ROYAL PAINS: *LÈSE MAJESTÉ* IN AN INTERNATIONAL RIGHTS-BASED LEGAL FRAMEWORK*

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Uneasy lies the head that wears a crown.
– William Shakespeare,
Henry IV, Part I.

INTRODUCTION

Throughout history, in the seemingly innocuous project of mythmaking by the State of its own image, many people who have dared to trample with the process—those who have inflicted upon the State what is called *lèse majesté*[1]—have undergone dire legal consequences. The State, in the legitimate exercise of its monopoly of violence in society, has sought to reinforce this image for its own survival as a general framework through which it maintains order. This image persists as a mechanism essential to the very existence of the State, despite its having undergone criticism for numerous violations of human rights.

In a narrower sense, the part of that image that shall form the focus of this Note is largely confined in its physical manifestations: symbols, objects, and even persons that constitute a crucial link in the generation of State myths. In the Philippines, majesty manifests itself in the symbols of State authority such as the flag, the National Anthem, and other state insignia. Respect for these symbols is ingrained in the minds of most Filipinos from childhood. Significantly, treating these symbols with contempt, even under the guise of

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[1] Literally, "injured majesty." It is defined as a crime against the state, especially against the ruler, or an attack on a custom or traditional belief [BLACK'S LAW DICTIONARY (8th ed. 2004)].

enjoying the mantle of protection under the Constitution's Bill of Rights, is punishable under the law. To wit, Section 34 (a) of the Flag and Heraldic Code of the Philippines[2] prohibits the act of mutilating, defacing, trampling on, or casting contempt, dishonor or ridicule upon the flag or over its surface. This act of disrespect against the flag is considered an injury against State majesty. In the Philippines and elsewhere, prohibition against *lèse majesté* remains a salient feature of political law despite advancing strides in human rights at the international level.

In this Note, we focus on the situation where the manifestations of State majesty happen to coincide in the body of a single person, as in monarchy. While it is simpler to imagine how one can be expected to treat inanimate objects with deference in non-monarchical settings such as the Philippines, the dissonance emerges when we examine the confluence of human energies and legal concessions to favor the stature of one individual (and in many cases, his family included) as the centerpiece of the State's mythmaking. In many cases, these persons, called monarchs, are often constitutionally protected through prohibitions against *lèse majesté*. They are often beyond the pale of liability and accountability, at least in theory. While in most present-day monarchies, democratically-elected governments are in place, the legal fictions of kingly supremacy remain in many aspects of these countries' fundamental laws. In this Note, we shall examine these fictions in the light of the monarchical State's obligations under an international rights-based legal framework.

I. TEARING DOWN PERSONIFICATIONS

On February 4, 1948, after protracted negotiation with the British government, the Soulbury Constitution finally took effect, transforming the colony of Ceylon into a fully-sovereign and independent state. On that occasion, the island was declared a Dominion under the British Crown.[3] For more than two decades, Ceylon was a Commonwealth Realm[4] with the British

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[2] Rep. Act No. 8491 (1998). Section 50 thereof punishes these acts with a fine of up to PhP20,000.00 and/or imprisonment of not more than one year upon the court's discretion.

[3] This is the default status of all British colonies upon independence.

[4] To this day, sixteen states remain Commonwealth Realms, each recognizing Queen Elizabeth II as head of state: Australia, Antigua and Barbuda, The Bahamas, Barbados, Belize, Canada, Grenada, Jamaica, New Zealand, Papua New Guinea, St. Kitts and Nevis,

monarch as the formal head of state. During this period, two persons held the distinction: George VI reigning as King of the United Kingdom and the British Dominions beyond the seas until his death in 1952, and his daughter Elizabeth II reigning in a separate and distinct capacity as Queen of Ceylon until the adoption of a republican constitution. In 1954, the Queen of Ceylon visited her realm for the first time to open the Ceylonese Parliament, where she was received in jubilation.

However, things had changed by the mid-1960s. Many Ceylonese increasingly desired more than just the fiction of a largely absentee European head of state represented in the island by a Governor-General; an office which carried with it the vestigial flavor of British colonial times. The Prime Minister, who was in all respects Ceylonese, could only advise the Queen of Ceylon, residing primarily in London, through the Westminster Parliament. Increasingly, it was becoming more difficult for the Ceylonese to reconcile the idea of being a fully independent nation with a government under an essentially alien monarchy.

Such was the political setting against which Her Majesty's Privy Council for Ceylon decided the case of *The Bribery Commissioner v. Pedrick Ranasinghe.* [5] As Professor M.L. Marasinghe observes, the decision was essentially the death warrant of the Soulbury Constitution.[6] The main issue in that case was the right of the Minister of Justice to appoint a Bribery Commissioner under the Bribery Amendment Act, "giving the appointee the status and ranking similar to that of any member of the country's judiciary, when the Constitution had in fact left the appointment of members to the judiciary in the hands of an independent body, ... the Ceylon Judicial Service Commission."[7]

In other words, the issue concerns the constitutionality of the appointment of a member of the Ceylonese judiciary by the Justice Minister, himself appointed by the Queen on the advice of the Prime Minister of Ceylon. But while *Bribery Commissioner* was ultimately resolved in the negative, the Privy Council went further to rule, via obiter, that there are matters which

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St. Lucia, St. Vincent and the Grenadines, Solomon Islands, Tuvalu and the United Kingdom.

[5] 2 WASH. L. REV. 1301 (1964); 66 New Law Reports 73 (Sri Lanka).

[6] M.L. Marasinghe, *Ceylon—A Conflict of Constitutions*, 20 INT'L. & COMP. L.Q. 645 (1971). (hereinafter "Marasinghe")

[7] *Id.*

"represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which *inter se* they accepted the Constitution; and these are therefore unalterable under the Constitution."[8] While the foregoing disquisition had not exactly been examined by the courts afterwards, it raised the realistic possibility of the Privy Council ruling that certain parts of the Constitution are unalterable notwithstanding a majority vote of Parliament—an issue that raised nagging doubts about the sovereignty of the lawmaking body.[9] Nag Parliament it certainly did, so much so that eight years after *Bribery Commissioner*, a new constitution was adopted repudiating Dominion status and the British Crown. Ceylon had become a parliamentary republic under the non-colonial name Sri Lanka.

