(RE)LOCATING THE CONCEPT OF SOVEREIGNTY IN THE PHILIPPINES' INTERNATIONAL LAW COMPLIANCE: VISUALIZING THE MONISTIC CONUNDRUM IN THE INTERNATIONAL HUMAN RIGHTS REGIME*

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The Duterte administration's "war on drugs" has attracted criticism and even threats of sanctions from international governmental organizations and other countries. This has in turn led to various shifts in Philippine foreign policy. Foreign Secretary Teodoro Locsin Jr. has framed the drug war as part of the country's efforts to protect its citizens and comply with the Universal Declaration of Human Rights (UDHR).[1] Meanwhile, despite the president's threat to quit the United Nations (UN) over the criticisms his administration's drug war has received,[2] the country was elected into a seat in the United Nations' Human Rights Council (UNHRC), receiving support from 165 out of the 192 member-states of the organization.[3] The Philippines also decided to leave the International Criminal Court (ICC) due to the latter's pursuit to examine the extrajudicial killings and other possible crimes committed during the government's "war on drugs."[4]

These events are contradictory occurrences rooted in the same issue: the Philippines' human rights policy during the "war on drugs." However, more than just being crucial events in the country's political landscape, these

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[1] Rappler.com, *FULL TEXT: DFA chief Locsin on Duterte foreign policy,* RAPPLER, Nov. 7, 2018, *at* https://www.rappler.com/nation/216165-full-text-locsin-speech-refined-duterte-administration-foreign-policy (last updated: Nov. 7, 2018).

[2] Karen Lema & Manuel Mogato, *Philippines' Duterte threatens to quit U.N. after drugs war censure,* REUTERS, Aug. 21, 2016, *at* https://www.reuters.com/article/us-philippines-duterte-un-idUSKCN10W05W

[3] CNN Philippines Staff, *Critics slam, administration lauds PH seat in UN Human Rights Council,* CNN PHIL., Oct. 13, 2018, *at* http://cnnphilippines.com/news/2018/10/13/unhrc-philippines-ai-hrw-panelo.html

[4] Jason Gutierrez, *Philippines Officially Leaves the International Criminal Court,* THE NEW YORK TIMES, Mar. 17, 2019, *available at* https://www.nytimes.com/2019/03/17/world/asia/philippines-international-criminal-court.html

developments illustrate a larger problem faced by international organizations struggling to regulate the world order. How successful are these institutions in establishing and regulating international norms when confronted by the exercise of state sovereignty? This question poses both a legal and political challenge to the understanding of the present relationship between states and the international regime.

Hans Kelsen's work on this matter is instructive. He posits that all legal orders are based on a Grundnorm, which then becomes the foundation of subsequent legal norms which centralize the legal order.[5] By having a centralized legal order, individuals may apply prescribed sanctions without the need of a sovereign.[6] However, the same does not apply in the international arena. States in the international arena are considered sovereign, and the legal order at this level is formed by customs attributed to the behavior of states.[7] Sanctions then enforced upon states should be in conformity with customs resulting from actual state behavior. Because of these differences, the state and the international community cannot be considered as having the same constitutions and cannot be organized into a singular monistic system.

However, there have been attempts to constitutionalize the relationships of states and state behavior primarily through international institutions that establish and regulate international norms. This then leads to a conflict between the primacy of the state and the primacy of international law in the established legal order.

This paper aims to deepen the understanding of the concept of sovereignty in legal theory through the lens of two crucial events in Philippine foreign relations: the country's withdrawal from the ICC and its re-election to the UNHRC. *First*, it will revisit the traditional theoretical conceptions of norm-creation and state and international regime relations presented by Hans Kelsen. *Second*, it will compare Kelsen's theory with the theoretical framework of constitutionalization, which is presently being used in the conceptualization of international law. In both perspectives, the problem remains the same: there are contesting movements in monistic organization because of conflicts between the primacy of the state and the primacy of international law.

