now turns the table and instead raises the issue whether the Constitution should be interpreted in conformity with the said treaty! It lends itself to the misconception that in domestic jurisdiction the Constitution may be held to be violative of objective international law.

The dilemma this vantage point presents may seriously affect the temper of the Court in the exercise of its judicial review power over the constitutionality of a treaty or executive agreement under Section 5(2) (a), Article VIII of the Constitution. This provides that the Court possesses the power to "[r]eview, revise, modify, or affirm on appeal on *certiorari* ... final judgments and orders of lower courts in 'All cases in which the *constitutionality or validity of any treaty, international or executive agreement* [...] is in question.'" It is to be assumed that if the Court finds justification to strike down a treaty as unconstitutional, it is aware that under objective international law its decision becomes an act of the Philippines as a State which is constituted as an internationally wrongful conduct by which the Philippines would incur international responsibility pointed out in *Bayan*, as quoted above. Will the Court avoid a decision adverse to the treaty pursuant to the approach taken by *Bayan*, even if the Constitution and the facticity of the case warrant? It is a dilemma born out of the exercise of constitutional authority without the awareness as to which legal order it is to be contextualized. It is a predicament that can find resolution in the concept of the treaty under the Philippine Constitution, not in the regime of treaties in the international plane.

All this complexity is brought about by the error of *Bayan* in changing the content of the problem: from the constitutional character of the "treaty" to an agreement "governed by international law" as used in the Article 2, paragraph 1 of the Vienna Convention on the Law of Treaties.

Promulgated more than eight years after *Bayan*, *Nicolas v. Romulo*[38] pursues the defense of the VFA by developing further the thesis that the United States Government has recognized it as a treaty as required by the Constitution in Section 25, Article XVIII. *Nicolas* derives its rationale from two reasons, as follows:

> (a) [T]he VFA was fully concurred in by the Philippine Senate and has been recognized as a treaty by the United States as attested and certified by the duly authorized representative of the United States government."[39]
>
> (b) The second reason has to do with the relation between the VFA and the RP-US Mutual Defense Treaty of August 30, 1951. This earlier agreement was signed and duly ratified with the concurrence of the Philippine Senate and the advice and consent of the United States Senate.[...]
>
> Clearly, [...] joint RP-US military exercises for the purpose of developing the capacity to resist an armed attack fall squarely under the provisions of the RP-US Mutual Defense Treaty. The VFA, which is the instrument agreed upon to provide for the joint RP-US military exercises, is simply an implementing agreement of the main RP-US Mutual Defense Treaty...
>
> Accordingly, as an implementing agreement of the RP-US Mutual Defense Treaty, it was not necessary to submit the VFA to the US Senate for advice and consent, but merely to the US Congress under the Case-Zablocki Act [....] It is for this reason that the US has certified that it recognizes the VFA as a binding international agreement, *i.e.,* a treaty, and this substantially complies with the requirements of Art. XVIII, Sec. 25 of our Constitution."[40]

The first reason appears to be in justification of the claim in the Hubbard letter that even as the VFA was concluded by the United States

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[38] 578 SCRA 438 (2009).

[39] *Id.,* at 8. The "duly authorized representative of the United States government" refers to US Ambassador Hubbard, mentioned above.

[40] *Id.*, at 9, 11–12.

Government as an executive agreement, it recognizes it as a binding commitment under international law and therefore it has the effect of a treaty. *Nicolas* now says that the status of the VFA under the Case-Zablocki Act proves further that the VFA as an implementing agreement of the Mutual Defense Treaty is recognized by the United States Government as "a binding international agreement or treaty."

Truly, this point is a falsification of the object and purpose of the Case-Zablocki Act. The most relevant provision of this law is section 112b(a), which reads:

> The Secretary of State shall transmit to the [US] Congress the text of any international agreement (including the text of any oral international agreement, which agreement shall be reduced to writing), *other than a treaty*, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter. However, any such agreement the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United Sates shall not be transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President. Any department or agency of the United States Government which enters into any international agreement on behalf of the United States shall transmit to the Department of State the text of such agreement not later than twenty days after such agreement has been signed.[41] (Emphasis supplied)

It is plain that all international agreements of the United Sates covered by the Case-Zablocki Act are not treaties and thus outside the scope of Section 2, Article II of the US Constitution.[42] The fact that an international agreement—as exemplified by the VFA—is transmitted to the US Congress on account of the Case-Zablocki Act testifies to the fact that it is not a treaty.

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[41] 1 USC 112b(a) (1976 ed., Supp. IV).

[42] This provides that the President "shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties."

The categorization under this Act is clear: an international agreement of the United States is a treaty or not a treaty; if it is not a treaty, then it is required to be transmitted to the US Congress by the Secretary of State under the Case-Zablocki Act. *Nicolas*, however, introduces a distortion as follows:

> Notice can be taken of the internationally known practice by the United States of submitting to its Senate for advice and consent agreement that are policy making in nature, whereas those that carry out or further implement these policymaking agreements are merely submitted to Congress, under the provisions of the so-called Case-Zablocki Act, within sixty days from *ratifications.*[43] (Emphasis supplied)

Here, *Nicolas* implies that agreements of the United Sates that may be in the nature of treaties are either policymaking agreements or implementing agreements, in the process creating a non-existent classification of treaties into policymaking and implementing treaties. It seems to be the sense of *Nicolas* that although they are all regarded as treaties, only the latter are within the scope of the Case-Zablocki Act. In the result, *Nicolas* utterly distorts this law, apparently by way of forcing the twisted interpretation that the VFA is a treaty under US law, even though it has been concluded as an executive agreement.

The second reason advanced by *Nicolas* springs from the notion that the requirement of the Constitution for the United States Government to recognize the VFA as a treaty has already been complied with. This had been purportedly accomplished by the ratification of the Mutual Defense Treaty of 1951 (MDT) by the two governments. It was concurred in by the Philippine Senate on 12 May 1952 and had the advice and consent of the US Senate on 20 March 1952. Thus the MDT no doubt has the status of a treaty as established under the Constitution of both the Philippine and the United States. On this fact, *Nicolas* constructs the thesis that the VFA "is simply an implementing agreement to the main RP-US Mutual Defense Treaty," and therefore it partakes of the MDT's status as a treaty not only under the Philippine

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[43] Note that under the US Constitution, the process of ratification of treaties is completed by the US Senate through its "advice and consent."

Constitution but as well as under the US Constitution. By this mythical formula, it is claimed that the VFA becomes qualified under Section 25, Article XVIII of the Philippine Constitution as an agreement "recognized as a treaty by the other contracting State," i.e., the United States.

The first count of absurdity in this thesis is that the compliance of the VFA with the said constitutional requirement is attributed by *Nicolas* to the MDT which was concluded almost fifty years before the case at bar came to the Supreme Court, producing the intriguing consequence that the compliance in question was accomplished fifty years earlier than its constitutional requirement—in fact about thirty-five years before the 1987 Constitution came into being. Surprisingly, under this thesis the VFA automatically became a treaty under the US law, although it was concluded by the United States Government merely as an executive agreement—a theory belied by the US Constitution *vis-à-vis* the Case-Zablocki Act.

On three counts, the VFA's connectivity with the MDT appears dubious at the least. How the two agreements are related, even discounting the distance of more than forty years between them, is an issue properly addressed to the intention of the parties. *Nicolas* is unable to show any objective fact in the negotiation or the *travaux preparatoire* of the MDT that an implementing treaty of the character of VFA has been contemplated by the parties to the MDT as its organic connection. Above all, the parties to the MDT do not manifest such an intention as reflected in the textual composition of the said agreement.

Under the circumstances, "the relation between the VFA and the RP-US Mutual Defense Treaty of August 30, 1951" as set forth in *Nicolas* is an imputation to both parties of a contrived intent. As against such imputation, the MDT does not indicate any need for an implementing treaty, which *Nicolas* claims to have materialized as the VFA forty-six years later.

On the part of the Philippine Senate in particular, its proceedings on the VFA demonstrate no connection with the MDT as a condition for its concurrence. It may be assumed that the instrument of ratification executed by the President, together with his request for concurrence by the Senate, did not deal with the VFA as an implementing treaty of the MDT.

Moreover, the MDT provides for its own implementing mechanism and, for this reason, does not need the VFA to implement its provisions. MDT's own means of implementation may be read in its Article III, thus:

> The Parties, through their Foreign Ministers or their deputies, will consult together from time to time *regarding the implementation of this Treaty* and whenever in the opinion of either of them the territorial integrity, political independence or security of either of the Parties is threatened by external armed attack in the Pacific.[44] (Emphasis supplied)

In a separate agreement, consisting of Exchange of Notes of 15 May 1958 between US Ambassador Charles E. Bohlen and Philippine Secretary of Foreign Affairs Felixberto M. Serrano, the means of consultation described in Article III of the MDT, quoted above, has been institutionalized in the Philippine-United States Council of Foreign Ministers. This Exchange of Notes has organized "a *permanent* Philippine-United States Mutual Defense Board.[45](Emphasis supplied) It stipulates that "The purpose of this Board is to provide *continuing intergovernment machinery* for direct liaison and consultation between appropriate Philippine and United States authorities on *military matters of mutual concern* so as to develop and improve, through *continuing military cooperation,* the common defense of the two sovereign countries."[46] (Emphasis supplied)

Note that the intent of the Bohlen-Serrano Exchange of Notes is to institutionalize an intergovernmental arrangement for the implementation of all security and defense agreements on a continuing and permanent basis.[47] As confirmed by established practice of the two governments, both the MDT and the VFA are subject to the decision-making and implementing procedures of the Foreign Ministers Council and the Mutual Defense Board under the Bohlen-Serrano Exchange of Notes.

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[44] II Phil. Treaty Series 727, 728; 177 UNTS 133.
[45] III Phil. Treaty Series 717.
[46] *Id.*, at 718.
[47] *Id. See supra* note 42 and Annex A in III Phil. Treaty Series 717, at 718–720.

In the light of these details, the theory relied on by the *ratio decidendi* of *Nicolas* that the VFA "is simply an implementing agreement to the main RP–US Mutual Defense Treaty" and thus it derives its status as a treaty from the MDT emerges as a transparent fallacy. The fact is that both the VFA and the MDT have a common implementing agreement in the Bohlen-Serrano Exchange of Notes.

*Nicolas* fails to understand that the Constitution itself precludes the connectivity of the VFA and the MDT. In Section 25, Article XVIII, "foreign military bases, troops, or facilities" are prohibited in the Philippines, "except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for the purpose, and recognized as a treaty by the other contracting State." Obviously, as an exception to this prohibition, what is prohibited may be allowed if such foreign military presence is provided in a treaty of a new and special kind and not in any other way.

The specificity by which the Constitution requires the nature of a new treaty under the said provision may even exclude the treaties or international agreements covered by the Treaty clause of the Constitution[48] in that as an added requisite by constitutional mandate, Congress may require ratification by the "a majority of the votes cast by the people in a national referendum held for the purpose."[49] As set apart from treaties under the Treaty Clause, this treaty of a new type has its own concurrence provision, as set out in Section 25, Article XVIII of the Constitution.

Subject to such new and special conditions, MDT cannot qualify under Section 25, Article XVIII of the fundamental law, even if its implementation entails US military presence in Philippine territory. In brief, to override the prohibition under Section 25, Article XVIII of the Constitution, an agreement must be a new treaty concluded under conditions peculiar to the mandates of that constitutional provision. By its own inherent characteristics as a new and

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[48] As provided in CONST. art. VII, §21: "No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate."

[49] CONST art.XVIII, §25.

complete treaty under this constitutional provision, the VFA must comply with these conditions and cannot derive its status as a treaty from any kind of agreement outside the scope of Section 25, Article XVIII of the Constitution. This mandatory prescription of constitutional character makes no distinction as to whether a treaty in question is an implementing agreement or otherwise.

**Sources of International Law and Internalization into National Law**

Reflecting general international law, Article 38(1) of the Statute of the International Court of Justice identifies the three principal sources of international law as consisting of:

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations; [....]

The first two sources, respectively, are well known as conven-tional rules and customary. It suffices for the present purpose to describe the binding character of a conventional rule as limited to the parties to the convention or treaty. On the other hand, in principle, a customary norm is binding on all States. This distinguishing characteristic of each source may be taken as the basis for determining the method by which they become part of Philippine law. A conventional rule is transformed into a "valid and effective" domestic law under the Treaty Clause of the Constitution. A customary norm becomes "part of the law of the land" by virtue of the Incorporation Clause of the Constitution. Hence, it is by reason of their legal status—as a conventional rule or customary norm— that the principal sources of international law locate their respective entry points under the Constitution to be applied as Philippine law. A customary norm is incorporated into the national law under the Incorporation Clause and a conventional rule is transformed into domestic law under the Treaty Clause. It is required that each source must correspond with its constitutional entry point, lest the legal character of one source would be confused with that of the other source. Moreover, the Treaty Clause

determines the method of transforming conventional rules, and thus generally no rules of this category may be applied within Philippine jurisdiction unless they are transformed into national law under the Treaty Clause. Their binding character is generally confined to the contracting parties. The Incorporation Clause does not have room to accommodate conventional rules since it should be obvious that by the Incorporation Clause, a conventional norm by its nature cannot become part of domestic law without concurrence by the Senate under the Treaty Clause (excluding in the meantime executive agreements).

***Confusion as to the Legal Character of the Principal Sources***

Jurisprudence does not seem to observe a consistently reasoned standard based on the nature of the sources of international law, in the determination of what are the "generally accepted principles of international law" to be subsumed under the Incorporation Clause. The problem begins with *Kuroda v. Jalandoni*[50] in dealing with the issue as to whether or not the Hague Convention and the Geneva Convention on the rules and regulations on land warfare have binding force in Philippine jurisdiction, considering that the Philippines is not a party to these international agreements. *Kuroda* affirms that the rules of the said Conventions "form part of and are wholly based on the generally accepted principles of international law" and, on this account, are binding on the Philippines "as part of the law of the nation" under the Incorporation Clause of the 1935 Constitution. It explains:

> Such rules and principles, therefore, form part of the law of our nation even if the Philippines was not a signatory to the conventions embodying them, for our *Constitution has been deliberately general and extensive in its scope and is not confined to the recognition of rules and principles of international law as contained in treaties to which our government* may have been or shall be a signatory.[51](Emphasis supplied)

Here, with the "rules and principles of international law as contained in treaties" as starting-point, *Kuroda* extends the scope of the "law of our nation" to include the rules and principles within the coverage of the

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[50] 83 Phil. 171 (1947).
[51] *Id.*, at 178.

"generally accepted principles of international law." This method is applied on the basis of the breadth of the constitutional text or its broad coverage, not on the nature of the "generally accepted principles" as norms or sources of international law. In this method, there is absence of characterization of the "generally accepted principles" as customary or general international law. And yet it is by virtue of this legal character that the Constitution attributes to them the status as "part of the law of the nation."

Conventional rules of international law are never transformed into domestic law except under the conditions required by the Treaty Clause. Compliance with this transformative process gives them the status of Philippine law. It would be mindless to pronounce conventional rules thus transformed as becoming part of Philippine law under the Incorporation Clause. In the first place, there is no sense in making them part of national law twice, both under the Treaty Clause and then under the Incorporation Clause; secondly, they may not be generally accepted in the international community, owing to their binding character as limited to the States parties; thirdly, they may not deserve to be characterized as "principles of law" which "may be justified because of their more general and more fundamental character."[52] It appears to be by automatic instinct that *Agustin v. Edu*[53] declares:

> ...[T]his Declaration of Principle found in the Constitution possesses relevance: The Philippines ... adopts the generally accepted principles of international law as part of the law of the land. [...] The 1968 Vienna Convention on Road Signs and Signals is impressed with such a character.[54]

At the time, the Philippines had already become a party to the Vienna Convention on Road Signs and Signals on account of ratification by means of Presidential Decree No. 207, and thus it had already become law by virtue of the Treaty Clause. It is not easy to make sense of the notion that the *entire* Vienna Convention has become part of domestic law as

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[52] See *Gulf of Maine Case*, ICJ Reports, 1984, para. 79.
[53] 88 SCRA 195 (1979).
[54] *Id.*, at 213.

"generally accepted principles of international law," without a showing as to what are the principles of law deserving that status. In implying that road signs and signals are by themselves principles of law, *Agustin* challenges us to accept such an absurdity.

*Reyes v. Bagatsing*[55] appears in the same light, more clearly with its factual elaboration:

> The Philippines is a signatory of the Vienna Convention of Diplomatic Relations in 1961. It was concurred in by the Philippine Senate on May 3, 1965 and the instrument of ratification was signed by the President on October 11, 1965, and was therefore deposited with the Secretary General of the United Nations on November 15, 1965. *As of that date then, it was binding on the Philippines.* The second paragraph of its Article 22 reads: "The receiving State is under a special duty to take appropriate steps to protect the premises of the [diplomatic] mission against intrusion or impairment of its dignity." *To the extent that the Vienna Convention is a restatement of the generally accepted principles of international law, it should be part of the law of the land.*[56] (Emphasis supplied)

*Reyes* explains in the first part that the Vienna Convention becomes binding law under the Treaty Clause by virtue of ratification. In the second part, it becomes law again on account of the Incorporation Clause.

*Marcos v. Manglapus*[57] perpetuates the confusion as to the sources of international law that respectively correspond to the Incorporation Clause and the Treaty Clause. Their application for travel documents having been denied, the petitioners invoked the right of abode and of changing the same, the right to travel, and the right to return to one's country. *Marcos* states:

> The right to return to one's country is not among the rights specifically guaranteed in the Bill of Rights [of the Constitution], which treats only of the liberty of abode and the right to travel, but it is our well-considered view that the right to return [to one's country] *may be considered as a generally accepted principle of international law and, under our Constitution, is part of the law*

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[55] 25 SCRA 553 (1983).
[56] *Id.*, at 566.
[57] 177 SCRA 668 (1989).