On its face, the departure from a monarchical form of government is viewed as an assertion of Sri Lankan sovereignty and a recognition of its right to govern its own affairs with institutions of its own choosing. The independence of Sri Lanka in 1948 was peacefully obtained through certain concessions in favor of the British monarchy. Admittedly, in many instances during decolonization, the British monarchy[10] was always an issue to contend with regarding the position it assumes in the former colony upon independence. In Ireland for instance, also a former Dominion, resentment against the British monarchy was so much more pronounced as compared elsewhere in the British Empire that it decided to adopt a republican constitution as soon as possible, and not without the loss of many lives. At the point of transfer of sovereignty, Sri Lanka maintained loyalty to the royal establishment by retaining the institution at the apex of its Westminster-style parliamentary government, at least in theory.

But how much (or little) of this theory—this legal fiction—must one need to consider to be satisfied that his rights, whether political, civil or human, had not been impaired? One need not look far from common sense that in such an arrangement, as in monarchies elsewhere, the mere accident of birth has always drawn criticism for the extraordinary privilege enjoyed by royal heads of state and their families, not only socially, but more importantly with respect to the law. Yack, in his examination of the Hegelian concept of

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[8] 2 WASH. L. REV. 1301, 1307 (1964).

[9] Marasinghe, at 647.

[10] Despite the fact that the institution headed by Elizabeth II based primarily in the United Kingdom should be more properly referred to simply as *the Monarchy*, for purposes of political correctness across all Commonwealth realms, in this Note the author takes the liberty of referring to the institution, for convenience, as the British monarchy.

monarchy, notes that "most readers find constitutional monarchy a disappointing climax to the *Philosophy of Right*" and that the concept of monarchy escapes '*Räsonnement*' (ordinary deductive reasoning)."[11] The Sri Lankan example above is a testament to this point.

Nevertheless, aside from being the dispensers of law and justice from ancient times, monarchs (at least in constitutional forms) have evolved into the living personification of the State. In Spain for example, the King is deemed the symbol of the "unity and permanence" of the Spanish Nation and "assumes the highest representation of the Spanish State in international relations."[12] As such his person "is inviolable and shall not be held accountable."[13] Interestingly, as a state-party to the Rome Statute of the International Criminal Court, Spain is under obligation to observe the irrelevance of official capacity in relation to criminal responsibility in Article 27 thereunder.[14]

How did this legal fiction develop? Scheuerman posits that for most of recorded human history, "[k]ingship is the norm ... and liberal democracy a rare and quite recent exception."[15] Citing Bendix, he also observes that "the *principle* of hereditary monarchy was challenged only some two centuries ago."[16] The practice of hereditary succession—the passing of royal authority from the

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[11] Bernard Yack, *The Rationality of Hegel's Concept of Monarchy*, 74 AM. POL. SCI. REV. 709 (1980).

[12] CONSTITUTION OF THE KINGDOM OF SPAIN, § 56 (1): "*El Rey es el Jefe del Estado, símbolo de su unidad y permanencia, arbitra y modera el funcionamiento regular de las instituciones, asume la más alta representación del Estado Español en las relaciones internacionales, especialmente con las naciones de su comunidad histórica, y ejerce las funciones que le atribuyen expresamente la Constitución y las Leyes.*"

[13] *Id.*, § 56 (3): "*La persona del Rey es inviolable y no está sujeta a responsabilidad...*"

[14] Statute of the International Criminal Court, art. 27: (1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence;

(2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

[15] William E. Scheuerman, *American Kingship: Monarchy and Presidentialism*, 37 POLITY 24, 26 (2005).

[16] *Id.* at 26; RICHARD BENDIX, KINGS OR PEOPLE: POWER AND THE MANDATE TO RULE 3-4 (1978).

old sovereign to the young in the same family, and from dynasty to dynasty, reflective of the fictive descent from God—has always been a central theme in the justification for the existence of monarchy. For many centuries, the Japanese government officially held out the descent of the Imperial Family from the Shinto sun goddess Amaterasu as part of state mythology. It was not until 1946 when the Showa Emperor issued the Humanity Declaration renouncing his divinity in human form. Nevertheless, many Japanese continue to revere the Emperor with the same deference befitting a demigod, because even with the complex connections claimed by theologians between divinity and monarchy, people have always tended to look upon kings as gods on earth, or at the very least, representatives of the divine. On this point, Scheuerman offers an interesting argument:

> When we observe that monarchy has been "the preferred form of structured temporal authority across a wide band of cultures on every major continent," it becomes difficult to deny, as one recent commentator notes, that *kingship "has served as an intellectually and emotionally satisfying focus" of human energies throughout the greater portion of both unrecorded and recorded history.*[17] (emphasis supplied)

The nexus between divinity and monarchy had become so entrenched that Hall refers to a framework of sacerdotal kingship, where the king "was valued as a provender of order, as 'legislator and pacifier' from whom Christian society was to receive *Rex, lex, pax.*"[18] Nonetheless, despite the divine sanction, it was also through divine law that kings were made accountable to human society, or to the clergy at the very least. Such was the entrenchment of divinity in the temporal authority of a royal head of state that this authority extended to all imaginable areas of human concern. From this point it must be recognized that when Hobbes wrote his seminal treatise on the *Leviathan*, he, like his predecessors before him, point out in response to proponents of limited government that the mere fact that one must attempt to limit sovereignty, and ineluctably fail, is in itself a recognition that sovereignty is elsewhere. [19] Corollarily, limiting the right of the sovereign through the establishment of a finite set of such powers which may have been granted him is no sovereign at all.[20]

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[17] Scheuerman at 26, *citing* W.M. SPELLMAN, MONARCHIES 1000-2000, at 7 (2000).