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[5] Iain Stewart, *The Critical Legal Science of Hans Kelsen,* 17 J. L. & SOC'Y 273 (1990).
[6] R. S. Clark, *Hans Kelsen's Pure Theory of Law*, 22 J. LEGAL EDUC. 170 (1969).
[7] Stewart, *supra* note 5.

Kunz succinctly frames the problem in the following manner:

> International law and the law of the land cannot be two absolutely different laws which have no connection with each other; and precisely this question of the relation between the law of the land and international law is the quintessence of the so-called "problem of the law of nations," which Kelsen considered primarily as the problem of sovereignty.[8]

The present debates in international law which focus on the constitutionalization model as opposed to an actor-centered model are insufficient in understanding this tension because they conflict with the present realities of the international order.

International law divides sovereignty into internal and external aspects so that the effects of international law in domestic affairs are dependent on the state's consent.[9] However, globalization challenged this model by creating new sites of authority separate from the state.[10] These alternative regimes are described using the language of constitutionalism because transnational governance systems are evolving into federal structures [11] through the creation of a formal constitution [12] or the consolidation of functional arrangements.[13] This paper also posits that by incorporating regional integration theories in addressing this legal problem, a more nuanced picture of the state's exercise of sovereignty emerges. By understanding state sovereignty more concretely, the monism conundrum characterizing international law can be addressed.

The discussion will be divided into three parts. *First*, the conundrum of monism will be explained through the discussion of the traditional theories of international law and the constitutionalization of international law. The first subsection will focus on the theories of monism proposed by Hans Kelsen. Then, the theory on constitutionalization of international law will be

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[8] Josef L. Kunz, *On the Theoretical Basis of the Law of Nations*, 10 TRANSACTIONS GROTIUS SOC'Y 115 (1924).

[9] Frank Schorkopf & Christian Walter, *Elements of Constitutionalization: Multilevel Structures of Human Rights Protection in General International and WTO-Law*, 4 GERMAN L.J. 1358 (2003).

[10] Federico Fabbrini, *The Constitutionalization of International Law: A Comparative Federal Perspective*, 6 EUR. J. LEGAL STUD. 3 (2013).

[11] *Id.*

[12] Alexander N. Sack, *The Constitutional Crisis of the United Nations,* 8 LAW. GUILD REV. 347 (1948).

[13] Miguel Poiares Maduro, *The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism*, 3 INT'L J. CONST. L. 332 (2005).

elucidated. *Second*, insights will be drawn from Ernst Haas' theories of regional integration. *Lastly*, a consolidation of the previous sections will then be used to interrogate the relationship between states and the international regime specifically in the context of the international human rights regime in the Philippines.

The monistic conundrum in this context would be illustrated through a study of two events related to the "war on drugs": the Philippines' withdrawal from the ICC and its re-election to the UNHRC. The analysis in the final section will be using Haas' theory of regional integration to highlight the issues in Kelsen's conceptions of national and international law, in order to answer key issues within the Philippine context.

Through this analysis, the paper explains the importance of national actors in determining state concessions that ultimately affect the applicability of international law in the Philippines. By highlighting this key factor, the paper illustrates the contradiction between the supremacy of international law over national law in theory, and national law over international law in practice.

I. THE MONISTIC CONUNDRUM

A. Traditional Conceptions of International Law

According to Clark, "if we assume for the moment that the term 'law' is appropriate to describe the rules governing the relations of states and those other bodies that are the subject of international concern, we are immediately faced with the question of the nature of the connexion between the legal orders called 'states' and the international legal order."[14] International law was created with the goal of regulating the relationships of co-existing independent states towards common aims, through cooperation on certain matters, to ensure co-existence.[15] There are two theoretical constructions of international law: based on natural law and positive law.[16]

According to Kunz, systems of law which look for its bases in other sciences belongs to the realm of natural law. Theorists like John Austin posit that international law is within the realm of natural law because it does not come from a command by a political superior, therefore, it belongs in the

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[14] Clark, *supra* note 6.