> *of the land* (Art. II, Sec. 2 of the Constitution). However, it is distinct and separate from the right to travel and enjoys a different protection under the International Covenant on Civil and Political Rights.[58] (Emphasis supplied)

Having in mind the fact that the Philippines is a party to the Covenant, the declaration that the right to return to one's country is a generally accepted principle of international law under the Incorporation Clause and therefore is part of the law of the land, repeats the same theme in *Agustin* and *Reyes*, as pointed out above. *Marcos* implies that the right to return to one's country, not being included in the Bill of Rights, becomes part of the law of the land only by reason of the Incorporation Clause. It assumes that this right forms part of the International Covenant but it fails to connect this fact to its status under the Treaty Clause. The confusion may have been avoided by recognizing that in normal human experience returning to one's country is also a way of traveling and thus comes within the scope of that right to travel.

We may explore the prospect that these cases may be applying the doctrine of the dual character of international law norms by which, as affirmed by the International Court of Justice in the *Nicaragua* case,[59] a customary norm that may have been codified in a treaty continues to exist and apply as customary law independently of the treaty law even if they have identical content. However, there is no discernible attempt to conceptualize the duality of norms in any of the cases reviewed above; it appears that the only burden is to establish that the conventional rule or principle in question forms part of national law by reason of the Incorporation Clause.

### *Internalization of Customary Norms as Juridical Enigma*

It is by constitutional mandate that the "generally accepted principles of international law" are accorded the status of law in Philippine jurisdiction, and thus derivative of rights and obligations. These principles acquire normative character by authority of the Incorporation Clause of the Constitution, not by

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[58] *Id.*, at 687–688.

[59] Case Concerning Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. US) 1986 ICJ 14,at para. 179. (June 27).

legislative pronouncement. *Lantion*[60] has observed that "[u]nder the doctrine of incorporation, rules of international law form part of the law of the land and no further legislative action is needed to make such rules applicable in the domestic sphere." They are not legislated norms nor the product of the mystifying "automatic incorporation," they are constitutionally derived.

The Constitution, however, does not provide the individual identity of these principles, and thus the enigma as to the existence of norms without prior knowledge of their substantive content. Being a special category of norms in the constitutional system, they are not contained in a catalogue or code of rules within the ken of public knowledge, which normally characterize the statutory norms. Even as their operational validity in domestic jurisdiction is determined by constitutional and legal standards, their substantive content is to be ascertained by objective international law, i.e., as recognized and accepted by the international community of States as a whole. Since they are generally accepted principles *of international law*, it is by virtue of their nature as such that they become national law. There is thus the imperative to ascertain that they possess this status in the international legal order. Without this process there is the likelihood of discrepancy—or incompatibility—between objective international-law norms and Philippine practice involving these norms. Generally, jurisprudence has shown no discernible recourse to this process and consigns this matter to the presumptive assumption that it has been done by some mental process of the courts. It is by some impressionism that *Agustin v. Edu*[61] makes generally accepted principles of international law out of road signs and signals as provided in the Vienna Convention on Road Signs and Signals. The confusion as to the binding character of customary norms with that of conventional rules of international law is apparent in *Marcos v. Manglapus,*[62] *Reyes v. Bagatsing,*[63] and *Augustin v. Edu.*[64]

How are the customary norms under the Incorporation Clause identified? Until an authoritative interpretation is done or an appropriate

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[60] *Supra* note 10.
[61] *Supra* note 52.
[62] *Supra* note 57.
[63] *Supra* note 55
[64] *Supra* note 53.

legislation is enacted, the identification of these norms is left to advocacy in each particular controversy, leaving to the courts to affirm or deny the conformity of the norm invoked with the standards required by objective international law. Invariably, in practice, it is the Supreme Court that finally determines the status of the generally accepted principles under the Incorporation Clause on a case-to-case basis. Time is uncertain as to when the Court is seized with the opportunity to make such a pronouncement. In the last sixty years, not more than fifty of the generally accepted principles of international law under the Incorporation Clause have been identified or so characterized in the decisions of the Court, mostly by way of *obiter dictum.*

As a source of rights and obligations, the generally accepted principles under the Incorporation Clause become effective law as applied only by reason of the Court's authoritative interpretation and at the time the Court promulgates its decision. However, the Incorporation Clause appears to have established the legal status of these principles as "part of the law of the land" at the time of the effectivity of the Constitution. This is the plain import of the Incorporation Clause when it proclaims that "The Philippines ... adopts the generally accepted principles of international law as part of the law of the land."[65] The *problematique* is that they assume the status as part of national law by virtue of the Incorporation Clause, but they become executory only at the time of the Court's authoritative interpretation that comes at each time an appropriate controversy is presented at bar. This would make the Incorporation Clause a non-self-executory provision or principle, awaiting the Supreme Court's exercise of interpretive authority. Still, there is need to return to the basic issue for authoritative response: when do the "generally accepted principles of international law" become domestic law? In performing this function is the Court engaged in law-making? If so, do these principles become law after the fact? Is the judicial act constitutive of what principles will form part of domestic law? Theoretically, it is the Constitution that constitutes them as part of national law; the judicial act is merely declaratory of what has already become part of the law of the land as derived by the Constitution from general international law. The judicial function determines

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[65] CONST. §art.II, §2.

which norm of national law is to be applied as drawn from "generally accepted principles of international law."

Quite apart from principles of general international law that are "part of the law of the land", are there such principles that *form part of the Constitution itself*? If norms and principles are constitutionalized in that they comprise of provisions of the Constitution, they are constituted as a category separate from those emanating from the Incorporation Clause; to be applied as constitutional provisions, they belong to a higher plane in the hierarchy of rules than the "generally accepted principles of international law." The principle of sovereign immunity is a good candidate for this category, as provided in the version given in Section 3, Article XVI of the Constitution.[66] Another is the principle of renouncing war as an instrument of national policy, derived from the Kellog-Brian Pact of 1928.[67]

**Meaning and Function of the Incorporation Clause**

In Section 2, Article II of the Constitution, the Incorporation Clause reads: "The Philippines [...] adopts the general accepted principles of international law as part of the law of the land. [...]" The Clause is the formal acceptance and recognition of principles of general international law as part of Philippine law; by this constitutional process they are transmuted into national law. This transmutation entails at least three consequences:

1. In Philippine jurisdiction, these principles are subordinated to the Constitution; their operation is subject to constitutional standards. This marks a radical departure from their legal character in the international sphere as part of objective international law in which they hold supremacy over the Constitution and statutory law. Indeed, they derive their validity from the Constitution under the Incorporation Clause.

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[66] This provides: "The State shall not be sued without its consent."

[67] Article I of the Pact provides "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another."

2. Their application as national law pertains to subjects or persons of Philippine law comprising of individual natural persons and juridical entities, thus striking a difference from their status in the international legal order in which they govern the legal relations of States, international organizations and other subjects or persons of international law.

3. Accordingly, the nature of rights and obligations undergoes transformation; in domestic jurisdiction they are derivative of rights and duties created by Philippine law, primarily by the Constitution.

The binding character of the principles of general international law on the Philippines as an international person should not be confused with the function of the Incorporation Clause as pointed out above. The former does not need the latter; the latter presupposes the former. General international law binds the Philippines as a State with the force of law without regard as to whether it has internalized them or not. As subject of international law, the Philippines possesses rights and obligations integral to the legal relations in the international community of States. As phrased by the Permanent Court of International Justice in the *Lotus Case*, "The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or *by usages generally accepted as expressing principles of law* and established in order to regulate the relations between those co-existing independent communities with the view to achievement of common aims."[68] (Emphasis supplied)

In this light, it is inaccurate to assert, as does *Tañada*,[69] that "[b]y the doctrine of incorporation, the country is bound by the generally accepted principles of international law which are considered to be automatically part of our own laws," referring to the Incorporation Clause. It is needless for the Constitution to have an Incorporation Clause only to serve this purpose; for the Philippines as a State to be bound by the "generally accepted principles of international law," no constitutional prescription is needed, no incorporation provision required. They are binding on the Philippines by reason of its status as an international person or subject of international law.

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[68] 1927 PCIJ (ser. A) No. 10, at 18.
[69] 272 SCRA 18, 66 (1997).

*United States of America v. Guinto* submits the following formulation:

> Sovereign immunity is one of the generally accepted principles of international law that we have adopted as part of the law of the land under Article II, section 2 [of the Constitution].
>
> *Even without such affirmation, we would still be bound by the generally accepted principles* under the doctrine of incorporation. Under this doctrine of incorporation, as accepted by the majority of States, such principles are deemed incorporated in the law of every civilized state as a condition and consequence of its membership in the society of nations. Upon its admission to such society the *state is automatically obligated to comply with these principles* in relation with other states.[70] (Emphasis supplied)

Thus, *Guinto* is of the view that the purpose of the Incorporation Clause is to make the generally accepted principles of international law binding on the Philippines. Necessarily, it implies that it is on this account that they are adopted as "part of the law of the land." However, at once it dismisses the need for the Incorporation Clause for that purpose, since even in its absence still the Philippines is "automatically obligated to comply with these principles." *Guinto* assigns a function to the Incorporation Clause and yet it renders it a surplusage in the Constitution. This self-contradiction is brought about by attributing to the Incorporation Clause a contrived and unreal function, i.e., to make these principles binding on the Philippines as a person in international law. It may be resolved by defining the true function of the Incorporation Clause which lies in the purpose of internalization, as explained above.

## Problems Relating to the Status of Treaties

### *Clarifying the Treaty Clause*

In Philippine practice, treaty as national law is directly operative without need of statutory implementation, upon compliance with constitutional

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[70] 182 SCRA 644 , at 652.

requirements. This self-executing nature of a treaty acquires specificity in the fact that ratification of a treaty is a process that combines the execution of an instrument of ratification by the President and concurrence by the Senate. When the Senate concurs in a treaty upon the request of the President, it does so in the making of "valid and effective" law out of the treaty rules.[71]

Under the Treaty Clause, the Constitution creates a mechanism for this purpose.[72] It provides in section 21, Article VII:

> No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.

This text may convey the impression that by Senate concurrence alone, the treaty becomes "valid and effective", but insofar as it deals with multilateral treaties it stands clarification. Treaties of this category invariably require a number of ratifications as a condition for entry into force. For example, the Vienna Convention on the Law of Treaties provides in Article 84 that it "shall enter into force on the thirtieth day following the deposit of the thirty-fifth instrument of ratification or accession." If Senate concurrence would signify only the twentieth or the thirtieth ratification of the Convention, in no way would it make the Convention "valid and effective" national law on account of Senate concurrence.

For a multilateral treaty to be transformed into national law under the Treaty Clause, two conditions must be fulfilled conjointly: Senate concurrence and its entry into force by the treaty's own provisions. Senate concurrence alone does not make a treaty of that category national law unless it has already become effective in accordance with its own provisions at the time of concurrence. In other words, concurrence by the Senate operates to effectuate a treaty as national law only at the time it has already become international law

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[71] *Bayan v. Executive Secretary,* 342 SCRA 449, 496 (2000): For the role of the Senate in relation to treaties is essentially legislative in character. Cf. *Tolentino v. Secretary of Finance,* 235 SCRA 630, 662 (1994): The exercise of treaty ratifying power is not the exercise of legislative power ... [I]t is the exercise of a check on the executive power.

[72] See *Guerrero Transport Services, Inc. v. Blaylock Transportation Services Employees Association-Kilusan,* 71 SCRA 621 (1976).

by its own entry into force; until the treaty has established this status, there is yet no international law that Senate concurrence can transform into national law.

The entire treaty system under the Constitution may be described as self-executing. However, the concrete terms of obligations under a treaty may require legislative implementation of its particular provisions after it has become national law. For example, the Convention on the Prevention and Punishment of the Crime of Genocide provides as one of the principal obligations of the parties that they "undertake to enact, in accordance with their Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for the persons guilty of genocide.[...]"[73] The International Convention on the Elimination of All Forms of Racial Discrimination requires the parties that they shall "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred.[...]"[74] Treaty obligations such as these do not negate the character of a treaty system as self-executing. Performance of these obligations does not constitute a precondition for the effectivity of the treaty as national law. Rather, the enactment of the law is in compliance with obligations under the treaty after it has become effective as national law under the Treaty Clause.

### *Statute and Treaty*

"A treaty has two aspects—as an international agreement between states, and as municipal law for the people of each state to observe", says the Supreme Court in reference to the Philippines–United States Labor Agreement of 1968.[75] *Abbas v. Commission on Elections*[76] observes that "a binding treaty or international agreement" on the part of the Philippines would "constitute part of the law of the land." Even as a treaty is accorded the force of law, "as

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[73] Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12. 1951, art. V.

[74] International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4. 1969, art. 4(a).

[75] *Guerrero's Transport Services, Inc. v. Blaylock Transportation Services Employees Association-Kilusan*, 71 SCRA 621, 629 (1976).

[76] 179 SCRA 287 (1989).

internal law it would not be superior to ... an enactment of the Congress of the Philippines, rather it would be in the same class as the latter."[77] On the whole, as *Mighty Corporation v. Gallo Winery* affirms,[78] "the fact that international law has been made part of the law of the land does not by any means imply the primacy of international law in the municipal sphere. Under the doctrine of incorporation as applied in most countries, rules of international law are given a standing equal, not superior, to legislative enactments."

*Secretary of Justice v. Lantion*[79] gives contradictory "principles" contained in the same paragraph, as follows:

> In a situation [...] where the conflict is irreconcilable and a choice has to be made between a rule of international law and municipal law, jurisprudence dictates that *municipal law should be upheld by the municipal courts* [...] *[f]or the reason that such courts are organs of municipal law and are accordingly bound by it in all circumstances.* [...] The doctrine of incorporation [...] decrees that rules of international law are given equal standing with, but are not superior to, national legislative enactments. Accordingly, the *principle lex posterior derogat priori takes effect—a treaty may repeal a statute and a statute may repeal a treaty* [...] (Emphasis supplied)

Thus, by imputing a superior status to national law, *Lantion* negates any other approach to resolving the problematic relation between a statute and a treaty. How may the rules of international law stand in parity with statutory law if "in all circumstances" international law is subordinated to national law? Apparently the temporal sequence in *lex posterior derogat priori* is altogether irrelevant in *Lantion's* hegemony of national law. At any rate, *Lantion* may serve to illustrate the confusion obtaining in a key area of jurisprudence.

Varying standards have been employed so far, with a minimum attempt to explain the rationale therefore, which might have been assumed to be mindlessly self-evident. In *Abbas v. Commission on Elections,*[80] an *obiter dictum*

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[77] *Id.,* at 294.
[78] 243 SCRA 473 (2004).
[79] 322 SCRA 160 (2000).
[80] 179 SCRA 287 (1989).

presents the application of the later-in-time principle (*lex posterior derogat priori*) in the following manner:

> Assuming for the sake of argument that the Tripoli Agreement is a binding treaty or international agreement, it would then constitute part of the law of the land. But as internal law [or national law] it would not be superior to R.A. No. 6734, an enactment of the Congress of the Philippines, rather it would be in the same class as the latter,[...] Thus, if at all, R.A. 6734 would be *amendatory* of the Tripoli Agreement, being a subsequent law. (Emphasis supplied)

Apparently based on *lex posterior derogat priori*, this formulation implies, in the words of *Lantion*, "a treaty may repeal a statute and a statute may repeal a treaty,"[81] depending on which comes later in time. Repeal is contemplated in the likelihood that Republic Act No. 6734, the Organic Act of the Autonomous Region of Mindanao, would be irreconcilable with the Tripoli Agreement. The logic of repeal would also run against that statute if it is enacted earlier than the Tripoli Agreement.

In the international sphere, *Abbas* does not seem to clearly foresee the implications of its own formula. The supremacy of the treaty in objective international law certainly does not respect the later-in-time principle on the side of the statute; there is no place for that principle at all. Changes in the rights and obligations under a treaty by means of national law are impermissible; they do not bind the other parties to the treaty. The theory of repeal does not appear to be clear: does repeal operate absolutely or only in relation to the Organic Act?

Under attack in *Ichong v. Hernandez*[82] is the constitutionality of "An Act to Regulate the Retail Business" on the ground that the Act "violates international and treaty obligations of the Republic of the Philippines," referring to the Treaty of Amity between the Republic of the Philippines and the Republic of China of April 18, 1947. *Ichong* resolves this issue by pointing out that in the case at bar there is no irreconcilable conflict between the

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[81] *See* note 79

[82] 101 Phil. 1156 (1957).

legislative enactment and the treaty in question. However, it goes on to affirm, thus:

> But even supposing that the law infringes upon the said treaty, the treaty is always subject to qualification or amendment by a *subsequent* law (*U.S. v. Thomson*, 258 Fed. 257, 260), and the same *may never curtail or restrict the scope of the police power of the State.* (*Paston v. Pennsylvaia,* 58 L. ed. 539).

Here, reference to subsequent law may imply that its controlling effect is determined by the fact that it comes later in time and thus it may be said to prevail over the treaty by reason of *lex posterior derogat priori.* When *Ichong* goes further with the thesis that a treaty may "never curtail or restrict the scope of the police power of the State", it may have shifted to *lex superior derogat inferiori, i.e.,* that the statute as a source of law with its inherent police power stands superior to the treaty. This shift assumes that a treaty may not qualify as instrument of police power under Philippine law.[83]

*Lex superior derogat inferiori* is first applied in *Philip Morris v. Court of Appeals*[84] and reiterated in *Mighty Corporation*[85] in identical language both dealing with the relation of Republic Act No. 166, the Trade Mark Law, and the Paris Convention on the Protection of Industrial Property. The locus of conflict lies in the commercial use of the trademark for not less than two months, as a prerequisite to registration under this law, which the Paris Convention does not require. Holding that national law takes precedence, *Philip Morris* postulates: "Following universal acquiescence and comity, municipal law on trademarks regarding the requirement of actual use in the Philippines must subordinate an international agreement inasmuch as the apparent clash is being decided by a municipal tribunal ...." As indicated above, *Lantion*[86] seems to have extended this holding to general application, beyond trademarks.