[18] Rodney Bruce Hall, *Moral Authority as a Power Resource*, 51 INT'L ORG. 591, 601 (1997).

[19] 'Elsewhere' here is being used in the sense of 'everywhere,' as to convey inherence.

[20] William Harvey Reeves, *Leviathan-Bound—Sovereign Immunity in a Modern World,* 43 VA. L. REV. 529, 533-534 (1957).

As a consequence of this special position in society, the king himself, as the personal embodiment of the nation, is regarded as a source of law. Macy, writing on the role of the English Crown, notes that "[a]ccording to the forms of English law the entire government is built up around the throne."[21] In the United Kingdom until present, all government authority resides and flows forth from the Queen, in theory at least. Parliament opens and operates on a program of government by the Queen-in-Parliament; after elections, the Queen *invites* the leader of the party with the most number of seats won to become Prime Minister and form a Government *in Her name*; British courts decide cases in the name of Her Majesty as the fount of all justice in the realm; criminal cases are prosecuted by the State as *Regina* (*The Queen*) v. X; all administrative officers and bureaucrats are required to take an oath covenanting to execute their duties in the name of the Queen; all honors and distinctions are conferred by the Queen as the sovereign of all British orders of merit in her capacity as *fons honorum*—all these in reciprocation to her coronation vow of consecrating her life, long or short, "to govern the Peoples of the United Kingdom,... according to their respective laws and customs."[22] While in practice many of these powers are usually exercised on her behalf by and on the advice of a popularly elected government, the theory of personification persists in the realities of government in such a scale that is difficult to simply dismiss. The constitutive character of monarchy has been so successful in the United Kingdom that when its colonies became independent, the royal institution has been relied upon as 'state-maker' in the formative years of these newly independent nations, such as in Sri Lanka. This is particularly important in stabilizing the young nation from an otherwise tumultuous foray into independence, the monarchy substituting for a semblance of permanence—an institution that remains despite the fact that governments come and go.

All of the foregoing dignities and distinctions incidental to the office of a monarch has led to the emergence of a body of laws against *lèse majesté*, or the crime of violating majesty, where an offense against the person of a reigning monarch is considered an offense against the State itself. *Lèse majesté* draws its origins from the concept of majesty inherent in the person of a royal head of state. In other words, from the premise that all temporal authority on earth proceeds from divine sanction, majesty manifests itself in human form

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[21] Jesse Macy, *The English Crown as an Aid to Democracy*, 7 POL. SCI. Q. 483, 485 (1892).

[22] Coronation Oath of Elizabeth II, June 2, 1953, *available at* http://www.royal.gov.uk/ImagesandBroadcasts/Historic%20speeches%20and%20broadcasts/CoronationOath2June1953.aspx.

through the king, giving rise to the obligation on the part of those subject to his authority to maintain inviolate this majesty. For most of human history, this constituted the only manner through which an individual might begin to imagine the creature called 'State.' To violate the person of the king therefore was as much an offense to the State as on his person, and in many instances, the State and the person of the king had become interchangeable constructs through majesty. In the eighteenth century, majesty, in most of the collective French psyche, "resided in the king, who was the possessor and *personification* of the public power"[23](italics supplied). Kelly makes an interesting observation:

> Many controversialists of that century, among them the proponents of the *thèse nobiliaire*, like the Comte de Boulainvilliers, and the Gallican parl[ia]mentary opposition to Louis XV, presumed that there were "fundamental laws" or a "constitution" which placed fixed limits on the royal will. Yet, even if France were held to be a "tempered monarchy" and not an absolute one, the method of enforcing these limits remained obscure. *The king embodied the state. Any attacks on majesty-and they were widely defined to include libels, derogatory utterances, and counterfeiting-were assaults against the monarch in his public personality and, as such, against all his wards who constituted, beneath him, the nation.*[24] (emphasis supplied)

The State having metamorphosed into human form, those who were largely dissatisfied with the system expressed discontent through attacks on the person of the king, not only through physical means but also through the perpetration of libels, defacement of symbols, debauchery and references to the impotence of the sovereign power and the myths it generated of itself. Yet Kelly also admits that most of the libels lacked any motive of reform.[25] Such an ambiguity, he notes, proved instrumental in the gradual erosion of the concept of *lèse majesté* into *lèse nation*, or an injury perpetrated against the newly emerging, somewhat mythical construct called 'nation.'

Despite this development, references to *lèse majesté* remained, even in the aftermath of the French Revolution. In the context of republican defection, a new, vastly different ideology of majesty emerged. Sorel writes:

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[23] G.A. Kelly, *From Lèse-Majesté to Lèse Nation: Treason in Eighteenth Century France*, 42 J. HIST. IDEAS 269, 270 (1981).

[24] *Id.* at 270.

[25] *Id.* at 272.

> With majesty transferred from the king to the people, the crime of *lèse-majesté* is diverted from the person of the king, and there arises a conception of treason toward the State by which the king, who formerly could only be the victim, can now be imagined as the primary transgressor.[26]

Thus, with this development in the concept of majesty, it now becomes possible and relevant to examine its implications in an international rights-based legal framework at present.