[15] Schorkopf & Walter, *supra* note 9.

[16] Kunz, *supra* note 8.

realm of positive morality.[17] In Hart's conception, international law cannot be considered as positive law, because it does not comprise of secondary rules, nor does it offer a basic rule to provide for the general criteria of validity for the rules of international law.[18] On the other hand, theorists like Triepel argue that international law exists as positive law that is absolutely different from the law of the land. Its source is not a single state, but a common will that is created by the union of the wills of different states.[19] Each law is valid and supreme within its set domain and there are no relations of supremacy between the two kinds of laws.[20]

There are two possible constructions of international law based on positive law: dualistic and monistic. These two systems have different sets of norms that are independent of each other, while being simultaneously valid, such that it is possible to view human behavior using both sets of norms and reach different outcomes.[21] Kelsen, however, critiques Triepel's construction by stating that if they were absolutely different and had no relation with each other, it would not be possible to call these different conceptions by the same word "law." A dualistic construction would allow one to place himself on either the standpoint of the law of the land or of international law.[22]

The monistic construction of international law can further be broken down to two conceptions based on differing points of reference. Under the *theory of the primacy of domestic law*, international law would be an application of constitutional law to the external relations of a state. Therefore, it is only by constitutional law that international law becomes law. Subsumed in this conception are the theories of recognition, self-obligation of the state, and transformation. [23] The theory of recognition and self-obligation are complementary theories, arguing that rules of international law are only binding on states that recognize such rules and they cannot be judicially bound to adhere to these rules.[24] This is similar to Hart's conception of rules of recognition, wherein the validity of rules and sources of law belonging to a legal order are based on the practice of recognition, drawn from an empirical social fact.[25] Meanwhile, the theory of transformation maintains that rules of

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[17] *Id.*

[18] Massimo La Torre, *The Hierarchical Model and H.L.A. Hart's Conception of Law,* 21 REVUS: J. CONST. THEORY & PHIL. LAW [IX] (2013).

[19] Kunz, *supra* note 8.

[20] La Torre, *supra* note 18.

[21] Clark, *supra* note 6.

[22] Kunz, *supra* note 8.

[23] *Id.*

[24] *Id.*

[25] La Torre, *supra* note 18.

international law are only binding upon national structures and citizens when they are transformed into the law of the land.[26]

Conversely, the *theory of the primacy of international law* advances that national laws are only particular laws delegated by a central body of international law. Therefore, international law has to be applied regardless of its adoption in domestic law.[27] National constitutions in effect draw their validity from international rules and can only be operative if they exist within an already valid legal order, which is that established by international law.[28] Both perspectives argue that simultaneous absolute sovereignty of both the state and international law are impossible.[29]

B. Kelsen's Grundnorm, Idea of a Constitution, and Conceptions of State and International Order

Hans Kelsen is an advocate of the monistic construction of international law. As explored in his theory, there are two competing constructions of monism based on the primacy of domestic law vis-a-vis the primacy of international law. With the idea that law is defined and delimited vis-à-vis other kinds of normative orders and the idea of law as a coercive order, all law is then unified in a uniform normative order, crucial in both the state and international level.[30] In these constructions, the source of the legal order, either at the state or the international level, derives validity from the other. However, they differ in their systems of reference.[31]

The foundation of Kelsen's theory begins with a distinction between a constitution in a positive legal sense and a constitution in a transcendental-logical sense.[32] A positive legal construction of the word "constitution" is, as it is formally understood,[33] the rules governing the branches of government. More vital to the inquiry at hand is the constitution in a transcendental-logical sense, or what Kelsen calls the Grundnorm.

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[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] Kunz, *supra* note 8.

[30] Jorg Kammerhofer, *Kelsen – Which Kelsen? A Reapplication of the Pure Theory to International Law*, 22 LHIL 225 (2009).

[31] La Torre, *supra* note 18.

[32] Clark, *supra* note 6.

[33] Stewart, *supra* note 5.