In the light of the supremacy of national law, *Philip Morris, Mighty Corporation, and Lantion* appear to have considered the Paris Convention, of

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[83] See *Agustin v. Edu,* 88 SCRA 195 (1979).
[84] 224 SCRA 576 (1993)
[85] *Supra* note 78.
[86] *Supra* note 78.

which the Philippines is a party, as separate and independent from national law, thus disregarding its application as part of the law of the land. Instead, the Paris Convention may have been treated in the context of objective international law operating in the international sphere, in opposition to national law. An alternative approach, while respecting the discrepancy between the Trademark Law and the Paris Convention, is to consider the conflict as internal to national law, *i.e.,* taking into account both the statute and the treaty as national law operating in the domestic sphere.

*Gonzales v. Hechanova*[87] may be evaluated as an application of *lex superior derogat inferiori* in regard to the relation of executive agreement and statutory law. It explains:

> But, even assuming that said contracts may properly be considered as executive agreements, the same are unlawful, as well as null and void, from a constitutional viewpoint, said agreements being inconsistent with the provisions of Republic Acts Nos. 2207 and 3452. Although the President may, under the American constitutional system, enter into executive agreements *without* previous legislative authority, he may *not*, by executive agreement, enter into a transaction which is *prohibited* by statutes enacted prior thereto.[...] He may not defeat legislative enactments that have acquired the status of law, by *indirectly repealing the same* through an executive agreement *providing for the performance of the very act prohibited by said law.*[88]

While *Gonzales* makes reference to "statutes enacted prior" to the executive agreements, it appears to be its burden to affirm the primacy of statutes without respect to temporal sequence, thus applying *lex superior derogat inferiori.* Note that the operation of this principle this time takes on the rationale of separation of powers. In addition to the emphasis made in the *ponencia* itself, as indicated in the excerpt above, *Gonzales* further states:

> Under the Constitution, the main function of the Executive is to enforce the law enacted by Congress. The former may not interfere in the

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[87] 9 SCRA 230 (1963).
[88] *Id.*, at 242.

> performance of the legislative powers of the latter, except in the exercise of his veto power.[89]

By its nature, this rationale may justifiably apply even if the statute were enacted *after* the conclusion of the executive agreement. Hence, the superior status of statutory enactment is asserted over an international agreement.

For the first time, the resolution of conflict in the statute-treaty relation is provided a clear statement of constitutional basis in *Gonzales*. Interpreting the review powers of the Supreme Court under the 1935 Constitution,[90] *Gonzales* declares:

> As regards the question whether an international agreement may be invalidated by our courts, suffice it to say that the Constitution of the Philippines has clearly settled it in the affirmative, by providing, in section 2 of Article VIII thereof, that the Supreme Court may not be deprived "of its jurisdiction to review, revise, reverse, modify, or affirm on appeal, certiorari, or writ of error as the law or rules of court may provide, final judgments and decrees of inferior courts in—(1) All cases in which the *constitutionality* or *validity* of any *treaty*, law, ordinance, or executive order or regulation is in question." In other words, our Constitution authorizes the nullification of a treaty, not only when it conflicts with the fundamental law, *but, also, when it runs counter to an act of Congress.*[91]

This interpretation enthrones the supremacy of the legislative enactment over a treaty, becoming its standard of validity. When a treaty "runs counter to an act of Congress," that supremacy logically prevails without respect as to whether the legislative act comes later or earlier in time. Hence in *Gonzales lex posteriori derogat priori* gives way to *lex superior derogat inferiori*. As a result, *Gonzales* does away with the theory of parity of the statute and the treaty, which is established in *Abbas, Lantion, Philip Morris* and *Mighty Corporation* as an elemental doctrine but without constitutional rationale. Further, it ramifies

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[89] *Id.*, at 242.

[90] The corresponding text of the present Constitution (1987) in art. VIII, § 5(2 adds the words "international or executive agreement" after "treaty."

[91] *Gonzales v. Hechanova*, 9 SCRA 230, at 246.

into the meaning of the Treaty Clause as interpreted by *Guerrero's Transport Services;*[92] a treaty becomes a "municipal law for the people to observe," subject now to the proviso that it does not run "counter to an act of Congress."

To reinforce the constitutional strength of *Gonzales*, it is relevant to bring into focus its pronouncement on the vital importance of the legislative will as built into the principle of separation of powers, as noted above.[93] Against the argument that the executive agreements in question should prevail since they were concluded later than the statutes, *Gonzales* reasons out: "No justification can be given as regards executive agreements *not authorized by previous legislation*, without completely upsetting the principle of separation of powers and the system of checks and balances which are fundamental in our Constitutional set-up.[...]"[94]

*Gonzales* retools the approach in *Philip Morris* and *Mighty Corporation* along the formula that municipal law "must subordinate an international agreement inasmuch as the apparent clash is being decided by a municipal tribunal which is bound by it in all circumstances", and infuses it with constitutional sense. It refines *Ichong's* scope of police power into the concrete reality of legislative function *vis-à-vis* the executive jurisdiction. Then, it resolves the contradiction between *lex superior derogat inferiori* and *lex posterior derogate priori* as it appears in *Lantion* by affirming the former in the context of the judicial review power of the Supreme Court as set out in the Constitution. And it leaves the later-in-time principle, as represented by *Abbas,* as a disembodied formula, a shadow of an American concept mechanically transplanted. In the end, it may be the unifying force of *Gonzales* that promises to put in order the confused state of the statute-treaty relation in Philippine jurisprudence. The controversy must find resolution in the principle that the treaty becomes valid and effective as domestic law if it does not contravene the Act of Congress.

From the viewpoint of the republican system of government, the supremacy of legislative will as embodied in statutory law assumes special

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[92] *Supra* note 75.
[93] *Gonzales v. Hechanova*, 9 SCRA 230, 243.
[94] *Id.*, at 243.

significance *vis a-vis* the expansive growth of treaty law. On the other hand, the rules generated by general multilateral conventions have virtually covered the entire compass of domestic jurisdiction, as a result displacing or overlapping major areas of legislation. As rules of conventional international law are transformed wholesale into "valid and effective" domestic law, the most representative body of the legislature has no participation in such transformative process. The vast fields of international legal regulation now structured into Philippine law include human rights, the environment, the uses of the ocean and its resources, as well as those in international trade in goods and services, textile and clothing, agriculture, intellectual property practice of profession, and criminal liability. This shows how extensive areas of domestic jurisdiction have been occupied by treaty law. The subsequent shift in strategic importance from legislation to treaty-making becomes evident and, hence, it may signify a shift in the balance of governmental authority from legislative to executive power.

### *The Constitution and the Treaty in Reyes v. Bagatsing*

In the regime of constitutional supremacy, *Reyes v. Bagatsing*[95] deserves an extended comment. In this case the Supreme Court granted the petition for mandatory injunction against the mayor of the City of Manila in denying permit to hold a protest march and rally against the US military bases towards the gates of the United States Embassy. The Court directed him to issue the permit "on the ground that there was no showing of the existence of a clear and present danger of a substantive evil that could justify the denial of a permit." Absent in the case at bar was the imminence of evil in which protest becomes advocacy of disorder and dissent, and a cloak for rebellion. Finding no justified limit to constitutional protection, the Court accordingly affirmed the unrestricted exercise of the fundamental rights of free speech and of peaceful assembly as set out in Section 9, Article IV of the 1973 Constitution: No law shall be passed abridging the freedom of speech, or of the press, or the

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[95] *Supra* note 55.

right of the people peaceably to assemble and petition the Government for redress of grievances.

But the Court went further and introduced what it considered "a novel aspect of this case," which made it one "of first impression." This is addressed to the prospect that had the "context of violence" — the substantive evil sought to be avoided by the clear and present danger test — involved the premises of the US diplomatic mission, *Reyes* would have justified the denial of the permit, declaring that "If there were a clear and present danger of any intrusion or damage, or disturbance of the peace of the [diplomatic] mission, or impairment of its dignity, there would be a justification for the denial of the permit insofar as the terminal point would be the [U.S.] Embassy."

This view is of the assumption that the circumstances considered as the clear and present danger of violence and disorder would lead to or constitute a violation by the Philippines of its obligation as a receiving State under Article 22(2) of the Vienna Convention on Diplomatic Relations. This provision states: The receiving State is under a special duty to take appropriate steps to protect the premises of the [diplomatic] mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

In dealing with the "novel aspect of this case," *Reyes* takes the risk of subordinating the fundamental freedoms of citizens guaranteed by the Constitution to the protection of the diplomatic premises of a foreign government under a treaty. In consequence, this implies that a treaty may stand over and above the Constitution if certain acts committed in the protest rally, claimed to be in breach of an obligation under that treaty, are characterized as, by the clear and present danger test, substantive evil of sufficient immediacy. Thus, *Reyes* clashes with the hierarchy of norms by which the Constitution becomes the supreme standard of validity of rules in the legal system. The infirmity of *Reyes* appears in bold relief in the light of the Supreme Court's power of review by which the fundamental law is instituted as "the ultimate

measure of the constitutionality or validity of any treaty, [or] executive agreement."[96]

Disorder and violence may occur on the occasion of the exercise of free speech and of peaceful assembly, in which conduct outside the constitutional protection may arguably be earmarks of the substantive evil sought to be tested by the clear and present danger principle. But in expanding the scope of the substantive evil so as to include the notion that these acts constitute unlawful conduct by which the Philippines would violate its "special duty" under Article 22(2) of the Vienna Convention on Diplomatic Relations, is to stand on dubious ground. *Reyes* would justify the denial of permit to hold the protest march and rally—in fact the denial of the exercise of free speech and peaceful assembly—in order to avert a breach of treaty obligation on the part of the Philippines.

Under the circumstances, it would be foolhardy for the foreign government in question to make out a case of breach of treaty obligation on account of state responsibility in international law based not on acts of State, but on acts of private persons who are in no way acting as organs or agents of State. In the factual setting of *Reyes,* the conduct of the rallyists, private individuals as they were, could not be attributed to the Philippines as a State. Hence, the consequences of their acts would not constitute a breach of special duty under Article 22(2) of the Diplomatic Convention. *Reyes* may approve the suppression of conduct under the free speech and peaceful assembly guarantees of the Constitution only to discover that this has nothing to do with the responsibility of the Philippines in international law: that the substantive evil is nowhere but in the misconception residing in the judicial mind.

The imagined breach of treaty obligation as the substantive evil may have been conceived on the basis of misunderstanding as to the nature of obligation stipulated in Article 22(2) of the Diplomatic Convention. It appears clearly that the duty in this provision is "to take all appropriate steps to protect the

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[96] CONST. of 1973) art. X, §5(2)(a). Under the present Constitution the pertinent text reads:." ... the constitutionality or validity of any treaty, international or executive agreement ...."

premises of the mission." In the performance of this duty, the Philippines does not act as a guarantor or insurer that no damage will be done on the diplomatic premises. It shall have complied with its duty if the Philippines employed all the resources for the purpose within its means and had exercised all the due diligence in protecting the premises but despite these, the occurrence in question had caused the damage. Moreover, no absolute standard is required on the Philippines as to what steps to take in compliance with this special duty this may be clearly inferred from the word "appropriate." At any rate, derogation of the right to free speech and to peaceful assembly cannot be characterized as "appropriate steps in the protection of diplomatic premises." At worse, the Philippines may opt to pay reparation or compensation for the damage; state practice on the said "special duty" indicates that the States may choose to pay compensation not out of legal duty but on an *ex gratia* basis. Between denial of human rights and payment of compensation, would *Reyes* be suggesting that the government takes the first alternative? It is a choice too between the Constitution and a treaty, on which *Reyes* sadly appears to have preferred the latter.

Even in objective international law, the right to free speech and peaceful assembly takes precedence over a duty or a right in the *inter se* relations between the sending State and the receiving State under the Diplomatic Convention. Universal respect for and observance of human rights and fundamental freedoms for all without distinction is an obligation of member States under the Charter of the United Nations, binding on both the Philippines and the United States.[97] Thus, they are subject to the supremacy clause of the UN Charter in Article 103: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

*Reyes* belabors the binding force of the Universal Declaration of Human Rights (UDHR) on the Philippines but fails to identify its significance in the context of the "novel aspect of this case," as pointed out above, and instead it

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[97] *See* U.N. CHARTER, ART. 55-56.

upholds the special duty under Article 22(2) the Diplomatic Convention, resulting in the impairment and defeat of the rights to free expression and peaceful assembly under the UDHR.[98]

In *Barcelona Traction Case,* the International Court of Justice draws our attention to two categories of international obligations:

> In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and *those arising vis-à-vis another State in the field of diplomatic protection* [or *inter se* obligations]. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes.*[99] (Emphasis supplied)

The International Court gives examples of international obligations of *erga omnes* character, thus: Such *[erga omnes]* obligations derived, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the *principles and rules concerning the basic rights of the human person* ....[100]

In this formulation, the undertaking to respect human rights and fundamental freedoms as *erga omnes* obligations stands on a higher plane over and above the *inter se* special duty under the Diplomatic Convention.

### *Misconception in the Means of Consent to be Bound by a Treaty*

In *Pimentel v. Executive Secretary,*[101] the petitioners had recourse to the Supreme Court in compelling the Office of the Executive Secretary and the Department of Foreign Affairs to transmit to the Senate for concurrence the Rome Statute of the International Criminal Court as signed by the *charge*

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[98] Article 19 of the UDHR reads: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers." Its Art. 20 provides:" Everyone has the right to freedom of peaceful assembly and association."

[99] 1970 ICJ 1970, para. 33.

[100] *Id.,* at para. 34.

[101] 462 SCRA 622 (2005).

*d'affaires ad interim* of the Philippine Mission to the United Nations. They are of the theory that the signature of the said diplomatic officer on the Rome Statute is the final act on the part of the Executive and, this being accomplished, it becomes the ministerial duty of the Office of the Executive Secretary and of the Department of Foreign Affairs to transmit the Rome Statute, as thus signed, to the Senate for concurrence under the Treaty Clause of the Constitution. *Pimentel* controverts the stand of the petitioners in interpreting the Treaty Clause "to mean that the power to ratify treaties belongs to the Senate." It affirms the well recognized view that it is the President who ratifies treaties.[102]

To this end, *Pimentel* distinguishes ratification from the signature of the diplomatic officer on the Rome Statute. In doing this it disregards the obvious status of such signature in the international law of treaties. Departing quite plainly from the Vienna Convention on the Law of Treaties, *Pimentel* is entrapped in the misconception that on the one hand "the signature is primarily intended as a means of authenticating the instrument and for the purpose of symbolizing the good faith of the parties."[103] It strikes a distinction "between signature and ratification" in that, on the other hand, the latter "is a formal act by which a state confirms and accepts the provisions of a treaty concluded by its representatives in a diplomatic mission."[104] It underscores this distinction by repeating it, "The signature does not signify the final consent of the state to the treaty. It is the ratification that binds the state to the provisions thereof", thus absolutizing the function of ratification.[105]

Under the Vienna Convention on the Law of Treaties, a signature may serve two functions: (a) authentication of the text of the treaty and (b) a means to express the consent of a State to be bound by a treaty. It is true that Article 10 of this Convention provides that "the text of a treaty is established as authentic and definitive: ... by signature, signature *ad referendum* or initialling by the representatives of those States of the text of the treaty...."

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[102] *Id.*, at 632–633.
[103] *Id.*, at 634–635.
[104] *Id.*
[105] *Id.*, at 636–637.

But in Article 11 of the Convention, contrary to *Pimentel's* view, a signature is recognized to signify "the final consent of the state to the treaty." Enumerating the "means of expressing consent to be bound by a treaty, this provision states:

> The consent of a State to be bound by a treaty may be expressed by *signature*, exchange of instruments constituting a treaty, *ratification*, acceptance, approval or accession, or by any other means if so agreed.

A focal point in the formation of norms and principles of the international law of treaties is the intention of the parties as expressed in the treaty, a factor which *Pimentel* misses. Hence, if the parties themselves have provided in their agreement that a signature is the means by which their consent is expressed to be bound by the treaty, this determines the status of the signature. Thus, in Article 12 of the said Convention "The consent of a State to be bound by a treaty is expressed by the *signature* of its representatives when: ... the treaty provides that signature shall have that effect;" or "... it is otherwise established that the negotiating States were agreed that signature should have that effect.[...]"

On the status of ratification, *Pimentel* cites as authority the book of Justice Isagani Cruz, *International Law*, in which ratification is characterized as one of the "steps in the treaty-making process." *Pimentel* incorporates the following formulation of Justice Cruz:

> The *usual steps in the treaty-making process* are: negotiation, signature, ratification, and exchange of the instruments of ratification. The treaty may then be submitted for registration and publication under the U.N. Charter, although this step is not essential to the validity of the agreement as between the parties.[106] (Emphasis supplied)

In this context, ratification becomes integral to every treaty as it goes through the entire process. Thereby, the intention of the parties to the treaty as to the function of ratification is disregarded.

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[106] *Id.*, at 633–634.

From the vantage point of objective international law, apparent is the discrepancy of *Pimentel* with the Vienna Convention on the Law of Treaties in which ratification is understood as "the international act ... whereby a State establishes on the international plane its consent to be bound by a treaty." It is *one of the means of expressing the consent of a State to be bound by a treaty* as provided in Article 11 of the Vienna Convention, quoted above. Which of these means becomes applicable is left to the choice of the parties. Thus, they may provide in the treaty that their consent to be bound by it is expressed by signature, as is the case governed by Article 12 of the Convention; or that their consent to be bound is by ratification, as is the case governed by Article 14 of the Convention.