II. MAJESTY AND RIGHT AS A PORTRAIT OF THE SOVEREIGN AUTHORITY: THE MUNICIPAL-INTERNATIONAL LAW DEBATE

When Harry Nicolaides, an Australian national, arrived at the Bangkok airport to fly out to Melbourne in 2008, he was unaware that a warrant of arrest had been issued against him. The Thai police arrested him at the airport just as he was about to board his flight. The criminal charge against him was for *lèse majesté*, a criminal offense that can carry a penalty of up to 15 years imprisonment in Thailand. He had been charged with the offense for the publication of his novel "Verisimilitude" in 2005, which, according to Thai media, was a "trenchant commentary on the political and social life of contemporary Thailand."[27] The novel had only 50 copies published, of which only seven were actually sold. In January 2009, the Bangkok court ruled that the novel had caused dishonor to the Thai royal family and sentenced Nicolaides to three years in jail. By the following month, Nicolaides had been granted a royal pardon by the King of Thailand and was set free.[28]

A constitutional monarchy with a parliamentary form of government, Thailand has been criticized in recent years for the renewed vitality of its law on *lèse majesté*. The Nicolaides affair was part of the increased crackdown on anti-monarchy activities and a renewed focus on *lèse majesté* as an important element of the national agenda. Preechasilpakul and Streckfuss offer a useful examination of Thailand's *lèse majesté* law through its various incarnations in the

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[26] II ALBERT SOREL, L'EUROPE ET LA RÉVOLUTION FRANÇAISE [Europe and the French Revolution] 137 (1904), in Kelly at 284.

[27] Nopporn Wong-Anan, *Australian arrested in Thailand for lese-majeste*, Sept. 3, 2008, *available at* http://www.reuters.com/article/2008/09/03/us-thailand-australia-lesemajeste-idUSBKK9474820080903.

[28] BBC News, *Thailand frees Australian writer*, Feb. 21, 2009, *available at* http://news.bbc.co.uk/2/hi/asia-pacific/7903019.stm.

past century.[29] The oldest version, enacted in 1900 before the collapse of the absolute monarchy, criminalized the act of defamation against not only the members of the royal family, but also foreign heads of state, both royal and non-royal.[30]

As Preechasilpakul and Streckfuss observe, under the 1900 provision acts against the King were deemed committed against the State, and vice versa. Furthermore, because of the absolute monarchy prevailing in then Siam, majesty enabled the law to interchange the State and the person of the King. The protection extended not only to present monarchs but also to their descendants "as part and parcel of absolute monarchy under which the king, as holder of the highest power, is inviolable, as are all of those closely related to him."[31]

An exception to the defamation provision was introduced in the aftermath of the 1932 Thai coup. Now under a constitutional monarchy, provision 104 of the amended Thai Criminal Code makes the following interesting exclusion:

> Provided that there shall be no offence under this section when the said words or writing or printed documents or means whatsoever will merely be an expression of good faith or amount to a critical and unbiased comment on governmental or administrative acts within the spirit of the Constitution or for the public interest.[32]

Provision 104 creates legal space in favor of utterances and acts directed against the King and the royal family for as long as these acts meet the standard of falling "within the spirit of the Constitution," or whenever "the public interest" calls for it, and for as long as such conduct is done as an "expression of good faith." However, it must be remembered that this

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[29] Somchai Preechasilpakul and David Streckfuss, Ramification and Re-Sacralization of the Lèse Majesté Law in Thailand, delivered at the 10th International Conference on Thai Studies (January 9-11, 2008).

[30] Royal Edict of 1900, Section 4 provides "[w]hosoever defames the reigning king of Siam or the major concubine, or the princes or princesses...with intemperate words which may clearly be seen as truly defamatory, this person has acted illegally."

[31] *Supra* note 31, at 3.

[32] Phraraatchabanyat kaekhai phoemtoem kotmai laksana aayaa ph.s. 2478 (chabap thii 3), [Amendment to the Criminal Law Code of 1935], in PKPS, Vol. 49, 2479 [1936] (Aug. 20, 2478 [1935]), at 46-76; *See also* 61 Raatchakitjaanubeksaa 6 [Royal Gazette], (Apr. 19, 2479 [1936]).

innovation was introduced during a time when liberal reforms were being incorporated for the first time into Thai law. After the end of absolute monarchy in 1932, resentment against the excesses of the old order was so widespread in Thai society that it seemed fashionable to adhere to rights-based reforms.

A comparison of two cases decided by the Thai High Court before and after 1932 reveals the changes in the scope of application of the Royal Defamation Law. In 1927, an accused stood charged with the offense of rebellion for claiming that the king, for his wrong decisions and for ruling poorly, must be removed from the station in which he had been born. The court sentenced him to seven years imprisonment.[33] The same court, deciding on the criminal liability of a defendant who, in the process of campaigning for public office in the 1946 elections, uttered comments against the government for restricting people from speaking or criticizing it, disposed of the case in the following manner:

> [A] person speaking publicly while campaigning for election, under democratic principles, the government may be criticized.[sic] Although the language of the defendant may have been intemperate, it nonetheless did not violate Section 104, citing the final paragraph of the provision which stipulated that if the action in question was done within the spirit of the Constitution or for public benefit, it shall not be held as in violation. This immunity did not extend only to what was said during parliamentary proceedings. The central principle of democratic governance is that sovereign power belongs to the people. Governments can thus be either criticized or praised, and so the defendant is found not guilty.[34]

But on a macro level, despite the aforesaid exception and even in the usual turbulence of Thai political life, where the constitution has been amended at least eleven times in the last century, the provision against *lèse majesté* remains a consistent feature. The current Thai Constitution, like all older versions that came before it, provides that "[t]he King shall be enthroned in a position of revered worship and shall not be violated. No person shall expose the King to any sort of accusation or action."[35]

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[33] Kham Phiphaksa San Dika [High Court Decision] 612/2475 (1932), in Preechasilpakul and Streckfuss (2008).

[34] Kham Phiphaksa San Dika [High Court Decision] 631/2491 (1948), in Preechasilpakul and Streckfuss (2008).

[35] 2007 CONSTITUTION OF THE KINGDOM OF THAILAND, art. 8.