The Grundnorm is a meta-legal norm which posits that the historically first constitution ought to be obeyed.[34] This historically first constitution is the application of the general principle of effectiveness.[35] It derives its validity in a revolutionary way, occurring in two possible scenarios: *first*, by breach of a former constitution; and *second*, by the creation of a constitution in a territory that was not previously in the sphere of validity of a constitution, both followed by a subsequent national legal order based on this new constitution.[36] The test for a constitution's validity is a revolution. If the revolution succeeds, and a new constitution and the subsequent norms made under it are adopted and are effective, a new basic norm is formed.[37]

From this Grundnorm, general legal norms are created by a legislature, resulting in the relative centralization of the legal order. This central legal order is then called the "state."[38] Because the legal order is centralized, the subjects of this legal order are authorized to render the sanctions it prescribes without needing a supreme sovereign in the Austinian sense.[39] Since there is no supreme person or body from which these rules flow, sovereignty is rooted on the relationship of the "state" with the international community.[40] This allows the "state" to be identified as a legal order rather than a supreme body or entity.

This is distinguished from the international arena in international law which, unlike the "state," forms general legal norms through custom.[41] The basic norm in international law is based on the idea that individual states, in relating with other states, ought to behave in a certain way, and that sanctions to be enforced on states should be in conformity with the customs resulting from actual behavior of states.[42] As a result, the international arena is decentralized and cannot be properly called a "state."[43] Because these customs are norms attributed to the behavior of states, the constitution of international law cannot be the same as that of national law.

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[34] *Id.*
[35] Clark, *supra* note 6.
[36] *Id.*
[37] Stewart, *supra* note 5.
[38] *Id.*
[39] Clark, *supra* note 6.
[40] *Id.*
[41] Stewart, *supra* note 5.
[42] Clark, *supra* note 8.
[43] Stewart, *supra* note 5.

Conceptions of monism would derive their foundations from either version discussed. There is ambiguity as to Kelsen's preferred monistic theory, as he claims both are equal in the eyes of science.[44]

C. Constitutionalization of International Law

Post-Cold War international relations paved the way for new forms of transnational cooperation among sovereign states, which led to the transformation of systems of governance beyond states. These global governance regimes are characterized by high degrees of legalization, legal decision-making affecting actors apart from the state (such as individuals and private entities), and a complex relationship between states and conventions of international law based on state consent.[45] This phenomenon is described by theorists as the constitutionalization of international law. Giegerich explains such as:

> [The] gradual transformation of the whole or at least parts of international law into a world constitution; international legal norms and peremptory norms which seem to establish a hierarchical order of global values, going far beyond the classical inter-State relationships of coexistence and synaliagmatic exchange.[46]

Constitutionalism was conceived as a set of legal and political instruments that either limit power, or expand the notion of common good through the creation of an instrument in pursuit thereof.[47] Its subject of inquiry involves either determining whether some norms are becoming constitutional in character compared to other norms in international law, or whether transnational or supranational law is becoming constitutionalized vis-à-vis domestic law.[48]

By shifting the international system into a constitutional one, a system of coordination among states based on customary international law is replaced by the binding force of decisions rendered by a higher legal order that was seen as necessary to take away a vital attribute of state sovereignty, which is

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[44] *Id.*

[45] Fabbrini, *supra* note 10.

[46] Thomas Giegerich, *The Is and Ought of International Constitutionalism: How Far Have We Come on Habermas's Road to a Well-Considered Constitutionalization of International Law,* 10 GERMAN L.J. 31 (2009).

[47] Maduro, *supra* note 13.