The status and function of ratification come into fuller view when shown in the light of Article 14(1) of the said Convention, as follows:

> The consent of a State to be bound by a treaty is expressed by ratification when:
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> (a) the treaty provides for such consent to be expressed by means of ratification;
>
> (b) it is otherwise established that the negotiating States were agreed that ratification should be required;
>
> (c) the representative of the State has signed the treaty subject to ratification; or
>
> (d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

This gives a clearer picture of contrast *vis-a-vis* the formulation of Justice Cruz as adopted by *Pimentel.* Even if a treaty provides for ratification, a signatory State is left to its own free choice as to whether or not it will give its consent to be bound by a treaty through ratification.

The Rome Statute itself—the treaty involved in *Pimentel*— indicates the distinction between, on one hand, the signature of a diplomatic officer on that

treaty and ratification, on the other. Paragraphs 1 and 2, Article 125, of this Statute provide as follows:

> 1. This Statute shall be open for *signature* by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until October 17, 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.
>
> 2. This Statute is subject to *ratification*, acceptance or approval by *signatory States*. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.[107] (Emphasis supplied)

These provisions become the main legal frame for dealing with the controversy in *Pimentel*. The signature of the *charge d'affaires ad interim* on the Rome Statute is made pursuant to paragraph 1 of Article 125, quoted above, and does not serve merely the purpose of authentication. It qualifies the Philippines as a signatory State which appears to be a pre-condition for ratification under paragraph 2 of Article 125 of the Rome Statute: This Statute is subject to ratification, acceptance or approval by the signatory States. Signature and ratification complement each other—a case where two means of expressing consent to be bound by a treaty are combined. In the regime of the Vienna Convention on the Law of Treaties, it is a case that may be subsumed under Article 14 (1) (c), thus:

> The consent of a State to be bound by a treaty is expressed by ratification when: ...
>
> (c) the representative of the State has signed the treaty subject to ratification;[...]

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[107] Rome Statute, July 17, 1998, art. 125, para. 1-2.

Under the Rome Statute, note that the means of expressing consent to be bound by the treaty is to be distinguished from the act that determines the date it enters into force. Article 126(1) of the Statute takes the date of *deposit of instrument of ratification,* acceptance, approval or accession with the Secretary General of the United Nations as such determinative date. Had the Philippines ratified the Statute, "after the deposit of the 60th instrument of ratification," it shall have entered into force with respect to the Philippines "on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification," pursuant to Article 126 of the Statute.

Article 126 of the Rome Statute illustrates a case where ratification if complied with as a means of expressing the consent to be bound by a treaty does not necessarily make the treaty binding on the ratifying State. Ratification or any other means of expressing consent may be treated separately from its entry into force.

The Philippines became a signatory State when its *charge d'affaires ad interim* signed the Statute when it opened for signature on 17 July 1998, pursuant to paragraph 1, Article 125 of the Statute. But it did not proceed to ratification under paragraph 2 of that Article. Having failed to ratify, its being a signatory State was of no legal consequence. However, the way is still open for it to become a party to the Statute as an acceding State. It derives its right to accede from Article 125(3) of the Statute which provides that "This Statute shall be open to accession by all States."

The principles governing signature as well as ratification are to be located right in the treaty in question, i.e., in the Rome Statute itself and are drawn from the Vienna Convention on the Law of Treaties. Why *Pimentel* has to stray away from these principles and settle on misconceived notions far removed from objective international law leaves a lingering amazement.

As thus explained, ratification is an international act as understood in objective international law. As a constitutional act on the national plane it pertains to the execution of the instrument of ratification by the President and, as signed by him or her, its transmittal to the Senate with the request for concurrence in the manner required by the Treaty Clause of the Constitution.

Contrary to the thesis of the petitioners in *Pimentel*, the power of the Senate under the Treaty Clause alone does not amount to ratification; it is an outlandish idea to impute to the Senate, or its president, the function of executing an instrument of ratification, further implying that the Secretary of Foreign Affairs, an alter ego of the President, is to be in the service of the Senate for that purpose. Yet, the petitioners must have derived some guidance from the Supreme Court itself. *Lopez v. Pan American World Airways*[108] describes the Senate "not only the Upper Chamber of the Philippine Congress, but the nation's treaty-ratifying body." In *Adolfo v. Court of First Instance of Zambales,*[109] the U.S. Military Bases Agreement is referred to as having been "ratified by the Senate." Under the Constitution, says the Court in *Commissioner of Internal Revenue v. John Gotamco & Sons,*[110] "treaties are required to be ratified by the Senate." *Wright v. Court of Appeals*[111] speaks of the extradition treaty with Australia as having been "concurred and ratified by the Senate in a Resolution dated 10 September 1990. *Tolentino v. Secretary of Finance*[112] treats the Treaty Clause in the following manner:

> The contention that the constitutional design is to limit the Senate's power in respect to revenue bills, in order to compensate for *the grant to the Senate of the treaty-ratifying power* and thereby equalize its powers and those of the House [of Representatives] overlooks the fact that the powers being compared are different. [....] The *exercise of the treaty-ratifying power* is not the exercise of legislative power. It is the exercise of a check on the executive power .... (Emphasis supplied)

Then, in *Pimentel* the Court comes home to the ground rule that "under our Constitution, the power to ratify is vested in the President."[113]

Bizarre as it may appear, the following case in *Reyes v. Bagatsing* deserves notice:

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[108] *Lopez v. Pan American World Airways,* 16 SCRA 431, 441 (1966).
[109] *Adolfo v. CFI of Zambales,* 34 SCRA 166, 172 (1970).
[110] *Commissioner of Internal Revenue v. Gotamco & Sons,* 148 SCRA 36, 39 (1987).
[111] *Wright v. Court of Appeals*, 235 SCRA 346, 356 (1994).
[112] 235 SCRA 630, 661–62 (1994).
[113] *Lopez v. Pan American World Airways*, 16 SCRA 431, 441 (1966).

> The Philippines is a signatory of the Vienna Convention on Diplomatic Relations adopted in 1961. It was *concurred in by the Philippine Senate on May 3, 1965 and the instrument of ratification was signed by the President on October 11, 1965, and was thereafter deposited* with the Secretary General of the United Nations on November 15.[114] (Emphasis supplied)

It is indeed a wonder how concurrence could be done by the Senate without the instrument of ratification executed by the President. This might be a case of the President instead concurring in the Senate ratification. And yet what is reflected in *Reyes* is not an isolated case. It appears to represent an established pattern in Philippine practice, as shown in the following selection. The Senate concurred in the Convention on the Privileges and Immunities of the United Nations in Resolution No. 28 which it approved on 18 February 1947, but the President did not sign the instrument of ratification until 30 July 1947.[115] Senate Resolution No. 44 concurred in the Constitution of the International Labor Organization on 19 March 1948, the instrument of ratification for which was signed by the President only on 19 May 1948.[116] The Senate concurred in the International Telecommunications Convention on 22 May 1952 but the President signed the instrument of ratification on 10 October 1952.[117] The Convention for the Prevention and Punishment of the Crime of Genocide received concurrence in Senate Resolution No. 9 of 28 of February 1950 and the instrument of ratification was signed on 23 June 1950.[118] The sequence of Senate concurrence and the Executive ratification indicates a broader pattern, thus: Geneva Convention Relative to the Treatment of Prisoners of War[119] and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, on 12 May 1952 as against 20 August 1952;[120] Treaty of Peace with Japan, on 16 July 1956 and on 18 July 1956;[121] Convention for the Protection of Industrial

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[114] 125 SCRA 553, 556 (1983).
[115] I Phil. Treaty Series, 181.
[116] I Phil. Treaty Series 273.
[117] I Phil. Treaty Series 455.
[118] II Phil. Treaty Series 83.
[119] II Phil. Treaty Series 263.
[120] II Phil. Treaty Series 333.
[121] II Phil. Treaty Series 729.

Property on 10 May 1965 and on 21 July 1965; and the Vienna Convention on Consular Relations on 20 May 1965 and on 11 October 1965.[122] More cases can make an extensive catalogue, but that belongs to another time. And to add to the enigma of ratification: The President transmitted to the Senate the Instrument of Ratification for the Charter of the Association of Southeast Asian Nations (ASEAN), dated 5 May 2008. In the letter of transmission of the same date, addressed to the President and Members of the Senate, the President writes as follows: "I have the honor *to recommend the ratification of the Charter of the Association of Southeast Asian Nations.*"[123] Is the President of the mind that it is the Senate that ratifies treaties and she consigns herself to the role of making recommendation for the ratifying power of the Senate to be exercised? The last sentence of the President's letter reads: "The Department of Trade and Industry (DTI) and the Department of Foreign Affairs (DFA), together with other relevant government agencies *have concurred with the ratification* of the ASEAN Charter."[124] (Emphasis supplied) Taking these agencies as the President's *alter ego,* is she informing the Senate that the Executive has already expressed concurrence in the Charter and implying that the way is clear for ratification by the Senate?

## Discrepancies between Objective International Law and Philippine Practice

### *On Sources of Law*

Article 38(1) of the Statute of the International Court of Justice (ICJ) defines its function to decide disputes submitted to it "in accordance with international law." In the performance of this function it becomes its duty to apply (a) international convention, (b) international custom, and (c) general principles of law.[125] To apply these sources is to decide disputes in accordance with international law, and to identify international law as pertaining to these

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[122] IV Phil. Treaty Series 671

[123] Letter of the President to the Senate of the Philippines (May 5, 2008)

[124] *Id.*

[125] These items are provided as (a), (b), and (c) of Article 38(1) of the ICJ Statute.

sources. Article 38(1) does not use the term "sources" but general international law refers to them under the established usage of that term.

Under Article 38(1)(d) of its Statute, the ICJ shall as well apply, "subject to the provisions of Article 59 [of the Statute], judicial decisions and the teachings of the most highly qualified publicists of the various nations, *as subsidiary means for the determination of rules of law.*"[126] (Emphasis supplied) It appears that in the application of judicial decisions and teachings of publicists, two limitations are to be observed by the ICJ, namely:

1. Pursuant to Article 59 of the ICJ Statute,[127] the binding character of the ICJ decisions, insofar as they may be applicable under Article 38(1)(d), is restricted to the parties to the dispute and is not extendible to any other case, including a case involving the same parties. In *German Interests in Polish Upper Sileria Case*, the Permanent Court of International Justice (PCIJ) states: The object of [Article 59] is simply to prevent legal principles accepted by the Court in a particular case from being binding on other States or in other disputes.[128] More properly, its function is limited to legal principles as applied to a particular factual context or as related to the dispositif. It would seem that *stare decisis* does not apply to the judgments of the International Court of Justice.

2. These decisions may also be applied as "subsidiary means for the determination of rules of law," which is quite distinct from the status of sources of law. They serve to evidence or ascertain the existence or status of a principle as law.

*Gibbs v. Rodriguez*[129] conveys an understanding of Article 38(1)(d), both as to judicial decisions and teachings of publicists. With regard to the former, it says:

> Although courts are not organs of the State for expressing in a binding manner its views on foreign affairs, they are nevertheless organs of the

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[126] ICJ Statute, art.38(1)(d).

[127] Article 59 of the ICJ Statute provides: The decision of the Court has no binding force except between the parties and in respect of that particular case.

[128] 1926 PCIJ, (ser) No. 7, at 19.

[129] 84 Phil., 231 (1949).

> State giving, as a rule, impartial expression to what is believed to be International Law. For this reason, judgments of municipal tribunals are of considerable practical importance *for determining what is the right rule of International Law[...].*[130] (Emphasis supplied)

Further, it expresses the view that:

> A decision of the Supreme Court of the small Republic of the Philippines is as much a *source* of *International Law* as a decision of the Supreme Court of the great Republic of the United States of America.[131] (Emphasis supplied)

*Gibbs* recognizes that under the ICJ Statute judicial decisions and teachings of publicists are to be applied as "subsidiary means for the determination of rules of law.[132] However, in its statement quoted above, it may have combined the meaning of *sources* with that of *subsidiary means.* Concededly, Article 38(1)(d) is to be interpreted as including the evidential significance of decisions of national courts, but certainly it is far-fetched from the import of "subsidiary means" to consider such decisions as in the nature of formal sources.

It is with respect to the teachings of publicists that *Gibbs* makes a clear delineation between *sources* and *subsidiary means* by pointing out that "it is as *evidence of law* and not as a *law-creating factor* that the usefulness of teachings of writers has been occasionally admitted in judicial pronouncements."[133] (Emphasis supplied)

### *The Case of the Universal Declaration of Human Rights*

The Universal Declaration of Human Rights (UDHR)[134] was adopted by the United Nations General Assembly on 10 December 1948 as Resolution 217A(III) by a vote of 48 for and none against, with eight abstentions. As

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[130] *Id.*, at 242.
[131] *Id.*, at 243.
[132] *Id.*, at 242.
[133] *Id.*, at 242.
[134] For text of the Declaration, *see* MERLIN M. MAGALLONA, FUNDAMENTALS OF PUBLIC INTERNATIONAL LAW 731–738 (2005).

such resolution it has no binding character as governed by Article 10 of the UN Charter which provides that the General Assembly "may make recommendations to the Members of the United Nations or to the Security Council or to both" on any questions or matters within the scope of the UN Charter. That it has no force of law means that its substantive provisions as such declaratory resolution do not embody rights and obligations under international law.

However, quite apart and distinct from the nature of the UDHR as a General Assembly resolution, some rights that it proclaims may have the status of general principles of law or a number of them may have developed into customary norms of international law since the time it was adopted. Most of the rights catalogued in the UDHR have been transformed into conventional norms under the International Covenant on Civil and Political Rights (ICCPR)[135]; this is in additional to UDHR rights that are provided under the International Covenant on Economic Social and Cultural Rights (ICESCR).[136] At least two constituent rights of the UDHR have not been absorbed into customary law and they are nowhere provided in the ICCPR. These are the right to seek and enjoy in other countries asylum from prosecution and the right to own property, as provided in Articles 14 and 17 respectively of the UDHR. Still other UDHR rights appear to be lacking in normative character, such as that in Article 28: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."

Instructive therefore is the need to determine the specificity of the varying legal statuses of the UDHR rights. Obviously the ground rules for the application of these rights are dictated by the identification of their individual status. Dealing with the UDHR in its entirety is a reference back to its nature as a General Assembly resolution. As a whole the application of the UDHR as a General Assembly resolution is of very limited practical value in dealing with the legal character of its individual constituent rights. On the other hand, the rights it proclaims in their individuated application acquire significance on the

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[135] 999 UNTS 171.
[136] 993 UNTS 3.

basis of their respective status as customary norm or conventional rule, and their import as "component" rights of the UDHR as a General Assembly resolution is of less value in normative praxis.

This background may prove to be useful as to the basis of internalization of international law norms in specific reference to the UDHR, both under the Incorporation Clause and the Treaty Clause. Pursuant to the condition that the process of internalization under the Incorporation Clause entails a showing that the norms in question are recognized by the international community as customary or general international law, it would be a justified burden to impose on *Mejoff v. Director of Prison*[137] as to how this requirement is met, if only on account of the fact that it has occasioned the first encounter of the Supreme Court with UDHR. While in the disposition of the case, *Mejoff* gives the *habeas corpus* petitioner, a foreign national, "protection against deprivation of liberty without due process of law [...] regardless of nationality," on constitutional grounds it shifts to the following approach:

> Moreover, by its Constitution (Art. II, Sec. 3), the Philippines "adopts the generally accepted principles of international law as part of the law of the Nation." And in a resolution entitled "Universal Declaration of Human Rights" and approved by the General Assembly of the United Nations of which the Philippines is a member, at its plenary meeting on December 10, 1948, the right to life and liberty and all other fundamental rights as applied to all human beings were proclaimed. It was there resolved that "All human beings are born free and equal in degree[138][sic] and rights" (Art. 1); that "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, nationality or social origin, property, birth, or other status" (Art. 2); that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law." (Art. 8); that "No one shall be subjected to arbitrary arrest, detention or exile." (Art. 9) ....[139]

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[137] 90 Phil. 70 (1951).

[138] "Degree" should read "dignity."

[139] *Mejoff v. Director of Prisons*, 90 Phil. 70, at 73–74 (1951).

In this tenor *Mejoff* seems to take the UDHR as a resolution and applies it with some direct binding effect on account of its adoption by the UN General Assembly with the participation of the Philippines as a member of the UN, presumably on the unjustified claim that the General Assembly possesses law-making or legislative powers. However this is incompatible with the application of the UDHR rights as "generally accepted principles of international law as part of the law of the Nation" under the Incorporation Clause of the 1935 Constitution.[140] Thus, technically, *Mejoff* adopts the process of converting the UDHR as a *recommendation* of the General Assembly under Article 10 of the UN Charter into customary international law as subsumed under the Incorporation Clause.

Arguably, an alternative approach that stays close to Mejoff's formulation is to affirm the UDHR as an authoritative interpretation of the obligation of member States under the UN Charter in reference to "respect for, and observance of human rights and fundamental freedoms" under its Articles 55 and 56.[141] Note that this core undertaking goes into the very purposes of the United Nations,[142] and yet nowhere in its Charter are the member states informed with specificity what these human rights and fundamental freedoms are. In the face of this lacuna, the UDHR serves to supply the necessary catalogue of human rights and fundamental freedoms reflecting the authoritative interpretation of the UN Charter by the member States.

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[140] CONST. of 1935, art. II, §3.