If the law against *lèse majesté* is intended to protect the dignity and the integrity of the person of the king and the State, then the issue arises as to whether all other individuals within the polity are entitled to otherwise recognized rights under elective governments. Drawing from Kelly's classic theory of majesty in the preceding section, the king, as dispenser of all law and justice in the realm, possesses the prerogative to grant, within the extent of his own sense of benevolence, concessions to individuals subject to his sovereign authority. The concept of 'right' traces its roots from grants and concessions of the sovereign. Even in republican contexts, a crude analogy can be drawn with respect to codified bills of rights which perform essentially the same function as royal concessions: a limitation on the otherwise awesome powers of the State against the lowly individual. However, where a sense of permanence is attained in codifying these rights as checks against the sovereign authority, such is blithely lacking in royal concessions which may be confiscated and revoked anytime *at His Majesty's pleasure.*

At this point, it becomes relevant to examine where the divide lies between State sovereignty exercised through majesty (bearing in mind that it is through majesty that the State identifies, organizes, and characterizes itself, both in its domestic and international relations) and State sovereignty tempered through the grant and/or recognition of individual rights. More precisely, we need to determine if such a dichotomy actually exists. But how does one proceed to address this question with the knowledge that the monarchic State affords full immunity in favor of the person of its leader? A particularly difficult aspect in the scrutiny of political crimes such as *lèse majesté* is the tendency to rely on municipal laws and practices, as well as municipal interpretations of what are considered rights. This difficulty can be explained by the fact that in the main, the primary content of the law on political crime hinges upon the very existence of the State itself, and mostly upon the general recognition that such concerns fall exclusively within a State's domestic jurisdiction. Ferrari, writing on the subject, observes that "[p]olitical crime is not a natural crime. It is dependent upon the legislator, and differs considerably from place to place."[36] An offense against majesty, regardless of its origin within or outside the State, is deemed actionable under the municipal law of the offended State. An eminent commentator on French criminal law defines political crime as:

> [T]hose felonies and misdemeanors which violate *only the political order of a state*, be that order exterior, as in attacking the

[36] Robert Ferrari, *Political Crime*, 20 COLUM. L. REV. 308, 309 (1920).

> independence of the nation, the integrity of its territory, the relations of the state to other states; or interior, as in *attacking the form of government,* the organization and functioning of the political powers and the political rights of citizens.[37] (emphasis supplied)

However, this must not mean that an examination of *lèse majesté* in the lens of international law is no longer possible. A practical proposition is here offered for the reader's consideration: this problem can only be accomplished by examining *lèse majesté* not in the context of municipal law, but in the light of the monarchic State's obligations under an international rights-based legal framework. This is in order to avoid circuitous references to the State when referring to the responsibilities of its leaders, considering that such royal heads, under municipal law, are protected beyond the pale of liability. In other words, if a royal head of state enjoys legal immunities under municipal law, then the question as to the conformity of these immunities with the State's international obligations to observe certain rights can be addressed with reference to an *international rights-based legal framework.* This deference to sources of law beyond the sovereign State has become an observable phenomenon in recent years, and has been most pronounced in Europe than elsewhere. MacCormick, commenting on the present realities in Europe, expresses his doubts on the feasibility of proudly subscribing to an Austinian theory of law and state premised upon a classic formulation of sovereignty amidst deference to European Community law:

> On the face of it, then, it may be possible to give some account of the realities of our modern Europe without departing from an essentially Austinian theory of law and state grounded in the theory of sovereignty as a matter of habitual obedience to sanctioned commands. Yet is the account a very convincing one? Or does it not proceed with too narrow a perspective? If you look at matters exclusively from the point of view of a decision-maker in the United Kingdom, it might be possible to be satisfied with this, so to say monocular, view. In this view, the European Community is sufficiently accounted for on the thesis that somebody here once said 'let these Community organs be obeyed as to those matters *quoad* the United Kingdom'; and now all these organs are being obeyed as a matter, ultimately, of obedience to our own native sovereign.[38]

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[37] VIDAL, COURS DE DROIT CRIMINEL ET DE SCIENCE PENITENTIAIRE [Discourse on criminal law and penology] 5 (5th ed. 1916).

[38] Neil MacCormick, *Beyond the Sovereign State,* 56 MOD. L. REV. 1, 4 (1993).

The possibility of examining sovereign immunities in international law is apparent in the ruling of the United States Supreme Court in *Schooner Exchange v. McFadden*.[39] In that case, a commercial schooner named *Exchange* was sailing off the coast of America in 1812. The *Exchange* was owned by two citizens of Maryland. In the course of its voyage, it was seized by the French navy and by order of Napoleon, Emperor of the French, the vessel was converted into a French military vessel. When the *Exchange* was forced to call at the port of Philadelphia due to bad weather, the owners filed a libel action *in rem* against the *Exchange* for its recovery. France argued that it cannot be brought into the action since the *Exchange* is part of a military fleet under Emperor Napoleon. The vessel is, by logic, an arm of the emperor and by extension was also entitled to the same personal privileges of immunity enjoyed by the emperor himself. Chief Justice Marshall, speaking for the Court, wrote:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself... All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself.[40]

Schooner Exchange recognizes two important principles of international law: (1) the supremacy of the jurisdiction of the State in matters pertaining to its own territory; and (2) that in recognition of sovereign equality among nations, the United States should be discouraged from compelling France to stand in judgment before the courts of the former for the latter's conduct—a principle to which Chief Justice Marshall admits of certain exceptions.

Then as now, State consent, whether express or implied, subjects the State to the jurisdiction of tribunals beyond itself. The same consent also operates, to the extent it is given or withheld, as the limitation upon the State's immunity from jurisdiction. The same exception in *Schooner Exchange* is more pronounced in the decision of the Canadian Supreme Court in *Government of the Democratic Republic of Congo v. Venne*:[41]

> [N]either the independence nor the dignity of States, nor international comity *require vindication through a doctrine of absolute*

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[39] 7 Cranch 116 (1812).

[40] *Id.* at 136

[41] 22 Dominion L. Rep. (3d) 669 (1971).

> *immunity. Independence as a support for absolute immunity is inconsistent with the absolute territorial jurisdiction of the host State; and dignity, which is a projection of independence or sovereignty, does not impress when regard is had to the submission of States to suit in their own Courts.*[42] (emphasis supplied).