[48] Fabbrini, *supra* note 10.

the recourse to armed force.[49] Constitutionalization of international law can be described in either an institutional or substantive dimension, both existing to some degree. The creation of the Security Council as well as the establishment of normative and institutional frameworks and enforcement mechanisms in specific areas of international law denote developments in institutional constitutionalization. Meanwhile, the presence of secondary norms and the formation of formal normative hierarchies, such as the international standards of legality and legitimacy, the primacy of the rule of law, and the normative force of multilateral treaties, illustrate substantive constitutionalization.[50]

These strands of discourse denote a shift from an actor-centered legal order to a subject-centered one as the role of sovereignty in state relations is substituted more by the role of states as creators and transmitters of legal obligations.[51] Key to understanding this role is the structuring of the global constitutional regimes into a federal model, which Fabbrini defines as:

> A constitutional regime that is created by sovereign states acting through a legal instrument of contractual nature (be it a treaty or a constitution) and that is endowed with an heterarchical system of governance in which the autonomy and continuous existence of the constituting entities is secured and yet combined with the authority and governmental capacity of the constituted union.[52]

Fabbrini's comparison of the federal model to global constitutional regimes yields three characteristics common to the models: pluralism, subsidiarity, and liberty.[53] Functionally, a federal constitution has three primary purposes: legitimization, accountability, and supervision.[54] Studies of these variables of the federal model operating in a global constitutional regime focus either on the UN Charter[55] or the European Union.[56] In a nutshell, these studies are illustrations of Kelsen's monistic theory in action.

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[49] Jochen Frowein, *The constitutionalization of the international community,* 248 RECUEIL DES COURS 355 (1994).

[50] K. Ziegler, *International Law and EU Law: Between Asymmetrical Constitutionalization and Fragmentation,* 2013 LAW UKR.: LEGAL J. 5 (2013).

[51] Schorkopf & Walter, *supra* note 9.

[52] Fabbrini, *supra* note 10.

[53] *Id.*

[54] Giegerich, *supra* note 46.

[55] Sack, *supra* note 12.

[56] Ziegler, *supra* note 50.

By analyzing the functional relationships between political actors, regardless of their formal attributes, permanent distinctions between domestic and international politics are eliminated. Politics is then viewed as a single process encompassing all activity within this constituted continuum.[57] This point is succinctly elucidated by Giegerich, who claims that the natural reaction to de-constitutionalization occurring at the national level is compensatory constitutionalization at the international level. International constitutionalization is the only way that the achievements of national constitutionalization can be preserved in the face of globalization.[58] Despite the change in the theoretical framing of international law, the monistic conundrum elucidated in Kelsen's conceptualization of international law remains the same.

However, Giergerich is careful to delineate the difference of federal constitutionalism from federal statehood. He argues that international constitutionalism can only be conceived as a kind of federal constitutionalism. This would involve the splitting of sovereignty through the establishment of a sovereign separate from the pre-existing, co-equal state governments. The exercise of sovereignty by these two entities is delineated through a federal constitution. Each entity is considered supreme in its sphere of public authority.[59] In this case, there is a homogeneity created between the legal orders even if the power is split between two levels of exercise. It is only through the establishment of a multilevel, global constitutionalism based on international and national constitutional law that the constitution can reign over governments.[60]

Meanwhile, Sandoval argues that through the creation of the ICC, international law is beginning to mirror municipal law in its application. The ICC increased the sanctioning capacity of the United Nations Security Council (UNSC) through a more aggressive assertion of its Chapter VII powers. He discusses this in the context of the invalidity of the U.S.-Philippines Immunity Agreement under both International Law and the Philippine Constitution. He argues that the establishment of ICC makes it possible to punish state leaders guilty of crimes. These leaders can no longer hide behind state immunities. However, he also posits that the effectiveness of the ICC is hampered by the Philippines' decision to enter into an Immunity Agreement with the U.S.[61]

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[57] Robert Wood, *Public Order and Political Integration in Contemporary International Theory*, 14 VA. J. INT'L L. 423 (1974).

[58] Giegerich, *supra* note 46.

[59] *Id.*

[60] *Id.*

[61] Raymond Vincent G. Sandoval, *The US-Philippines Impunity Agreement: Violating International Law and Municipal Law with Impunity*, 78 PHIL. L.J. 461 (2004).