[141] Along this viewpoint, *see* HUMPHREY WALDOCK,GENERAL COURSE ON PUBLIC INTERNATIONAL LAW 106, *Recueil Des Cours* 1, 32–33; Louis Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AMERICAN U.L. REV. 1, 16 (1962). Article 55 of the UN Charter provides that "... the United Nations shall promote: ... (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." Article 56 states that "All members pledge themselves to take joint and separate action in co-operation with the [United Nations] Organization for the achievement of the purposes set out in Article 55." Articles 1(3), 13(1)(b), 56, 62(2) and 76 (c) of the Charter make mention of "human rights and fundamental freedoms."

[142] The Preamble of the UN Charter declares that the UN is established "to affirm faith in fundamental rights, in the dignity and worth of the human person." Among the purposes of the UN in Article 1(3) of its Charter is "To achieve international cooperation [...] in promoting and encouraging respect for human rights and for fundamental freedom for all without distinction as to race, sex, language, or religion ...."

It is significant that *Mejoff* is one of the few cases in which the application of principles of international law form part of the *ratio decidendi.* It has been reaffirmed repeatedly as precedent in *Borovsky v. Commissioner of Immigration,*[143] *Chirkoff v. Commissioner of Immigration,*[144] and *Andreu v. Commissioner of Immigration.*[145] In a footnote, *Reyes* declares that in these cases the "Supreme Court *applied* the Universal Declaration of Human Rights," stating that:

> The Philippines can rightfully take credit for the acceptance, as early as 1951, of the binding force of the Universal Declaration of Human Rights *even if the rights and freedoms therein declared are considered by other jurisdictions as merely a statement of aspirations* and not law until translated into the appropriate covenants.[146] (Emphasis supplied)

Considering that the constitutive rights of the UDHR are internalized into national law through the Incorporation Clause, the note quoted above reflects subjectivity in the identification of what are "generally accepted principles of international law." It is not in the spirit of competition among States that the normative content of the Incorporation Clause is ascertained but by objective verification as to the principles which have gained recognition as general international law in the international community. That "The Philippines can rightfully take credit for the acceptance, as early as 1951, of the binding force of the Universal Declaration of Human Rights" may imply that at the time the constituent rights of the UDHR had not yet developed into general practice in the context of customary international law; lacking the status of an international agreement, neither did they constitute conventional international law. Hence, it becomes a puzzle as to how the constituent rights have, or the UDHR itself has, acquired "binding force."

The approach of thus individuating the rights under the UDHR as a means of applying them—in place of its "wholesale" application as a General Assembly resolution—is appropriate in the context of the Incorporation Clause which calls for the adoption of principles in their individuated status as

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[143] 90 Phil. 107 (1951).
[144] 90 Phil. 256 (1951).
[145] 90 Phil. 347 (1951).
[146] *Supra* note 55. *See supra note* 34, at 566.

norms of general international law. This is done in *Salonga v. Hermoso* which requires that the function of issuing traveling documents should be discharged "conformably to the mandate of the Universal Declaration of Human Rights on the right to travel."[147] *Villar v. TIP* has struck down as impermissible the expulsion of students by an educational institution for participating in protest demonstration, since among other grounds it constitutes a denial of right to education as a constitutional right, implying that it is also in violation of Article 26 of the UDHR.[148]

The case of the UDHR as surveyed above illustrates a lack of conceptual clarity as to how the incorporation of international law norms into domestic law may be qualified by ascertaining the status of individual norms as recognized in the international community.

***Encounter with "People Power Revolution"***

For the first time in Philippine jurisprudence, the Supreme Court encounters a constitutional interregnum as it deals with "people power revolution" in *Republic v. Sandiganbayan,*[149] and avails of international law to save the day. In question is the protection against illegal search and seizure and the inadmissibility of illegally seized items in evidence, owing to the fact that the raid resulting in the illegal search and seizure was conducted within the duration of the revolutionary government that took power "in defiance of the provisions of the 1973 Constitution." *Republic* synthesizes the situation as follows:

> During the interregnum, the directives and orders of the revolutionary government were the supreme law because no constitution limited the extent and scope of such directives and orders. With the abrogation of the 1973 Constitution by the successful revolution, *there was no municipal law higher than the directives and orders of the revolutionary government.* Thus, during the interregnum, a person could not invoke any exclusionary right

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[147] 97 SCRA 121 (1980 ). UDHR in Art. 13(2) provides: Everyone has the right to leave any country, including his own, and to return to his country.

[148] 135 SCRA 706 (1985). Art. 26(1) of the UDHR in part provides: Everyone has the right to education...

[149] 407 SCRA 10 (2003).

> [in evidence] under a Bill of Rights because there was neither a constitution nor a Bill of Rights during the interregnum ....[150] (Emphasis supplied)

However, *Republic* adheres to the view that the revolutionary government cannot derogate from the obligations under the international law of human rights. In contrast, the directives and orders of the revolutionary government "should not have violated the Covenant or the Declaration."[151] Emphatic in this contrasting outlook, *Republic* proclaims:

> We hold that the Bill of Rights under the 1973 Constitution was not operative during the interregnum. However, we rule that the protection accorded to individuals under the Covenant and the Declaration remained in effect during the interregnum.[152]

*Republic* deserves scrutiny because lacking conceptual clarity, it invites a revisit to the relation of national law and international law beginning with the following problem: Is the Supreme Court applying norms of international law as part of Philippine law, or directly as law in the international sphere?

If *Republic* works on the premise that there is no operative Constitution in the revolutionary interregnum, it cannot rely on the application of the Incorporation Clause nor of the Treaty Clause which are constitutional provisions—the only entry points to the internalization of international law norms into national law. It follows then that there being no internalization through these entry points, such norms have not become part of Philippine law. Not being part of Philippine law, they cannot be applied within Philippine jurisdiction by the domestic courts.

In avoidance of this impediment, *Republic* may have resorted to a novel approach in the following modality:

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[150] *Id.*, at 52.

[151] *Id.*, at 58, referring to the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR).

[152] *Id.*, at 51.

> The Declaration, in which the Philippines is also a signatory [sic], provides in its Article 17(2) that [n]o one shall be arbitrarily deprived of his property." Although the signatories [sic] to the Declaration did not intend it as a legally binding document, being only a declaration, *the Court has interpreted the Declaration as part of the generally accepted principles of international law and binding on the State.* Thus, the revolutionary government was also obligated under international law to observe the rights of individuals under the Declaration.[153]

Here, the Court seems to invoke the UDHR or its constituent rights, but refrains from making reference to the Incorporation Clause or to their status as part of national law under the Incorporation Clause. It appears to deal with these rights as directly binding on the Philippines as a State, setting aside the Incorporation Clause as medium of their binding force. However, when it declares that "the Court has interpreted the Declaration as part of generally accepted principles of international law," it makes particular reference in the footnote, to its decisions applying the UDHR in *Mejoff, Borovsky, Chirskoff,* and *Andreu,*[154] in which it applies the Incorporation Clause of the 1935 Constitution, thereby establishing the status of the UDHR and its constituent rights as part of Philippine law. *Republic* seems to avoid the application of the Incorporation Clause but the precedents that it applies are based on the Incorporation Clause of the 1935 Constitution.

It appears that this approach seeks to apply the UDHR not under the Constitution through the Incorporation Clause—in other words not as national law—but as objective international law directly binding on the Philippines as a *person in international law* and not on individual Filipino citizens as *subjects of Philippine law.*

This interpretation by *Republic* is reinforced by its notion that:

> Suffice it to say that the Court considers the Declaration *as part of customary international law,* and that *Filipinos as human beings are proper subjects*

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[153] *Id.,* at 57. The UDHR was adopted by the UN General Assembly as a resolution. Resolutions of this category are not subject to signature. They are adopted by voting or consensus. Emphasis added.

[154] *Supra* notes 143 to 145.

> *of the rules of international law* laid down in the Covenant.[155] The fact is the revolutionary government did not repudiate the Covenant or the Declaration in the same way it repudiated the 1973 Constitution. As the *de jure* government, the revolutionary government could not escape responsibility for the State's good faith compliance with its treaty obligations under international law.[156] (Emphasis supplied)

This language speaks of the UDHR as customary international law, implying its binding nature as a source of law on the Philippine State. But when it regards Filipinos as "human beings ...[as] subjects of the rules of international law," it elevates them to the international plane, on which they become direct possessors of rights and duties under objective international law, and implying further that by themselves they are subjects of international law. Since *Republic* considers them as subjects of international law, how are they juridically connected to the Covenant? As *Republic* points out, they are "subjects of the rules of international law *laid down in the Covenant.*"[157] (Emphasis supplied) Hence, they appear as possessors of undertakings under the Covenant. Under Article 2(1) of the Covenant, defining the core obligation,

> Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant [....]

The subjects under the Covenant are the States Parties; they are the bearer of rights and duties, never the individuals whose human rights are thereby protected. As such individuals under the Covenant, Filipino citizens are the beneficiaries, not subjects of the "rules of international law laid down by the Covenant." A breach of obligations may give rise to a case of international responsibility between States Parties, not the individuals as beneficiaries.

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[155] Referring to the International Covenant on Civil and Political Rights of which the Philippines is a party.

[156] *Republic v. Sandiganbayan*, 407 SCRA 10, at 58 (2003).

[157] *Id.*

These are among the problematic implications when *Republic* shifts to the application of international law in the international sphere, as it departs from the fundamental requirements of the national legal order. In contrast, under national law, customary norms of international law find no application as such; they have to go through the process of incorporation by which they become "part of the law of the land" upon their characterization as "generally accepted principles of international law." It is imperative that they acquire the status of Philippine law, as a condition *sine qua non* of applicability in Philippine jurisdiction. As regards treaties, they are transformed into domestic law; it is the treaty itself that becomes "valid and effective" as Philippine law following compliance with constitutional requisites. Accordingly, the human rights recognized by the Covenant become rights and guarantees under Philippine law, this time the entitlement of Filipinos to these rights are as subjects of Philippine law, not of international law. They become the bearer of these rights, enforceable by them before domestic courts, not before international tribunals. When, therefore, *Republic* declares that being the supreme law during the "people power" interregnum, there was no municipal law higher than the directives and orders of the revolutionary government, the rights under the Covenant as *domestic law* may have been derogated, together with the abrogation of the 1973 Constitution and its Bill of Rights. However, the Covenant has a dual character. It becomes "valid and effective" under the Treaty Clause not only as domestic law but as a treaty of international obligations vis-à-vis the other States Parties. By the Covenant, the Philippines as a State Party undertakes to respect and ensure to all Filipino citizens and other persons within its jurisdiction the rights which it provides. The obligations under the Covenant pertain to the Philippines as a *State* and are not adversely affected by internal changes in the *government.*

It might be less problematic if a distinction between State and Government be underscored. In this approach, the State as an international person is not affected by internal changes in the Government even as such changes bring about a new constitution or restructuring of its political institutions. The identity and continuity of the State in terms of its rights and obligations under international law is maintained despite the internal revolution, such as the "people power revolution" of the kind involved in

*Republic.* In particular, this approach would serve the purposes of *pacta sunt servanda.*[158] Hence, the Philippine State, in the same identity as a subject of international law, continues to be bound by its obligations under the Covenant. Remaining as a member State of the United Nations, it must comply, as before, with the supreme obligations under the UN Charter, in particular the duty to respect and observe human rights and fundamental freedoms for all without discrimination, as authoritatively interpreted by the UDHR.

What remains is the problem of effectuating human rights as national law, in the light of the abrogation of the 1973 Constitution by the revolutionary government, leaving a lacuna in the legal system. In point is a fundamental principle that Philippine law rejects the doctrine of *non-liquet, i.e.,* that the court may not decline a case for want of an applicable law. Thus, the Civil Code affirms that "[n]o judge or court shall decline to render judgment by reason of the silence, obscurity or insufficiency of the laws.[159] The jurisprudence of the Supreme Court itself becomes a rich and vast resource that virtually covers the entire field of the Bill of Rights, embodying as well rulings on international human rights applied as national law. Concededly, this jurisprudence is to be recognized as the law of civil and political rights, relying on the axiom that "[j]udicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines."[160] Hence, on this basis, *Republic* could have availed of the principle of precedent thus embodied in Philippine law.

### *Pacta Sunt Servanda as National Law*

Universally recognized is the *pacta sunt servanda* rule as general international law.[161] It is a fundamental principle decidedly of *jus cogens* character.[162] Article 26 of the Vienna Convention on the Law of Treaties states

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[158] *See* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 405(1979); K. MAREK, THE IDENTITY, AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW 5-6 (1954).

[159] CIVIL CODE, Art. 9.

[160] CIVIL CODE , Art. 8.

[161] Vienna Convention on the Law of Treaties, May 23, 1969 Preamble.

[162] *See* Manfred Lachs, *Pacta Sunt Servanda* in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 364, 368-369 (Rudolf Bernhardt ed., 1984).

the rule as follows: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." As both customary and conventional international law, *pacta sunt servanda* governs treaties in force as an agreement under international law between States.[163] It has been declared as national law through the Incorporation Clause in *Tañada,*[164] and *Bayan,*[165] as well as in *La Chemise Lacoste v. Fernandez*[166] and *WHO v. Aquino,*[167] *Tañada* and *Bayan* deserve comment on account of common peculiarity: both deal with international agreements under constitutionality attack, in response to which *pacta sunt servanda* is asserted in support of their constitutionality as affirmed by the *dispositif.* Thus *Tañada* states:

> In its Declaration of Principles and State Policies, the Constitution "adopts the generally accepted principles of international law as part of the law of the land, [....]" By the doctrine of incorporation, the country is bound by generally accepted principles of international law, which are considered to be automatically part of our laws. One of the oldest and most fundamental rules in international law is *pacta sunt servanda* — international agreements must be performed in good faith. "A treaty engagement is not a mere moral obligation but creates a legally binding obligation on the parties [....] A State which has contracted valid international obligation is bound to make in its legislation such modification as may be necessary to ensure the fulfillment of the obligation undertaken."[168]

Although it takes *pacta sunt servanda* in the context of the Incorporation Clause as "part of the law of the land," it would appear that *Tañada* espouses this principle from the viewpoint of objective international law operating in the international plane between States, not as national law. Even as it is the very constitutionality of the WTO agreements that are squarely challenged it still insists on "international agreements [that] must be performed in good faith,"

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[163] Or between a State and an international organization or between international organizations, under the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Art. 26.

[164] *Tañada v. Angara*, 272 SCRA 18, 66 (1997).

[165] *Bayan v. Executive Secretary*, 342 SCRA 449, 492–493 (2000).

[166] 129 SCRA 373 (1984).

[167] 48 SCRA 242 (1972).

[168] *Tañada v. Angara*, 272 SCRA 18, 66 (1997).

that "a treaty creates a legally binding obligation on the parties, and that the "fulfillment of the obligation undertaken" be ensured, unmindful of the legal conditions which control the operation of *pacta sunt servanda* as national law, especially conditions of constitutional character. In the case at bar, *pacta sunt servanda* in this sense is incompatible with the nature of the controversy engaged in the actual exercise of the review power of the Supreme Court to determine the constitutionality or validity of the WTO agreements which are sought to be enforced by the invocation of this principle. In national law, *pacta sunt servanda* as part of that system cannot begin to be operational until the Supreme Court shall have decided that the international agreements under litigation are proclaimed as in conformity with the Constitution. *Tañada* and *Bayan* fail to perceive the contradiction between *pacta sunt servanda* as a generally accepted principle of international law under the Incorporation Clause and the power of judicial review of the Supreme Court to declare a treaty unconstitutional or invalid pursuant to section 5(2)(a), Article VIII of the Constitution. It is this failure that spells the error to recognize the supremacy of the constitutional status of this power over *pacta sunt servanda* as "part of the law of the land." What must be overcome is the schizophrenic split of the judicial mind by which it affirms the enforcement of an obligation under a treaty in the same case at bar in which it is engaged in the exercise of its authority to determine the constitutionality of that treaty.

Then, *Bayan* displays more clearly its treatment of *pacta sunt servanda* as a principle operating in the international sphere. It points out in the controversy concerning the constitutionality of the Visiting Forces Agreement between the Philippines and the United States (VFA) that it must be enforced because *pacta sunt servanda* requires it as obligatory, apparently implying that this principle overrides the Constitution as a fundamental standard by which the validity of international agreements is determined. Indeed, in the international sphere, *pacta sunt servanda* prevails over the national law, including the Constitution. But not if *pacta sunt servanda* assumes its proper place as national law. *Bayan* asserts:

> With the *ratification* of the VFA,... it now becomes obligatory and incumbent on our part, *under the principle of international law, to be bound by the terms of the agreement.* Thus, no less than Section 2, Article II of the

> Constitution, declares that the Philippines adopts the generally accepted principles of international law as part of the law of the land. [...]
>
> As an integral part of the community of nations, we are responsible *to assure that our government, Constitution and laws will carry out our international obligation. Hence, we cannot readily plead the Constitution as a convenient excuse for non-compliance with our obligation, duties and responsibilities under international law.* [...]
>
> Equally important is Article 26 of the [Vienna] Convention [on the Law of Treaties] which provides that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." This is known as the principle of *pacta sunt servanda* which preserves the sanctity of treaties and have been one of the most fundamental principles of positive international law, supported by the jurisprudence of international tribunals.[169] (Emphasis supplied)

This formulation reflects a total shift to the application of *pacta sunt servanda* in the international sphere where, together with the entire regime of treaties, it acquires supremacy over the Constitution. Thus it assumes the standpoint of an international tribunal, not of a domestic court, in applying general international law in the international sphere. In effect, *Bayan* takes on the viewpoint of the Permanent Court of International Justice in *Polish Nationals in Danzig Case*:[170] "It should ... be observed that ... a State cannot adduce as against another State its Constitution with a view to evading obligations incumbent upon it under international law or treaties in force." A complement of *pacta sunt servanda* as applied in *Bayan*, this norm of general international law is now codified in Article 27 of the Vienna Convention on the Law of Treaties, providing that [a] party [to a treaty] may not invoke the provisions of its internal law as a justification for failure to perform a treaty. [....][171] The term "internal law" includes the Constitution. In this paradigmic

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[169] *Bayan v. Executive Secretary*, 342 SCRA 449, at 492–493 (2000).