Admittedly, however, the scope of the exception still falls within the scope of the law of the forum. While there is still a debate as to the proper domain of sovereign immunity, whether it is municipal or international law, D.W. Greig credits the work of the International Law Commission on the draft articles on state immunity as an attempt to firmly place the latter in the sphere of international law.[43]

III. PAINS OF MAJESTY: CONTRADICTIONS AND NECESSITIES

Marasinghe's theory of dignity[44] proceeds from the basic premise that a State as a sovereign entity is entitled to the respect of both its citizens and of other States. Therefore, to force it to submit to the jurisdiction of another tribunal, whether international or foreign, would constitute an affront to the high esteem accorded to a State. However, in monarchy, such dignity is necessarily preconceived in the notion of majesty, and an interesting aspect nuances the ordinary formulation of the former in the sense that its object in a monarchical government is usually a single individual who, in theory, wields all sovereignty in and on behalf of the State. The concept of dignity is less complicated in republican systems, where majesty is abstractly held by all institutions of government as a collective, and not necessarily vested in the person of parliament or the chief executive exclusively.

Another peculiar aspect to the majesty of a State as embodied in the person of a monarch is that, in international law, the classic distinction between immunity *ratione personae* and immunity *ratione materiae* tends to blur. Immunity *ratione personae* attaches to the person for as long as he is in office so as to allow the free exercise of diplomatic duties. In the *Arrest Warrant* case, the International Court of Justice recognizes that "[i]t is firmly established that,

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[42] *Id.* at 684.

[43] D.W. Greig, *Forum State Jurisdiction and Sovereign Immunity under the International Law Commission's Draft Articles*, 38 INT'L & COMP. L. Q. 243, 254 (1998).

[44] Lakshman Marasinghe, *The Modern Law of Sovereign Immunity*, 54 MOD. L. REV. 664, 666 (1991).

as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal."[45] The mantle of immunity *ratione personae* is made to extend not only to acts or omissions connected to the exercise of diplomatic functions, but also to private acts as well. The rationale is that protection is afforded the head of state to encourage diplomacy and develop healthy relations among states. Tunks makes the relevant observation

> Head-of-state immunity allows a nation's leader to engage in his official duties, including travel to foreign countries, without fearing arrest, detention, or other treatment inconsistent with his role as the head of a sovereign state [footnote omitted]. Without the guarantee that they will not be subjected to trial in foreign courts, heads of state may simply choose to stay at home rather than assume the risks of engaging in international diplomacy abroad.[46]

On the other hand, immunity *ratione materiae,* or functional immunity, attaches not to the person, but to official acts of the State. As Akande notes, "[s]ince this type of immunity attaches to the official act, it may be relied on not only by serving state officials, but also by former officials with respect to official acts performed while in office."[47] It is the very nature of the act itself which forms the basis of immunity from liability.

Again, a peculiarity arises with respect to royal heads of state, at least in hereditary systems. The nature of a kingly office—a tenure that usually lasts for a lifetime; a person not susceptible to accountability and legal action; the personal embodiment of the State itself—makes permeable the distinction between the aforesaid classes of immunity. Since a monarch usually remains in this capacity for the rest of his life, it becomes nugatory to examine the distinctions between his personal and functional immunities. As a hypothetical example, if a king, regnant for the rest of his life, decides to issue a decree revoking the right of suffrage formerly enjoyed by his subjects, then he is not only immune with respect to actions against his person (for the rest of his life) arising from a constitutional violation of a political right, but is also immune

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[45] Case Concerning the Arrest Warrant of 11 December 2000 (D.R. Congo *v.* Belg.), 2002 I.C.J. 3 at par. 51.

[46] Michael A. Tunks, *Diplomats or Defendants? Defining the Future of Head-of-State Immunity*, 52 DUKE L.J. 651, 656 (2002).

[47] Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L. L. 407, 412 (2004).

with respect to the legal consequences of the decree should he decide to abdicate the throne.

Be that as it may, it must be recalled that all the peculiarities arising from the office of a king which the law against *lèse majesté* seeks to protect is inextricably founded upon the person of its holder rather than the institution itself. Thus, the distinction between personal and functional immunity becomes immaterial in the face of the deeply personal nature of the kingly office.

What safeguards exist in international law against abuses committed under the guise of sovereign immunity? The decision of the European Court of Human Rights in *al-Adsani v. United Kingdom*[48] illustrates a fascinating, if not alarming, aspect of the effect of actions based on violations of *jus cogens* norms on sovereign immunity, such that "[w]hile recognizing that the prohibition of torture possesses a 'special character' in international law, the ECHR rejected the view that violation of such a norm compels denial of state immunity in civil suits."[49] Stated otherwise, notwithstanding the non-peremptory character of the norm of sovereign immunity, an action based on a violation of a peremptory norm (such as torture in the *al-Adsani* case) may not prosper because this is a *non sequitur*. Recognizing on one hand that sovereign immunity is not *jus cogens* is still insufficient to the attainment of a remedy for violation of a *jus cogens* norm in the other. This disquisition by the European court polarized its judges into their own separate opinions as to the nature of sovereign immunities before international law:

> On the one side, Judges Matti Pellonpää and Nicolas Bratza concurred with the decision and renounced the theory on practical grounds. They reasoned that if the theory were accepted as to jurisdictional immunities, it would also, by logical extension, have to be accepted as to the execution of judgments against foreign state defendants, since the laws regarding execution, like state immunity law, are arguably not *jus cogens* either.
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> Consequently, acceptance of the normative hierarchy theory might lead to execution against a wide range of state property, from bank accounts used for public purposes to real estate and housing

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[48] A detailed summary is available in 96 AM. J. INT'L L. 699 (2002).

[49] Lee M. Caplan, *State Immunity, Human Rights, and* Jus Cogens*: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741, 742 (2003).