II. CONSTITUTIONALIZATION AND EUROPEANIZATION: REGIONAL INTEGRATION THEORIES AND THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW

The previous sections discuss Kelsen's analysis of the two kinds of monistic legal orders, staging the debate on the primacy of national law over international law or vice versa, and the constitutionalization of international law as a means to impose globally-created norms over states. However, these two theoretical frameworks differ in their understanding of the foundations of international law. Kelsen argues that international norms resulting from actual state behavior should be the basis of the sanctioning capacity of international law. Meanwhile, in codifying pre-existing customs through the constitutionalization process, there is an attempt to regulate actual state behavior in the international arena by concretizing state obligations. While both perspectives posit means by which international law can take primacy over that of the national, there seems to be a gap in understanding the shift between the primacy of state sovereignty traditionally embodied in law and the shift of powers occurring in the international arena as a result of globalization. Essentially, these theoretical debates posit the question: how do constitutions created at a supranational level gain binding force upon states?

As Maduro posits, incorporating regional integration theories into understanding the process of constitutionalization will lead to a better understanding of the function of constitutionalism. It is through the determination of this function that the monistic conundrum can be articulated in its present iteration.

In his analysis of the constitutionalism of power within the European Union (EU), Maduro distinguishes the process of constitutionalization occurring within the EU from the Europeanization of the EU in general. The process of Europeanization led to the creation of a low-intensity constitutionalism in the region, which Maduro assessed using the lens of liberal inter-governmentalism. He argued the function of constitutionalism depends on the relationship between the process of constitutionalism and the prevailing notions of underlying political community and constitutional authority.[62]

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[62] Maduro, *supra* note 13.

Maduro's elucidation of European constitutionalism is instructive as a springboard to this inquiry. He writes:

> European constitutionalism, thus, is linked to two different visions of the legitimacy of the process of European integration. The first is represented by a functional and technocratic conception of the European Union as an efficiency-oriented, problem-solving entity to which states delegate the resolution of collective problems they can no longer address individually." The second follows the tradition of limited government and conceives of the process of European integration as a new constitutional constraint on public power, protecting freedom and private autonomy. In this case, and in this way, European constitutionalism is perceived as reinforcing national constitutionalism. It is not linked to the creation of a European polity but is limited to the control of European and national forms of power. Both these visions of legitimacy assume that European constitutionalism is framed by and limited by national political communities.[63]

This conception of a limited government model is further shaped by the fluidity of political communities and legal systems because they are constituted by widely diverse patterns of agreement. [64] These varying intensities of integration are explained by Haas' model of regional integration. In formulating his theory, he analyzed the UN as a mechanism for global integration. He says that conflict resolution is an instructive indicator along the path of states' integration. He posits the prevalence of three types of compromise that indicate differing measures of integration and uses these as characterizations of existing international organizations in Europe. Through these descriptions, Haas aims to describe the experience of shaping the European political community. The three measures of integration are as follows:[65]

(1) Accommodation on the basis of the minimum common denominator: wherein "equal bargaining powers gradually reduce their antagonistic demands by exchanging concessions of roughly equal value."[66] In this arrangement, "the impact of the transaction never goes beyond what the least cooperative bargaining partner wishes to concede."[67]

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[63] *Id.*

[64] Wood, *supra* note 57.

[65] Ernst B. Haas, *International Integration: The European and Universal Process*, 15 INT'L ORG. 3 (1961).

[66] *Id.*

[67] *Id.*

(2) Accommodation by splitting the difference: "demands are reduced and concessions of roughly equal value exchanged among autonomous bargaining units"[68] In this mode of accommodation, mediatory services of a secretary-general or *ad hoc* international experts may be admitted by the party. The basis of resolving conflict is not dependent on the will of the least cooperative but is in between final bargaining positions.[69]

(3) Accommodation based on deliberate or inadvertent upgrading of the common interests of the parties: This is the most similar to political communities with full legislative and judicial jurisdictions and is a matter of conflict resolution identified as integration. Integration is characterized as finding a solution wherein both sides have found a position wherein neither side has to sacrifice anything.[70]

Integration is the result of the parties' success in redefining their conflict areas in order to work out a solution at a higher level. This problem-solving mechanism will, in turn, imply that the functions of an international or national government agency would have to expand.[71] To consider integration successful, compromise and accommodation occur on the basis of upgrading common interests rather than accommodation occurring by splitting the difference or based on the minimum common denominator. Successful integration is also indicated by political actors' shift in loyalties and expectations, which leads to political activity directed towards a new larger center. If political actors' main emotive attachment and political activities are still centered on the state, then integration is dormant.