[170] 1931 PCIJ (Ser. A/B) No. 44, at 24.

[171] Not relevant here is the second sentence of this provision: "This rule is without prejudice to Article 46." Under Article 46 of this Convention a State may invoke the fact that its consent has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent under the conclusion that the violation is manifest and that provision is a rule of fundamental character.

misconception, it should occasion no surprise that inevitably *Bayan* renders the VFA constitutional! In a decision crucial to sovereign integrity, it rests on conceptual confusion built into the relation of national law and international law.

***Diplomatic Immunity and International Immunity***

Distinction between diplomatic immunity and international immunity must be recognized. Diplomatic immunity is integral to the relations between States, concretely between the sending State and the receiving State; it pertains to the head of the diplomatic mission, its members as well as the diplomatic mission itself, in their character as representatives of the sending State in diplomatic relations.

On the other hand, international immunity pertains primarily to international organizations of inter-governmental character of which the State granting or recognizing immunity is a member. Such immunity is spelled out invariably in the constituent instrument of the organization, of which that State is a Party and thus it becomes its binding treaty obligation.[172] International immunity does not involve diplomatic relations between States; relation of a member State and the international organization cannot be said to be "establishment of diplomatic relations"; neither does the commencement of a State's membership in the organization be deemed as "establishment of diplomatic mission" in that organization. In international immunity, there is no sending State nor, obviously, receiving State. While some particular entitlements and protection are of the same nature in both systems of immunity, they remain distinct, subject to different conditions of applicability.

One other distinction between diplomatic immunity and international immunity may be of key importance in practice. Diplomatic immunity pertaining to members of the diplomatic staff applies to all acts, both private

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[172] Art. 5 of the Vienna Convention on the Law of Treaties provides that this Convention applies to "any treaty which is the constituent instrument of international organization"—its charter or constitution.

and official, subject to only three exceptions.[173] In consular law, immunity from jurisdiction of the receiving State is limited to the exercise of official functions on the part of the members of the consular post; such acts are said to be outside the jurisdiction of that State. But with respect to private acts, unlike diplomatic agents, consular officers are subject to the jurisdiction of the receiving State.[174] On the other hand, international immunity as set out in the Convention on the Privileges and Immunities of the United Nations[175] and the Convention on the Privileges and Immunities of the Specialized Agencies[176] generally pertains only to immunity "in respect of words spoken or written and all acts performed by them in their official capacity."[177]

A multilateral convention granting international immunity may provide, in addition to standard privileges and immunities, those which are "accorded to diplomatic envoys" as in the case of executive head of the specialized agencies of the UN, his spouse and minor children under Section 21 of the Convention on Specialized Agencies. Among these specialized agencies is the World Health Organization (WHO), involved in *WHO v. Aquino.*[178] International immunity under the Convention on Specialized Agencies may thus be combined with diplomatic immunity but within a highly restricted scope. Certain privileges and immunities enjoyed by "members of diplomatic mission of comparable rank" may be granted, such as those provided in the Host Agreement between the Republic of the Philippines and the World Health Organization with regard to its premises in the Philippines, with the

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[173] Under Article 31(1) of the Vienna Convention Diplomatic Relations, a diplomatic officer or agent is not exempt from civil and administrative jurisdiction of the receiving state as to real action relating to private immovable property in the receiving State which he holds in his private capacity, a case in succession in which he is involved as a private person, and an action relating to professional or commercial activity outside his official function. See MERLIN M. MAGALLONA, FUNDAMENTALS OF PUBLIC INTERNATIONAL LAW 108-109, (2005)

[174] Magallona, *op.cit.*, *supra*, note 130a, pp. 141–142.

[175] 1 UNTS 15. Hereinafter referred to as UN Convention.

[176] 33 UNTS 261. Hereinafter this Convention is referred to as Convention on Special Agencies.

[177] *See* Section 18(a) of the UN Convention and Section 19(a) of the Convention on Specialized Agencies. Under the UN Convention, only the UN Secretary-General and the Assistant Secretaries-General are given complete jurisdictional immunity accorded to diplomatic agents. *See* Section 19, UN Convention. Under the Convention on Specialized Agencies, such complete immunity pertains only to the executive head of each agency and the specified deputy or assistant executive heads. *See* Section 21, Convention on Specialized Agencies.

[178] 48 SCRA 242 (1972).

proviso that they are not "inconsistent with those specified in this Agreement.[179] These mixed provisions of international and diplomatic immunity in the Host Agreement pertains to representatives of the member states of WHO. That officers and representatives of member states of international organizations are accorded some diplomatic privileges and immunities do not affect the nature of their function and the status of their office under international law; they do not become heads of diplomatic mission or diplomatic agents, and are not subject to diplomatic law.

*WHO v. Aquino* deals with the issuance of a search warrant by a judge of a domestic court with regard to twelve crates of personal effects, against an official of WHO assigned to its Regional Office in the Philippines. *WHO* is of the conclusion that "[i]t is undisputed that the official in question is *entitled to diplomatic immunity* pursuant to the Host Agreement executed on July 22, 1951 between the Philippine Government and the World Health Organization [...and] *such diplomatic immunity carries with it, among other diplomatic privileges and immunities,* personal inviolability, inviolability of the official's properties, exemption from local jurisdiction, exemption from taxation and customs duties."[180] Citing the comments of the Solicitor General, *WHO* says that it is the "official position of the executive branch that [...] the WHO official *is entitled to diplomatic immunity.*"[181] (Emphasis supplied) It appears to be clear that *WHO* considers this a case of diplomatic immunity and it loses its distinction with international immunity, which is the proper category employed in the Convention on Specialized Agencies as well as in the Host Agreement referred to above. Whereas, notable is the fact that WHO as party to the case at bar makes no reference to diplomatic immunity but to the precise formulation that its official in question is entitled "to all privileges and immunities, exemptions and facilities *accorded to diplomatic envoys* in accordance with section 24 of the Host Agreement,"[182] (Emphasis supplied) thus, striking a distinction between diplomatic immunity proper and international immunity intermixed

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[179]Host agreement between the Republic of the Philippines and the World Health Organization, July 22, 1951,Ph-WHO, art. VII, sec. 15.

[180] *Supra* note 166, at 244. Emphasis supplied.

[181] *Supra* note 166, at 247. Emphasis supplied.

[182] *Supra* note 166, at 247.

with immunity "accorded to members of diplomatic mission of comparable rank."

That *WHO* has deliberately characterized the case at bar as one of diplomatic immunity, unmindful of the nature of international immunity, is underscored by the fact that it takes into account Republic Act No. 75, a penal statute entitled, "An Act to penalize acts which would impair the proper observance by the Republic or inhabitants of the Philippines of the immunities, rights and privileges of *duly accredited foreign diplomatic and consular agents* in the Philippines."[183] Under this Act, it is prohibited to issue a writ or process whereby the person of an ambassador or public minister is arrested or imprisoned or his goods or chattels are seized or attached. It makes it a penal offense for "every person by whom ... [such writ or process] is obtained or prosecuted, whether as party or attorney, and every office concerned or executing it" to obtain or enforce such writ or process. Strictly this penal statute is limited in its application only to members of the diplomatic mission and of the consular post, i.e., those who derive their privileges and immunities from the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, and the Convention on Special Missions.[184] But the approach taken in *WHO* in interpreting international immunity of the *WHO* and its officials as diplomatic has led *WHO* to extend the application of Republic Act No. 75 to international immunity as exemplified in the case at bar.

Remarkably, *International Catholic Migration v. Calleja*[185] manifests sheer inaccuracies, reflecting, unfortunately, the misconceptions advanced by the Department of Foreign Affairs (DFA) which was allowed intervention in this case. As described in the statement of facts, the International Catholic Migration Commission (ICMC) is incorporated in New York, USA, as a non-

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[183] Articles 15 and 22 of the said Host Agreement also make mention, respectively, of certain privileges and facilities "as accorded to members of diplomatic mission of comparable rank" and "as are accorded to officials of comparable rank of diplomatic mission to the Republic of the Philippines. Article 24 of this Agreement speaks of privileges and immunities, exemptions and facilities "accorded to diplomatic envoys in international law," in regard to WHO officials.

[184] These comprise the international law on diplomatic and consular relations. For citations of these Conventions, respectively, see 500 UNTS 95, 596 UNTS 261, and 1400 UNTS 231.

[185] 190 SCRA 130 (1990).

profit agency, "an international organization" engaged in international humanitarian and voluntary work.[186] In a Memorandum of Agreement with the ICMC, "the Philippine Government,... granted ICMC the status of a specialized agency with corresponding diplomatic privileges and immunities." ICMC resists the petition of the trade union for a certification election among its employees "on the ground that it is an international organization registered with the United Nations and, hence, enjoys diplomatic immunity."[187] The DFA has rendered an opinion that the order of the Bureau of Labor Relations (BLR) Director to immediately conduct a pre-election conference, to get the order to hold a certification election, "violates ICMC's diplomatic immunity."

On certiorari, the Supreme Court presents the following issue: Whether or not the grant of *diplomatic privileges and immunities* to ICMC extends to immunity from the application of Philippine labor laws.[188] (Emphasis supplied) *ICMC* upholds the position of ICMC that on account of the grant of "diplomatic privileges and immunities" by the Philippine Government, it is not amenable to such legal process and the orders of the BLR Director violates its diplomatic immunity.[189] In support of this position, sustained by *ICMC*, ICMC cites "(1) its Memorandum of Agreement with the Philippine Government giving it the status of a specialized agency [...]; (2) the Convention on the Privileges and Immunities of Specialized Agencies adopted by the UN General Assembly [...] and concurred in by the Senate [...]; and (3) Article II, Section 23 of the 1987 Constitution, which declares that the Philippines adopt the generally accepted principles of international law as part of the law of the land."[190] A number of points militate against the position taken by the ICMC as sponsored by the Philippine Government.

1. In international law, international organization characterized as persons in law are intergovernmental organizations; the States establishing it in a multilateral treaty comprise its membership. Thus, in the law of treaties the

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[186] *Id.*, at 133.
[187] *Id.*
[188] *Id.*
[189] *Id.*, at 134.
[190] *Id.*

term "international organization" means an intergovernmental organization.[191] Article 5 of the Vienna Convention on the Law of Treaties provides that it applies to any treaty "which is the constituent instrument of an international organization,"[192] which means that insofar as such instrument establishes the organization as an international personality, this status binds only the States parties to its constituent instrument.[193] As a person under international law, an international organization of this category is a bearer of rights and obligations as defined in its constituent instrument.

But ICMC is an "international organization" of the non-governmental category, the type not created under international law as an international person. It is a private corporation, composed of individual persons; its legal status is determined by the State of New York, by the law of which it is incorporated. Its rights and obligations are derived from the law of the State of incorporation, not from international law — much less from a constituent instrument of which it has none. There is, therefore, no legal basis by which ICMC can establish diplomatic immunity or international immunity under international law.

2. As pointed out above in the statement of facts, it is by the Memorandum of Agreement with the Philippine Government that ICMC has acquired the "status of a specialized agency" or "similar to that of a specialized agency." Since it has become a specialized agency as thus claimed, ICMC purportedly comes under the coverage of the Convention on Specialized Agencies. In effect, by unilateral act, the Philippine Government has achieved two results: transforming ICMC into a specialized agency and placing it under the system of privileges and immunities of the Convention on Specialized Agencies—acts which are way beyond the competence of the Philippine Government.

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[191] Article 2(1)(i), Vienna Convention on the Law of Treaties, May 23, 1969, art. 2(l)(i) and Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, March 21, 1986, art. 2(l)(i).

[192] *See* also Vienna Convention on the Law of Treaties, March 21 1986, *supra* note 191.

[193] *See* Article 34 of both Vienna Conventions on the Law of Treaties.

It is a pity that *ICMC* carries gross errors and inaccuracies. Under the law of the United Nations, a specialized agency is established by means of an intergovernment agreement pursuant to Article 57(1) of the UN Charter. Its international responsibilities are defined in its basic instrument[194]—or the constituent instrument of an international organization, as specified in Article 5 of the Vienna Convention on the Law of Treaties.[195] It becomes clear that a specialized agency of the UN is necessarily an international organization established by a multilateral treaty of the States parties which comprise its membership. This is exemplified by concrete examples of international organizations that are included in the meaning of the term "specialized agencies" in Article I, Section 1(ii) of the Convention on Specialized Agencies, thus: "(a) The International Labour Organizations; (b) The Food and Agricultural Organization of the United Nations; (c) The United Nations Educational, Scientific and Cultural Organization; (d) The International Civil Aviation Organization; (e) The International Monetary Fund; (f) The International Bank for Reconstruction and Development; (g) The World Health Organization; (h) The Universal Postal Union; (i) The International Telecommunication Union.[...]"

How an international organization of the intergovernmental type becomes entitled to privileges and immunities is a process completed under Article 63 of the UN Charter and the Convention on Specialized Agencies. It must establish relationship with the UN by means of an agreement with the UN Economic and Social Council, subject to approval by the UN General Assembly.[196] Compliance with this process will bring it to entitlement of the privileges and immunities under the Convention on Specialized Agencies as it comes within the meaning of the term "specialized agencies" in Article I, Section 1 (ii)(j) of that Convention: "Any other agency in relationship with the United Nations in accordance with Articles 57 and 63 of the [UN] Charter."

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[194] Article 51(1) of the UN Charter provides in full: The various specialized agencies, *established by intergovernmental agreement* and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63. (Emphasis supplied)

[195] *See supra* note 192.

[196] U.N. Charter, art. 63.

With regard to the requirements qualifying an intergovernmental international organization as possessing the status of a specialized agency of the UN, the ICMC is obviously a non-person. It is mystifying how it is characterized in *ICMC* as a specialized agency of the UN. Its recourse to the Convention on Specialized Agencies to accord the ICMC with privileges and immunities is therefore completely out of place.

3. In the light of the foregoing explanation, it becomes intriguing how the Philippine Government can create a specialized agency out of ICMC by means of a Memorandum of Agreement and conjure unilaterally its coverage under the Convention on Specialized Agencies. In the attempt to qualify the ICMC as a specialized agency, refuge is sought under the fact that the ICMC "is duly registered with the United Nations Economic and Social Council (ECOSOC) and enjoys Consultative Status."[197] This is irrelevant to the problem; a long catalogue of non-governmental organizations (NGOs) appears in the registry of ECOSOC that may, on consultation, provide the benefit of their field of work or expertise on matters in the ECOSOC agenda. ECOSOC-NGOs relations have nothing to do with the ECOSOC–Specialized Agencies relationship that is established by formal agreement and approved by the UN General Assembly pursuant to Article 63 of the UN Charter. Of course, in the first place, the ICMC cannot be qualified to be engaged in this process since it is not an intergovernmental international organization.

4. Excluding the pretense that the status of specialized agency as well as "diplomatic privileges and immunities" is in the competence of the Philippine government to grant by agreement, the problematical Memorandum of Agreement becomes devoid of legal status.

What remains as a fig leaf of immunity that the *ICMC dispositif* may rely on is immunity by reason of the undertakings of the Philippine Government expressed in the Memorandum of Agreement with ICMC, the applicability of which would be limited to the two parties. Certainly, the grant of such

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[197] *Supra* note 185, at 133.

immunity does not bind any other State. In the first place, it does not vest ICMC with international personality.

But how does the grant of immunity under the said Agreement stand in relation to the obligation to protect and observe the rights of workers as guaranteed under national law and pursuant to the international law on human rights? This issue highlights the travesty in the treatment of workers' rights in international law, owing to irregularities concerning the grant of immunities to ICMC. Just the same it must be affirmed that in either national law or international law the Agreement in question does not constitute a treaty; it stands merely as an agreement with a private corporation and must be subordinated to constitutional mandates and statutory rights. Even if it were regarded as a treaty in national law, it would be subordinated to the constitutional rights of workers.[198] The undertaking on the part of the Philippines under the International Covenant on Civil and Political Rights "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind," cannot be derogated from by an agreement with a private corporation on the seriously defective claim of immunity. That undertaking acquires specificity under Article 22(1) of that Covenant: "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests." The imperative demand of this right is demonstrated by the mandate of Article 22(3) of the Covenant that States Parties to the Convention on Freedom of Association and Protection of the Rights or Organize of the International Labor Organization (ILO) may not "take legislative measures [under this Covenant] which would prejudice, or to apply the law in such manner as to prejudice the guarantees provided for in that Convention." As a party to the International Covenant on Economic, Social and Cultural Rights, the Philippines in Article 8(1)(a) undertakes to take steps to achieving the full realization of "the right of everyone to form trade unions and join trade unions of his choice." As a member of the ILO, the Philippines undertakes under Article 11 of the said

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[198] *See* discussion on *Reyes v. Bagatsing, supra* note 55, at53–54.