> for cultural institutes, threatening "orderly international cooperation" between states.
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> On the other side, Judges Christos Rozakis, Lucius Caflisch, Luzius Wildhaber, Jean-Paul Costa, Ireneu Cabral Barreto, and Nina Vajic dissented and advocated resolution of the case on the basis of the normative hierarchy theory. They wrote: "The acceptance ... of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions." Thus, the minority concluded that Kuwait could not "hide behind the rules on State immunity to avoid proceedings for a serious claim of torture made before a foreign jurisdiction.[50] (citations omitted)

Now, when majesty as manifest in the form of sovereign immunity comes at conflict with recognized human rights, an existential dilemma is posed on the monarchic State's own mythmaking. At one end of the spectrum lie the State and its inherent entitlement to create an image of itself and to exact respect for this image. As a matter of necessity, for a State to be able to carry out its own ideals, agenda, duties, and aspirations, it is recognized that only a certain set of individual attitudes are permissible with respect to the image it intends to project. These permissible attitudes, legislated by the State within its own framework of majesty, produce a disciplining effect among individuals, a transgression of which shall constitute an infraction of municipal law. While scholars like Servaes et al. would certainly disagree, arguing that "[p]olicymakers cannot legislate respect, nor can they coerce people to behave respectfully," [51] the development of laws on *lèse majesté* is a necessary consequence of compulsory membership in a political association called the State. In the recognition of the necessity of *lèse majesté* both domestically and internationally, is there a necessary inconsistency with human rights in international law? This author is not prepared to resolve the question in the affirmative.

In the midst of the Cold War, two major instruments outlining human rights entered into force: (1) the International Covenant on Economic, Social and Cultural Rights (ICESR) and (2) the International Covenant on Civil and Political Rights (ICCPR). Do these Covenants purport to impose obligations

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[50] *Id.*

[51] Jan Servaes, Patchanee Malikhao and Thaniya Pinprayong, *Communication Rights as Human Rights* for instance *in Thailand*, 7 GLOBAL MEDIA J. 1 (2008) at 2.

on States to observe the rights therein set forth? The answer is both yes and no. For one, these Covenants may be construed as the embodiment of ideals sought in human existence; an inherent part of the human desire for improvement. However, "to avoid false generalizations," and disappointment, "human rights must only be taken for what they are: not a dream of paradise but a tool to limit the power of the State."[52] On the other hand, Künnemann also submits that if human beings view themselves from an existential standpoint[53] in relation to the State, then certain obligations on the part of the latter set the rules for the satisfaction of such an existential status for citizens. As a consequence, he notes that "every right is actually threefold, consisting of the right itself, the existential status linked to this right, and the State obligations following from this right. The derivations of human rights ... are therefore paralleled by specifications in the linked existential status and related obligations."[54]

If State obligations arise from recognized rights, a breach thereof can be the basis for an action for relief before international tribunals. At the risk of making an oversimplification, it has to be pointed out that immunity as a consequence of majesty is a matter to contend with in seeking redress for violations of rights before all forums, whether domestic, foreign or international. In *Prosecutor v. Charles Taylor*,[55] former Sierra Leonean head of state Charles Taylor faced indictment for the commission of various international crimes during the Sierra Leonean Civil War. In his defense, Taylor, invoking the immunities of his office, argued that the indictment against him was void since he was still in office, and for inconsistency with the principle of sovereign immunity in international law. In a complete turnaround from the decision of the European court in *Al-Adsani*, the Special Court for Sierra Leone, relying upon the Statutes of the International Criminal Court, and the Nuremberg and Tokyo war tribunals, rejected Taylor's argument and ruled that "the principle seems now established that the sovereign equality of States does not prevent a Head of State from being prosecuted before an international criminal tribunal or court."[56]

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[52] Rolf Künnemann, *A Coherent Approach to Human Rights*, 17 HUM. RTS. Q. 323, 326 (1995).

[53] An existential standpoint means that humans, as sentient beings, recognize certain entitlements in the way they live.

[54] Künnemann, *supra* note 52, at 327.

[55] *Prosecutor v. Charles Taylor*, Immunity from Jurisdiction, No. SCSL-03-01-I (May 31, 2004).

[56] *Id.* at par. 52.

In 2002, a class action under the Alien Tort Claims Act and the Torture Victims Protection Act was brought by several plaintiffs before a U.S. federal court against then Chinese president Jiang Zemin and against China's Falun Gong Control Office.[57] The plaintiffs, practitioners of the Chinese spiritual movement Falun Gong, allege that the named defendants had held them in detention for their adherence to the said movement, during which detention the defendants perpetrated acts of torture, genocide, violations of the rights to life, liberty, and security of the person, and impaired their freedom of thought, conscience, and religion. The lower court ordered for the service of process on the Chinese president through any one of his U.S. federal security detail during the Chicago leg of his 2002 U.S. state visit. President Jiang was served, but no reply was received from the People's Republic of China. Later on, the U.S. impugned the validity of the service of process on the ground of its own sovereign immunity from suit (process was constructively served on President Jiang through his U.S.-provided security personnel) which the U.S. extended to the Chinese president as head of state.

When Jiang left office in March 2003, the U.S. changed its position, and in its comment before the lower court it argued that:

> [N]othing in the Alien Torts Claims Act ... or the Torture Victim Protection Act ... provides a basis for an opportunity by the executive branch to assert its constitutional role over foreign affairs to block private litigation against a former head of state charged with violations of internationally recognizable human rights, especially where the legal standards themselves have been established and confirmed by the United States Congress.[58]

In September 2003, the court upheld the immunities of Jiang as a foreign head of state and, notwithstanding the fact that he no longer was, the plaintiffs had failed to cite any holding by any court that such sovereign immunities for acts *de jure imperii* during Jiang's term as president had disappeared upon the conclusion of his tenure. The court also cited *Republic of the Philippines v. Marcos*[59] which ruled via *obiter* that head-of-state immunity may

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[57] *Plaintiffs A, B, C, D, E, F* v. *Zemin*, 97 AM. J. INT'L. L. 4, 974-977 (2003).

[58] *Id.*, Brief of Amicus Curiae Relating to Issues Raised by the United States in its Motion to Vacate October 21, 2002, Matters and Statement of Interest or, in the Alternative Suggestion of Immunity, at 4 (June 9, 2003).