Aside from this, Haas also notes that regional integration is a defense employed by states with common environmental features and needs against an outside force, regardless of the clarity or temporality of the perceived threat. Haas notes that this purpose is not present in the UN system which encompasses the whole international arena, including states in conflict with each other, without intentionally emphasizing what they share in common. The integration that is the result of UN membership can be considered wholly

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[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*

unintended and unstable because the shifting perception of necessary and common tasks interfere with the functional specificity for integration.

However, Haas notes that the UN is complex in its functions and institutions, encompassing a variety of models found in European integration.[72] The dominant mode of accommodation in this complex system is compromise on the basis of the minimum common denominator. But compromise based on "splitting the difference" can also be found in activities of certain specialized agencies. While there have been attempts to upgrade common interests, successful UN actions or solutions have always been based on the minimum common denominator. Calls for supranational powers and upgrading common interests for peaceful change and relative stability resulting from international crises contradicts member states' persistent actions and conduct focused on advancing only their own local policy aims. Despite this, issues of collective security have led the UN to exercise some degree of quasi-supranational powers. However, universal economic policy and common world trade, which was originally the purpose of the UN in its conception, has not led to supranational arrangements because of irreconcilable demands and incompatible ideologies.[73]

Haas' claims regarding compromise based on the minimum common denominator is clearly illustrated in the framework of treaties. This is especially operationalized in the Vienna Convention on the Law of Treaties. The Vienna Convention emphasizes how treaties are only binding on states upon their agreement[74] and how states have the option to make permissible reservations in adopting treaties[75] and to withdraw from treaty obligations.[76] Principles that are binding through treaties only bind non-party states when they have become customary international law.[77] For a rule to become customary international law, it must be a general practice which is accepted by the States concerned as law among themselves.[78] This still depends on States' consent and validation of the practice's existence by other sources, such as the UN International Law Commission.[79]

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[72] Haas, *supra* note 65.

[73] *Id.*

[74] Vienna Convention of the Law of Treaties [hereinafter "Vienna Convention"], art. 11, Jan. 27, 1980, 1155 U.N.T.S. 331, *available at* https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf

[75] Art. 19.

[76] Art. 22.

[77] Art. 38.

[78] *Draft conclusions on identification of customary international law, with commentaries, in* II (Part Two) YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 2018 (2018).

[79] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, 1986 I.C.J. 14 (1986).

By basing the international law system on state consent, the system is premised on the idea of state concessions. In its entirety, the process achieves compromise using the minimum common denominator because it allows states to control their concessions. While the international system also allows for compromise based on "splitting the difference" by finding final bargaining positions of states in the process of making drafts, resolutions, conventions, and treaties, it is questionable if states upgrade their common interests. States are often given the option of reservation and can opt out of adopting certain portions of the treaty. Rules are not binding to states who do not want to be subject to them, and are thus not created as a result of the collective upgrade by the international community of its common interests.