Convention "to take all necessary and appropriate measures to ensure that workers [...] may exercise the right to organize." It commits itself to give effect to Article 2 of this Convention which provides that "[w]orkers without distinction whatsoever, shall have the right to establish and, subject to the rules of the organization concerned, to join organization of their own choosing without previous authorization."[199] As a party to the Constitution of the International Labor Organization, the Philippines recognizes the "principle of freedom of association of workers.[200] The Bill of Rights of the Constitution sets out clearly the right adversely affected by the grant of immunity to ICMC: "The right of the people, including those employed in the public and private sectors, to form unions, associations, or societies, for purposes not contrary to law shall not be abridged."[201] How a long-established principle of general international law can be expediently set aside without an overriding reciprocal advantage and dispensed with under legal anomalies presents a bizarre case deserving of reconsideration. And yet *ICMC* takes a cavalier treatment of this fundamental freedom, asserting that the dispute settlement method under the Convention on Specialized Agencies may be resorted to by the ICMC employees,[202] presumably in place of trade union-management relation. At any rate, the nature of the human right involved in ICMC should take precedence over the grant of immunity, by virtue of the hierarchy of rules in national law as well as in international law, as outlined above, even if the irregularities in that grant are discounted. If the State itself is precluded from acting in violation of fundamental human rights, does it have the competence to issue immunity with the same effect?

The confusion as to diplomatic immunity with international immunity in *WHO* and *ICMC* persists in *Lasco v. United Nations Revolving Fund for Natural Resources Exploration*,[203] in which the term "diplomatic immunity" is freely used in reference to the United Nations Revolving Fund for Natural Resources Exploration (UNRFNRE). Obviously, Philippine relation with UNRFNRE is

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[199] Text of this Convention is in II PTS 15; 70 UNTS 336.

[200] *See* preamble of the ILO Constitution and the Declaration Concerning the Aims and Purpose of the International Labor Organization annexed to this Constitution.

[201] CONST., art. III, §8.

[202] *Supra* note 185, at.

[203] 241 SCRA 681 (1995).

quite remote from the concept of diplomatic relations as known under the Vienna Convention on Diplomatic Relations and thus the Philippines cannot in any way be regarded as a receiving State in international diplomatic law *vis-a-vis* the UNRFNRE.

As in *ICMC*, the confused application of the relevant law assumes grotesque proportion. *Lasco* begins with the description of UNRFNRE as a "special fund and subsidiary organ of the United Nations."[204] Then, obliquely, *Lasco* accepts the view of the Solicitor General that UNRFNRE "is covered by the mantle of diplomatic immunity" and goes on to assert that UNRFNRE is a specialized agency of the United Nations."[205] Here, *Lasco* does not seem to be aware that in its thinking UNRFNRE has changed from a "subsidiary organ" of the UN to a "specialized agency" of the UN, without consciousness that in the process the regime of immunity has accordingly changed too, i.e., from the Convention on the Privileges and Immunities of the United Nations[206] to the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations.

But *Lasco* continues by quoting Article 105 of the UN Charter which deals with the privileges and immunities of the UN itself as well as of the representatives of the UN Member States "in the territory of its Member [States]." This provision, however, assumes relevance only if UNRFNRE is to be considered as a UN subsidiary organ, but not as its specialized agency which possesses international personality separate from the UN itself. Then, *Lasco* appears to have shifted to UNFRFNRE as UN's specialized agency when it invokes the application of the privileges and immunities under the Convention on Specialized Agencies, mentioned above.

In the result, *Lasco* seems to have characterized UNRFNRE as both a subsidiary organ and a specialized agency of the UN and applied the system of

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[204] *Id.*, at 63.
[205] *Id.*
[206] Hereinafter referred to as Convention on the UN.

privileges and immunities of both the Convention on the UN and those in the Convention on Specialized Agencies.

If indeed UNRFNRE is characterized as a subsidiary organ of the UN, properly it would operate within the scope of the Convention on the UN. It is obvious that it cannot be a specialized agency which Article 57 of the UN Charter describes as having been "established by intergovernmental agreement" and, under Article 63 of the UN Charter, is brought into relationship with the UN by means of an agreement with the UN Economic and Social Council, subject to approval by the UN General Assembly. Hence, it is outside the coverage of the Convention on Specialized Agencies.

The problem extends to *Department of Foreign Affairs (DFA) v. National Labor Relations Commission,*[207] in which the issues relate to the "diplomatic immunity extended to the Asian Development Bank (ADB)."[208] Yet the immunity under litigation pertains to one instituted in the Agreement Establishing the Asian Development Bank and under the Agreement between the Asian Development Bank and the Government of the Philippines regarding the Bank's Headquarters.[209] Moreover, *DFA* reiterates the application as precedents of Supreme Court decisions dealing with *sovereign immunity*[210] in the case at bar dealing with *international immunity*, which it refers to as *diplomatic immunity.*

The term "diplomatic immunity" may have become an omnibus conceptual framework which, in Philippine judicial practice, has embraced all systems of privileges and immunities in international law, including the principle of sovereign immunity, without regard to the legal status of the person or entity in question and in disregard of the categories well recognized and accepted by the international community of States as a whole. Thus, Philippine practice deviates to a significant degree from objective international law, even as invariably reference is judicially made to principles of international

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[207] 262 SCRA 39 (1996).
[208] *Id.*, at 40.
[209] *Id.*, at 40, 43–44.
[210] *Id.*, at 47–48 invoking *Holy See v. Rosario, Jr.*, 238 SCRA 524 on *sovereign immunity.*

law on immunities as part of national law by reason of the Incorporation Clause.

The treatment of immunity pertaining to international organizations in *Southeast Asian Fisheries Development Center– Aquatic Department (SEAFDEC-AD) v. National Labor Relations Commission*[211] leaves an impression of vagueness as to the statement of the principle applied as well as to the identification of the source of international law. Citing a widely used textbook, SEAFDEC-AD's status as that of "an international organization [that] enjoys functional independence and freedom from control of the State in whose territory its office is located."[212] The *ponencia* then explains through an official opinion that "[o]ne of the basic immunities of an international organization is immunity from local jurisdiction, *i.e.,* that it is immune from the legal writs and processes issued by the tribunals of the country where it is found ... [for the reason that] subjection to local jurisdiction would impair the capacity of such body to discharge its responsibilities impartially on behalf of its member-States."[213] There is no showing in the *ponencia* that the privileges and immunities of SEAFDEC are provided in its constituent instrument and its headquarters agreement does not indicate the material source of the rules on immunity as quoted above. This ruling is replicated as a precedent in *SEAFDEC v. Acosta.*[214]

Privileges and immunities of an international organization are still a matter of conventional international law, i.e., derived from its constituent instrument. While it may have been established as possessing personality under international law, it is doubtful if immunity automatically attaches to it on that account. In other words, immunity is not a matter of customary international law. It must be provided in the constituent instrument of the international organization for it to be entitled to immunity. It is a matter of

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[211] 206 SCRA 283 (1992).

[212] *Id.,* at 287. SEAFDEC was established by a regional agreement the parties to which are Burma, Cambodia, Indonesia, Japan, Philippines, Singapore, Thailand, and Vietnam.

[213] *Id.,* at 289.

[214] 226 SCRA 49 (1993).

controversy too as to whether States have the duty to grant immunity to an international organization under customary international law.[215]

But the ruling in *SEAFDEC v. NLRC* gives the impression that it relies on some principles in customary international law and there is no mention of a treaty or conventional rule as source. In support of this formulation it cites the work of C. Wilfred Jenks[216] but the pages referred to in this work are devoted to a discussion of immunity as provided in the General Convention on the Privileges and Immunities of the United Nations and in constituent instruments specific to international organizations mentioned.

*Municher v. Court of Appeals*[217] deals with issues of fundamental principles in diplomatic immunity. Unfortunately, they may have suffered a setback in this case. Setting aside the question of authenticity of the diplomatic note purporting to evidence the diplomatic status of the respondent and assuming that he is a member of the diplomatic mission as is done in this case, *Municher* goes on to point out that:

> (1) In the determination of immunity from the civil jurisdiction of the receiving State, a distinction must be made between acts performed on official function and private or personal acts.
>
> (2) Diplomatic immunity from civil jurisdiction of the receiving State pertains only to acts performed in official function.
>
> (3) As demonstrated by the citation of Supreme Court decisions on sovereign immunity as precedents in the case at bar, the said distinction as consistently applied in the principle of sovereign immunity is transported into diplomatic immunity apparently as its element.

Immunity of the diplomatic agent—or a member of the diplomatic mission—from criminal, civil and administrative jurisdiction of the receiving

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[215] *See* for example, AUGUST REINISCH, INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS 180-182 (2000).

[216] C. WILFRED JENKS, INTERNATIONAL IMMUNITIES 37-44, (1961).

[217] 214 SCRA 242 (1992).

state is set out in Article 31(1) of the Vienna Convention on Diplomatic Relations, thus:

> A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
>
> (a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purpose of the mission;
>
> (b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
>
> (c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

Under this provision, immunity from criminal, civil and administrative jurisdiction is complete in the sense that it contemplates all acts of the diplomatic agents without regard as to whether they are performed in the discharge of official functions or personal acts. The only exceptions to this immunity pertain to civil jurisdiction and these exceptions are limited to the three categories of civil actions in Article 31, paragraphs (a), (b), and (c), as set forth above. The pertinence of the distinction between official acts and personal or private acts is restricted to these three categories of civil actions which make up the exceptions to immunity from civil jurisdiction. Otherwise, this distinction is of no moment in diplomatic immunity.

By way of stressing the nature of diplomatic immunity from the jurisdiction of the receiving State, focus may be shifted to the distinction between diplomatic immunity and consular immunity in matters of civil jurisdiction. As reflected in the reports of the UN International Law Commission (ILC) on diplomatic and consular law, it is part of general international law that:

> .... In respect of acts performed by them *in the exercise of their functions (official acts)* members of the consulate are not amenable to the jurisdiction

> of the judicial and administrative authorities of the receiving State. [...] [They] enjoy complete inviolability *in respect of their official acts* ...
>
> *Unlike members of the diplomatic staff,* all the members of the consulate are in principle subject to the jurisdiction of the receiving State, unless exempted by ... the present rules or by a provision of some other applicable international agreement. In particular, they are, like any private person, *subject to the jurisdiction of the receiving State in respect of all their private acts.*[218] (Emphasis supplied)

*Municher* concludes that the person claiming to be a member of the diplomatic mission is not entitled to immunity for the reason that his act in question is outside his official functions and his case falls under Article 31(1)(c) of Diplomatic Convention as set out above. It asserts that "the private respondent committed the imputed acts in his personal capacity and outside the scope of his official duties and functions," reaching the conclusion that he is not therefore entitled to immunity.

Since *Municher* is of the view that the case comes within the purview of Article 31(1)(c), it is proper to apply as it did, the distinction between acts performed on official functions and personal acts. On this basis, it concludes that the private respondent claiming immunity from civil suit for damages is not entitled to it on the ground that the acts in question are "beyond his official functions and duties." However, there is nothing in the statement of facts in *Municher* showing, in the light of paragraph (c) in Article 31(1), that he is engaged in "any professional or commercial activity." This deficiency all the more becomes glaring on account of the authoritative meaning attributed to the words "any professional or commercial activity:" they do not refer to a single act of commerce—as may be inferred from *Municher*—but to a continuous pursuit of trade or business activity or practice of profession,[219] which is completely absent in *Municher.*

Surprisingly, *Municher* draws precedential authority from *United States of America v. Guinto*[220] and from *Shauf v. Court of Appeals*,[221] to justify its

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[218] INTERNATIONAL LAW COMMISSION, II YEARBOOK 117 (1961).
[219] *See* EILEEN DENZA, DIPLOMATIC LAW 247 250-251 (1998).
[220] 182 SCRA 644 (1990).

application of the distinction between acts performed within official authority and those done in private or personal capacity, by way of stressing that the latter category of acts are not protected by immunity. However, it must be emphasized that these are decisions dealing with sovereign immunity, which certainly must strike a clear difference from diplomatic immunity. For *Municher* to confuse the said decisions with a case involving diplomatic immunity is an impermissible deficiency. And yet *Baer v. Tizon*,[222] one of the decisions on sovereign immunity referred to by *Municher*,[223] already recognizes the distinction between diplomatic immunity and sovereign immunity, as follows:

> There should be no misinterpretation of the scope of the decision reached by this Court. Petitioner, as Commander of the United States Naval Base in Olongapo, *does not possess diplomatic immunity. He may therefore be proceeded against in his personal capacity* ....[224] (Emphasis supplied)

This ruling implies that had he possessed diplomatic immunity, the said official could not have been proceeded against in his personal capacity. It signifies that diplomatic immunity comprehends acts performed in official as well as personal capacity.[225] *Municher* must return to this formulation.

### *Individuals as Subjects of International Law*

In granting bail to a person under extradition proceeding, the immediate import of *Government of HongKong Special Administrative Region v. Olalia*[226] is the reversal of the Supreme Court's ruling in *Government of United States of America v. Puruganan*[227] that the constitutional provision on bail cannot be availed of in

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[221] 191 SCRA 713 (1990). The citation of precedents for this purpose includes the Supreme Court decisions cited in *Shauf*, which includes *Director v. Aligaen*, 33 SCRA 368 (1970); *Baer v. Tizon*, 57 SCRA 1 (1974); and *Animos v. Philippine Veterans Affairs Office*, 174 SCRA 214 (1989). These are all cases in *sovereign immunity*.

[222] *Supra* note 158.

[223] *See supra* note 154, at 251.

[224] 214 SCRA 242 (1992).

[225] Subject to the exceptions in Article 31(1) (a), (b), and (c) of the Vienna Convention on Diplomatic Relations, as pointed out *supra*,130–132.

[226] 521 SCRA 470 (2007).

[227] 389 SCRA 623, 664 (2002).

extradition cases, holding that "as suggested by the use of the word 'conviction', the constitutional provision on bail [...] applies only when a person has been arrested and detained for violation of Philippine criminal laws. It does not apply to extradition proceedings because extradition courts do not render judgments of conviction or acquittal."

A cardinal element of bail, of which the *Government of Hongkong* is well aware, is that it is a constitutional right and the impact of its reversal takes one specific doctrinal expression: bail appears to have become a constitutional right in extradition proceedings. This leads to a significant alteration of an established conceptual hallmark. On two points, *Government of Hongkong* shows awareness as to how far it has extended such a conceptual change: (1) bail rests on the premise of presumption of innocence which is not at issue in extradition; (2) its *dispositif* has to revise the quantum of evidence, from proof beyond reasonable doubt to clear and convincing evidence. The approach thus taken may be much of a burden on the distinction between judicial and legislative functions, in particular having in mind constitutional limitations.

Nonetheless, of interest here is how the *Government of Hongkong* defines the main rationale in expanding the protection of human rights through the grant of bail in extradition proceedings. It affirms:

> **The modern trend in public international law is the primacy placed on the worth of the individual person and the sanctity of human rights.** *Slowly the recognition that the individual person may properly be a subject of international law is now taking root.* The vulnerable doctrine that the subjects of international law are limited only to States was dramatically eroded towards the second half of the past century. For one, the Nuremberg and Tokyo trials after World War II resulted in the unprecedented spectacle of defendants for acts characterized as violations of the laws of war, crimes against peace, and crimes against humanity. Recently, under the Nuremberg principle, Serbian leaders have been persecuted for war crimes and crimes against humanity committed in the former Yugoslavia. These significant events show *that the individual person is now a valid subject of international law.*[228] (Emphasis in italics supplied)

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[228] *Id.* at 481.

The foregoing statement deserves more than a passing interest if only for the rare occasion that a *ponencia* is admittedly motivated in its departure from precedential doctrine in interpreting the Constitution on account of developments in international law. In the perspective of *Government of Hongkong*, such developments are synthesized in the thesis that "These significant events show that the individual person is now a valid subject of international law."[229]

Indeed, international law recognizes the individual natural person as a subject. It endows him/her with international personality, which means he/she is possessed of rights and obligations derived from sources of international law. Yet, the broad sweep of generalization of the *ponencia* must be contained by the normative realities of the international legal order. It is not by general international law or international custom that the individual becomes a subject or person in international law. His/Her personality is derived from the collective will of States expressed in an international convention. Being a creation of States parties to the convention constituting him/her as a subject of law, his/her rights and obligations are specific and peculiar to the legal status as thus created by conventional international law. The individual becomes a subject of international law by reason of conventional international law, not on account of customary international law. The rights and obligations constituent of that personality are not binding on all States, and are subject to the general rule that "A treaty does not create either obligations or rights for a third State."[230]

It is true that the range of that personality has vastly expanded. For example, from obligations arising from criminal acts under the Treaty of Versailles of 1919[231] to individual criminal liability defined for crimes against peace and crimes against humanity in the London Agreement of 1945 Establishing the Nuremberg International Military Tribunal;[232] then to liability under the Convention on the Prevention and Punishment of the Crime of

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[229] *Id.*

[230] As now codified in Article 34 of the Vienna Convention of the Law of Treaties.

[231] 225 Consolidated TS 188.

[232] 82 UNTS 8280.

Genocide[233] and under the Rome Statute of the International Criminal Court for the crimes of genocide, war crimes, crimes against humanity, and aggression.[234] For individual criminal liability, the Statutes of the *ad hoc* International Criminal Tribunals for former Yugoslavia[235] and for Rwanda, obligations charged against individuals include liability for "grave breaches of the Geneva Conventions of 1949" and "violations of the laws or customs of war."[236]

The legal status of individuals in the international sphere is not limited to criminal liability. Their right to make international claims is recognized by the Iran-United States Claims Tribunal by agreement of the States Parties.[237] In the exploration and exploitation of the resources of the Area under the UN Convention on the Law of the Sea (UNCLOS), natural and juridical persons may be parties to contractual relations with the International Sea-Bed Authority and thus assume rights and obligations of contractual character under conditions prescribed by Part XI and Annex III of the UNCLOS. Accordingly, they may pursue claims against the parties to a contract, including the International Sea-Bed Authority, through the dispute-settlement facilities of the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea or through a binding commercial arbitration.[238]

A willful endowment of international personality to natural and juridical persons in dispute settlement and for enforcement of claims is elaborately set out in the Convention on the Settlement of Investment Disputes between States and Nationals of other States.[239] Nationals of Contracting States may be direct parties to investment disputes against other Contracting States in arbitration or conciliation proceedings in the International Center for the Settlement of Investment Disputes. In the interest of natural and juridical

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[233] 78 UNTS 277.
[234] U.N; Doc.A/COF.189/9, (1998) as corrected.
[235] U.N. Doc. IT/32/Rev. 3 (1995)
[236] U.N. Doc. S/RES/955 (1994).
[237] *See*, for example, A/18 Case, 5 Iran-US Claims Trib. Rep. 251 (1984).
[238] *See* in general Art. 186–190, Annex III of the UNCLOS.
[239] 57 UNTS 159.

persons as investors, the Convention avoids the difficulties of espousal of their claims by the States of which they are nationals.