[59] 806 F. 2d 344, 360 (1986).

not go so far as to render a former head of state immune with respect to acts *de jure gestionis*.[60]

Notwithstanding the varying views of different tribunals as to the availability of the defense of sovereign immunity in actions arising from State acts in breach of international obligations to observe certain rights, more caution must be taken in upholding the view that sovereign immunities can no longer be pleaded before international courts. The first consideration, as Akande suggests, is to look into the provisions of the statute creating the tribunal. Even as these statutes generally tend to provide for the irrelevance of official capacity in barring prosecution, he notes that it is crucial "to pay attention to the manner in which immunity is provided."[61] More importantly, he writes that:

> [T]he possibility of relying on international law immunities (particularly immunity *ratione personae*) to avoid prosecutions by international tribunals depends on the nature of the tribunal: how it was established and whether the state of the official sought to be tried is bound by the instrument establishing the tribunal. In this regard, there is a distinction between those tribunals established by United Nations Security Council resolution (i.e., the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) and those established by treaty.[62]

Proceeding from the above discussion, the universal membership of the United Nations means that Security Council decisions bind all members of the U.N., and so the provisions of the statutes of the Yugoslavia and Rwanda courts can render sovereign immunity nugatory with respect to practically all States. Again, as Akande observes, *this is only because those states are bound by and have indirectly consented (via the U.N. Charter) to the decision to remove immunity*. In contrast, since a treaty is *res inter alios acta* with respect only to the States parties to it, a treaty establishing an international tribunal cannot prejudice the immunities in international law of officials of States not parties to the treaty.

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[60] For a useful discussion of the distinctions between acts *de jure imperii* and *de jure gestionis,* please refer to footnote 23 in Abigail Hing Wen, *Suing the Sovereign's Servant: The Implications of Privatization for the Scope of Foreign Sovereign Immunities*, 103 COLUM. L. REV. 1538, 1542 (2003).

[61] *Supra* note 47, at 417.

[62] *Id.*

At this point, it becomes instructive to note that the inconsistency of jurisprudence and international law on the matter of sovereign immunity as a defense against prosecution for human rights violations is a recognition that the keeping of laws on *lèse majesté* is not conclusively anathema to an emerging framework of international human rights. Comparing, for example, the existence in municipal law of both *lèse majesté* prohibitions and the provisions of the ICCPR, a cursory review would reveal that the former would almost always be present across all legal systems, while the same could not be said of the latter. This is because the presence or absence of ICCPR in municipal law is not a reliable measure of respect for human rights in that State. As an illustration, it must be noted that the ICCPR was placed on a superior footing over domestic legislation on rights at the time of the 1994 genocide in Rwanda, in contrast to Sweden where the ICCPR does not exist in domestic Swedish law. Interestingly, Sweden has one of the world's most impressive records in human rights. At most, what the incorporation of the Covenant into domestic law achieves is to clear away some of the bars to the achievement of respect for the provisions of the ICCPR, but it is no guarantee of respect for those provisions.[63]

IV. RE-EXAMINING PERSONIFICATIONS

As a consequence of its being a human organization, the State, fraught with the frailties of any human individual, has had to project a suitable image of itself for its own survival. Whether a State has the right in international law to the unadulterated image of itself or to the fabrication of its own myths at the expense of human rights can be the subject of intense debate, but affirmatively or otherwise, the portrayal of its majesty in the manner of its own choosing just *is*.

On the other hand, the State is also a *sovereign* entity. In monarchy, State sovereignty and its other manifestations coincide, in theory at least, in the body of a single person. Thus, increasingly, in the forward strides taken in the field of human rights, the monarch necessarily becomes an easier object of critique. However, a shift in the conception of sovereignty must also be taken into account. In this regard, Reisman observes:

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[63] Farrokh Jhabvala, *Domestic Implementation of the Covenant on Civil and Political Rights*, 32 NETH. INT'L L. REV. 461, 483(1985).

> International law still protects sovereignty, but—not surprisingly—it is the people's sovereignty rather than the sovereign's sovereignty. Under the old concept, even scrutiny of international human rights without the permission of the sovereign could arguably constitute a violation of sovereignty by its "invasion" of the sovereign's *domaine réservé*. The United Nations Charter replicates the "domestic jurisdiction-international concern" dichotomy, but no serious scholar still supports the contention that internal human rights are "essentially within the domestic jurisdiction of any state" and hence insulated from international law.[64]

In the *Tinoco* arbitration,[65] Chief Justice Taft decided that the standard of effective control sufficed to find that the government Tinoco represented is the legitimate government of Costa Rica, without due regard to popular sovereignty as manifest in the Costa Rican Constitution. Reisman suggests that this would be an anachronistic ruling if decided at present, but back in 1923, the *Tinoco* arbitration did not raise any eyebrows.[66]

However, in monarchy, the abstraction of the nation and of sovereignty are given a physical incarnation. Wrote Yack on Hegel: "...the rational state was possible because, given the constitution and underlying spirit of the modern European states that he knew, monarchy offered a concrete political means of depersonalizing the politics of the state."[67] Upon this premise, the legal historical development of monarchy, at least in Europe, gave way to the reconciliation of the subjective freedom of individuals (right) with the free and rational direction of public affairs (government).

In sum, the law on *lèse majesté* remains as an indissoluble part of traditional concepts about the State and sovereignty which, while being slowly relegated into irrelevance by developments in international law, keeps constantly resurfacing each time the State reinforces its image of itself upon its citizens and among other States with respect to human rights.

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[64] W. Michael Reisman, Sovereignty and Human Rights in Contemporary International Law, Paper 872, in YALE FACULTY SCHOLARSHIP SERIES 869 (1990).

[65] *Tinoco case* (United Kingdom *v.* Costa Rica), 1 R.I.A.A. 369 (1923).

[66] *Supra* note 64, at 870.

[67] *Supra* note 11, at 719.