Moreover, an interpretation of a more general treaty may occasion an identification of a right as that of a natural person, such as the pronouncement of the International Court of Justice (ICJ) in the *LaGrand Case*.[240] As against the contention that the "rights of consular notification and access under [... paragraph 1, Article 36 of] the Vienna Convention [on Consular Relations] are rights of States, and not of individuals, the ICJ "concludes that article 36, paragraph 1, creates individual rights, which by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person."[241] The ICJ goes on to emphasize this point, reiterating that "The Court has already determined that Article 36, paragraph 1, crates individual rights for the detained individual in addition to the rights accorded the sending State."[242]

Thus, the scope of rights and obligations created under international conventional law on the part of individual natural persons has expanded, but the nature and application of this personality are always circumscribed by the

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[240] 2001 ICJ Reports. Also *see* http:/www.icj-icj.org for full text of the judgment.

[241] *Id.,* at para.77.

[242] *Id.,* at para. 89. Article 36, paragraph 1, of this Convention reads:

> 1. With the view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by a person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
>
> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

conditions in each international convention providing them. The reality underlying human rights treaties is defined by the fact that individuals are treated as *beneficiaries* of States parties: in this context they are not regarded as *subjects* of international law.

The *LaGrand* judgment may suggest that the textual composition of "rights," especially in human rights treaties, should not be mechanically treated as those pertaining to rights of States while dealing with individuals merely as apparent beneficiaries. As in *LaGrand*, the statement of treaty rights may give room to the interpretation that the right in question, created under international law, pertains to the individual.

### *Recognition and Enforcement of Foreign Judgment*

In *Mijares v. Ranada,*[243] the sole issue of determining the amount of filing or docket fee is occasioned by the complaint for the enforcement of final judgment of the US District Court against the estate of former President Ferdinand E. Marcos for violation of international law on human rights. Although the *Mijares* judgment is not a verdict on the enforcement of the said foreign judgment and, as a result, it merely reinstitutes the civil case for the purpose of such enforcement, the *ponencia* belabors on its advocacy that:

> While the definite conceptual parameters of the recognition and enforcement of foreign judgments have not been authoritatively established, the *Court can assert with certainty that such an undertaking is among those generally accepted principles of International law.*[244]

Here, *Mijares* affirms solemnly that recognition and enforcement of foreign judgments is no doubt a generally accepted principle of international law, but quite explicitly in the same breath it admits that the "definite conceptual parameters... [for this principle] have not been authoritatively established." It casts doubt on the formation of its own

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[243] 455 SCRA 397 (2005).
[244] *Id.,* at 421–422. Emphasis supplied.

normative pronouncement. And yet this has a bearing on its *ratio decidendi*; it declares that "The preclusion of an action for enforcement of a foreign judgment in this country merely due to an exorbitant assessment of docket fees is alien to generally accepted practices and principles in international law."[245] In other words, *Mijares* concludes that the judgment of the lower court in dismissing the civil case for enforcement of the foreign judgment in question on account of deficiency in payment of docket fee contravenes a generally accepted principle of international law, one of the main reasons by which it strikes down on *certiorari* the lower court's decision. Is *Mijares* suggesting then that the lower court may have committed an internationally wrongful conduct which may be attributable to the Philippines as an act of State for purposes of State responsibility?

Recognition and enforcement of foreign judgment in Philippine jurisdiction is governed by Section 48, Rule 39 of the Rules of Civil Procedure, which *Mijares* keeps on reiterating although not at issue in this controversy. This law provides:

> Section 48. *Effect of foreign judgment.*—The effect of a foreign judgment of a tribunal of a foreign country, having jurisdiction to pronounce the judgment is as follows:
>
> (a) In case of a judgment upon a specific thing, *the judgment is conclusive upon the title to the thing*;
>
> (b) In case of a judgment against a person, the judgment is *presumptive evidence of a right as* between the parties and their successors in interest by a subsequent title;
>
> In either case, the judgment or final order may be repelled by evidence of want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact.

*Mijares* points out that "The requisites and exceptions as delineated under Section 48 are but a restatement of generally accepted principles of

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[245] *Id.*, at 424.

international law."[246] It is of the view that recognition and enforcement of foreign judgment has become customary international law:

> There may be distinctions as to the rules adopted by each particular state but they all prescind from the premise that there is a *rule of law obligating states to allow for, however generally, the recognition and enforcement of a foreign judgment. The bare principle, to our mind, has attained the status of opinio juris in international practice.*[247] (Emphasis supplied)

Based on the Incorporation Clause of the Constitution, *Mijares* argues that the efficacy of Section 48, Rule 50 on foreign judgment is derived "not merely from the procedural rule, but by virtue of the laws of the land, including the generally accepted principles of international law which form part thereof, such as those ensuring the qualified recognition and enforcement of foreign judgment."[248]

However, what prevails in the international community is the reality of domestic jurisdiction of States over recognition and enforcement of judgments. Today, no State engages in recognition and enforcement of judgments of other States except on the basis of its own judicial jurisdiction, i.e., by authority of its own national law, unless it establishes special rules in treaty relations with them. What is settled is that recognition and enforcement of foreign judgment belongs to the regime of private international law in the national law of States.

The long discourse in *Mijares* on the international law status of recognition and enforcement of foreign judgments is not only needless. It reflects a confused outlook concerning the relation of national law and international law. Needless because even on the assumption, as claimed by *Mijares* that the principles in Section 48, Rule 50 have the status of customary international law, they do not operate within Philippine jurisdiction as objective international law. By constitutional mandate—by reason of the Incorporation Clause—they are applied by domestic courts as "part of the law

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[246] *Id.*, at 419.
[247] *Id.*, at 422–423.
[248] *Id.*, at 423.

of the land", i.e., as national law, not as law in the international sphere governing the relations of States. Further, needless because Section 48, Rule 50 has long been established as Philippine law—in the exercise of judicial jurisdiction of the Philippines as a State—long before the *Mijares* formula came into view. And if this formula is to be pursued by regarding Section 48, Rule 50 as "part of the law of the land," in addition, on account this time that it is customary international law, there may emerge the spectacle of making the so-called recognition-enforcement of foreign judgment principles Philippine law *twice.*

As *Mijares* claims, if the recognition-enforcement of foreign judgments principle in Section 48, Rule 50, embodies customary international law, in precise terms what is the substantive content of the obligation, a breach of which may give rise to state responsibility on the part of the Philippines? Is there a clear perception in *Mijares* that in the context of international responsibility, contravention of the recognition-enforcement principle as customary norm would constitute an "internationally wrongful act" to be charged against the Philippines in terms of the duty to make reparation? Does the *Mijares* formula imply then that the Philippines may incur international responsibility *vis-a-vis* the United States if it fails or denies enforcement of the US District Court's judgment against the Marcos estate in question?

This concept of recognition-enforcement of foreign judgments is quite remote from the textual and jurisprudential meaning of Section 48, Rule 50. As may be verified from the text of this provision given in full above, it is comprised of two sets of requirements. The first determines the conditions by which foreign judgments acquire recognition and enforcement in Philippine jurisdiction; the second defines the grounds by which such judgments may be denied legal effects by domestic courts. Thus, the recognition-enforcement provision of Philippine law consists of permissibility and denial, a self-contradictory proposition from the standpoint of international law that can hardly be accommodated in the regime of international custom.

If a foreign judgment is recognized or enforced as a matter of compliance with obligation under customary international law, a judgment rendered by a court of one State is to be enforced directly in every State—a

process which has the effect of universalizing the recognition-enforcement of foreign judgment. This phenomenon is unknown in the international community. That is what Section 48, Rule 50 is *not.* In the end, nothing in the nature of international obligation emerges from the text or the context of Section 48, Rule 50. Objective international law still leaves the matter of recognition–enforcement of foreign judgment to the determination by the judicial jurisdiction of each State.

*Pharmaceutical and Health Care Association of the Philippines v. Duque*[249] is explicit in presenting the following issue: Whether pertinent international agreements entered into by the Philippines are part of the law of the land and may be implemented by the DOH [Department of Health] through the RIRR's [Revised Implementing Rules and Regulations issued by the DOH]; if in the affirmative, whether the RIRR is in accord with the international agreements. In particular, in regard to Resolutions of the World Health Assembly (WHA) of the World Health Organization (WHO), which have not been embodied in any local legislation, "Have they attained the status of customary law and should they then be deemed incorporated as part of the law of the land?"

*PHCAP* enumerates the international agreements or conventions of which the Philippines is a party, invoked by the respondent public officials, as follows: "(1) The United Nations Convention on the Rights of the Child; (2) The International Covenant on Economic, Social and Cultural Rights; and (3) the Convention on the Elimination of all Forms of Elimination Against Women."[250] It concludes, however, that none of these instruments is relevant to the central issue relating to breastmilk substitutes. Hence, confined to breastmilk substitutes, *PHCAP* limits itself to "The international instruments that do have specific provision regarding breastmilk substitutes [which] are the ICMBS and various WHA Resolutions." These pertain to the International Code of Marketing of Breast-milk Substitutes (ICMBC) and World Health Assembly (WHA) Resolutions.

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[249] 535 SCRA 265 (2007). Hereinafter referred to as *PHCAP.*
[250] *Id.,* at 284.

Even as the issue is thus reduced to its specificity, i.e., the legal status of ICMBS, *PHCAP* employs an extensive exposition of the sources of international law, the first time in juridical memory that this has been achieved. But such a presentation does not appear to be necessary in the light of the precise legal context of the case.

What has escaped the focus of that context is its starting point that the Philippines is a party to the Constitution of the World Health Organization (WHO), a constituent instrument which embodies international obligations binding on the Philippines as a member of the WHO. Simply, the question pertains only to whatever obligation may arise on the part of the Philippines as a party to the WHO Constitution as regards one particular matter, namely, the ICMBS which the World Health Assembly (WHA) adopted by authority of the WHO Constitution. The result can be clear-cut and uncomplicated: except for administrative annual reporting, the adoption of the ICMBS does not charge any obligation on the Philippines, owing to the fact that it was adopted as a *recommendation* of the WHA to the WHO Members pursuant to Article 23 of the WHO Constitution. This provision reads: The [World] Health Assembly shall have authority to make recommendations to Members with respect to any matter within the competence of the Organization. Accordingly, the International Code of Marketing of Breast-milk Substitutes (CMBS) affirms, "Therefore: The Member States hereby agree to the following articles which *are recommended as a basis for action*."[251] (Emphasis supplied)

Other than the exercise of its authority to make recommendations, the WHA has two alternatives under the WHO Constitution. It could have adopted the ICMBS as a treaty by virtue of its "authority to adopt conventions or agreements" in Article 19 of the said Constitution by two-thirds vote. In which case, such convention "shall come into force for each Member when accepted by it in accordance with its constitutional processes." Thereby, it

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[251]International Code of Marketing of Breast-milk Substitutes (CMBS), preamble, WHO, May 1981.

becomes "a treaty adopted within an international organization" and is governed by the Vienna Convention on the Law of Treaties.[252]

The other alternative was for the WHA to have adopted the ICMBS under Article 21 of the WHO Constitution as regulations concerning in particular "standards with respect to the safety, purity and potency of biological, pharmaceutical and similar products in international commerce," and "advertising and labelling of biological, pharmaceutical and similar products moving in international commerce." Article 22 of the WHO Constitution prescribes that these regulations "shall come into force for all Members after due notice has been given of their adoption by the [World] Health Assembly," subject to *rejection* or reservation by the Members upon notice to the WHO Director General within the period stated in the notice.

Returning to *PHCAP's* exposition of the sources of international law, it restates the relevance of the following constitutional guidelines:

> Under the 1987 Constitution, international law can become part of the sphere of domestic law either by ***transformation*** or ***incorporation***.[253] The transformation method requires that an international law be *transformed into domestic law through a constitutional mechanism such as local legislation.* The incorporation method applies when, by mere constitutional declaration, international law is deemed to have the force of domestic law.
>
> Treaties become part of the law of the land through **transformation** pursuant to Article VII, Section 21 of the Constitution, which provides that "[n]o treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the members of the Senate ..." (Emphasis supplied)

In thus making a review of the methods by which customary norms and conventional rules in international law are internalized into Philippine law, it

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[252] Article 5 of the 1969 Vienna Convention on the Law of Treaties provides: The present Convention applies to any treaty which is the constituent instrument of an international organization and *to any treaty adopted within an international organization* without prejudice to any relevant rules of the organization.

[253] 535 SCRA 265 (2007)

seems to be the sense of *PHCAP* to introduce the question as to whether WHA Resolution may become part of national law by those methods.

Preliminarily, there is need to clarify the meaning of transformation set out in the excerpt given above. This may be interpreted to mean that a treaty may be transformed in either way, namely: (a) by enacting a statutory law or "local legislation", or (b) by Senate concurrence of the treaty. The first implies that it is the implementing "local legislation" that effectuates the treaty as part of national law; under the second, it is the treaty itself as thus concurred in that becomes national law. The Treaty Clause clearly embodies the second formula, which spells out the self-executing method of transformation, as affirmed by the jurisprudence of the Supreme Court. The self-executing transformative method should not be confused with the case of a treaty already binding on the Philippines following Senate concurrence, which requires a legislative implementation of an obligation undertaken by the Philippines as a State Party to that treaty. Note that the congressional act in implementation of a treaty obligation is not a precondition to, or does not form part of, the transformation of the treaty into national law under the Constitution. Rather, this time the legislative implementation pertains to the treaty *after it has already been transformed into national law.*

Coming back to the implications of transformation and incorporation arising from the *PHCAP* excerpt given above, either method of internalization into national law has no relevance in the light of the legal status of ICMBS and other WHA Resolutions under the WHO Constitution. Since ICMBS has been adopted as a mere recommendation of the WHA to the WHO States Parties it would be out of place to connect it to the formal sources of international law as recognized by the international community of States.

Of critical importance among the functions of the WHA is "to determine the policies of the [World Health] Organization."[254] The policies it adopts take the form of *resolutions* which are of different regulatory nature or effectiveness, depending on the authority it exercises as provided in the WHO

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[254] WHO CONST.art. 18(a).

Constitution. Under this Constitution, the WHA has the authority "to adopt conventions or agreements with respect any matter within the competence of the [World Health] Organization" under Article 19; the authority "to adopt regulations concerning" ... specified standards of wide scope under Article 21; and the authority to make recommendations to Members with respect to any matter within the competence of the [World Health] Organization."[255] Whichever authority it exercises, the substantive content of the policy the WHA adopts is formulated in the form of a resolution. It would be imprecise, therefore, to assume that every resolution the WHA adopts necessarily raises the issue of its connectivity to customary norm or conventional rule in international law *vis-a-vis* its internalization into Philippine law.

Finally, therefore, by the nature of authority exercised by the World Health Assembly of the WHO pursuant to Article 23 of the WHO Constitution, the Philippines incurs no international obligation arising from CMBS: it affirms the agreement of WHO Member States that its constituent articles are recommendatory "as a basis for action." Its nature as a recommendation as thus provided may be understood to mean that in good faith it may take action, on account of the CMBS as addressed to its discretion. It does not require adoption of CMBS. In this frame, the range of options on the part of the Philippine may start from adoption of the entire CMBS to abstention from taking action based on CMBS. However, it may imply good faith consideration of the WHA recommendation. In the end, adverse action taken on the recommendation does not give rise to any form of liability. The action taken by the Philippines on the CMBS properly takes place within this frame: adoption of CMBS with changes on its policy discretion. Certainly, in the case at bar the Philippines has considered CMBS as a basis for its action pursuant to the WHA recommendatory resolution, in compliance with the WHO Constitution.

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[255] WHO CONST art. 23.

**Concluding Note**

Underlying the foregoing presentation is the reality that international law forms part of Philippine law by constitutional mandate. In context, the relation of international law and national law in concrete application remains as the key problem area, which badly needs to be investigated. This *problematique* acquires its sharper edges in the cavalier and at times mindless treatment of principles in public international law as they are built into Philippine law by judicial interpretation. Intriguing is the lack of attention that these principles deserve in the light of conceptual and practical developments of what has transformed into a law of the international community, reflecting as it does a high degree of integration of human interests accentuated by crises of planetary dimensions.

The expanding accretion of international legal regulation through treaty law in domestic jurisdiction has not been studied in its far-reaching implications, if only with regard to the resulting displacement of legislative enactments by treaty rules. The tension between norms of international law and those of national law that marks the dualist character of Philippine recognition of the international legal order continues to elude juristic clarification.

The complex problems arising from the relation of objective international law and national-law practice certainly find some response in the mandate of the new Code of Judicial Ethics that judges should familiarize themselves with principles of public international law. But what may prove to be more fruitful in the shaping of the judicial mindset are the conditions of legal education, which appears to regard this problem-area without a sense of commitment to its critical function in Philippine law within the larger scale of the international public order and unmindful of the stake by which the national community is deeply engaged in the vicissitudes and crises common to humankind and its planet Earth.

The heavy burden of judicial interpretation in problems of international law lies in the involvement of the sovereign integrity of the Philippine Republic and in the modality by which the will of the national community finds juridical

expression. In this light, we may gather our hopes once again for better days to come.

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