In a reiteration and expansion of this model, Haas' focus shifts from the idea of upgrading common interests to integration as the product of the inevitable, unintended consequences of previous decisions to centralize regional governance. Integration occurs when governments are pressured by organized economic interests to manage economic interdependence through the centralization of policies and institutions. This centralization causes spillovers as an unintended or unwanted consequence.[80]

There are three key takeaways from Haas' theory on European integration when connected with the present discourse on constitutionalization. *First*, institutionally, supranational bodies are most adaptable to achieving accommodation through upgrading common interests. *Second*, functionally, it is also the upgrading of common interests which is the predominant conflict resolution method. The tendency for different institutions to pursue their functions autonomously can only be overcome by establishing specific assignments that maximize the spillover process. *Third*, environmentally, national policy changes can be detrimental to integration unless there are strong central institutions which maximize the spillover process.[81]

While Haas' neofunctionalism was considered crucial in the development of regional integration theory, its flaws are equally recognized by its theorists. The introduction of concepts like "spillback" and "spill-around" illustrate that governments did not always prioritize regional cooperation. Unintended consequences and feedback can become secondary to the concrete preferences and strategies of political actors. Haas himself wrote that more attention should be given to the types of demands made by

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[80] Andrew Moravcsik, *The European constitutional compromise and the neofunctionalist legacy*, 12 J. EUR. PUB. POL'Y 2, 349-386 (2006).

[81] Haas, *supra* note 65.

states, the concessions states exchanged, and the degree of delegation of authority to new central institutions.[82]

As illustrated by the shift in Haas' theory, it is necessary to understand the preferences of political actors in order to explain the political community and constitutional authority that underlies the process of constitutionalization. While there is criticism towards the determination of integration through spillovers, this does not invalidate Haas' conception of integration as the upgrading of common interests. It is within the debate of upgrading common interests that the underlying source of political community and constitutional authority embedded in the process of constitutionalization will be interrogated in the succeeding section. And it is within this context that the demands made, concessions exchanged, and degree of delegation of authority, as Haas emphasized, would be elucidated.

Using Haas' analysis can be instructive to the conundrum Kelsen presents in his models of legal orders. It illustrates the difficulties of the process of constitutionalization in international law from an institutional perspective. While studies on constitutionalization focus on international organizations as mechanisms for introducing and implementing international laws, thereby resulting in shifting notions of state sovereignty in the international arena, there are still gaps in the literature pertaining to actual practice of international law from an institutional perspective. By introducing Haas' theory to existing analyses of international law development and practice, the underlying motivations of state actors entering into international agreements that become binding to their sovereign states may be explored. The succeeding section analyzes this discussion by framing Haas' regional integration lens in the Philippines' application of international law regimes in its human rights law.

III. THE MONISTIC CONUNDRUM IN THE PHILIPPINE CONTEXT: CASE STUDIES

In assessing the case studies on the operation of the international human rights regime in the Philippines, the discussion will first be contextualized in the discourse of constitutionalization and the human rights regime. Then, the specific case studies will be interrogated based on the demands made, concessions exchanged, and degree of delegation of authority, using Haas' theory. From this, observations on the monistic conundrum will be made.

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[82] *Id.*

A. Constitutionalization and Human Rights in the International Arena

The constitutionalization of international law, has led to an increased cooperation in the uniform upgrading of human rights standards. The emergence of international standards for human rights are linked to emerging normative hierarchies.[83] An articulation of this is found in the UN Charter, which links the security of peace with the politics of human rights.[84] Because of the emerging international emphasis on human rights, there has been a change in the perception that individuals are merely objects of international law. Traditionally, it is the state's obligation to provide for such rights. However, as human rights became a topic of interest in the international community, with the recognition that states must treat their own nationals in accordance with such rights, individuals have also become a subject of international law.[85]

The human rights regime is an articulation of Giergerich's conception of international constitutionalism, wherein there is a set of core values that serve as the foundation of the international human rights regime, and that complements the human rights standards at the state level. There are several major international human rights conventions adopted by the UN that set the standard for international normative hierarchies. Majority of the rights that are subject of conventions can be found in the UDHR. This has been transformed into state obligations through adoption, ratification, or accession of instruments such as the International Covenant on Civil and Political Rights (ICCPR).[86]

Under the ICCPR are the guarantees of the right to life, liberty, and security of persons, as well as their right to due process, equality, privacy, free expression, association, religion and rights pertaining to families and children. Article 2 states that if the rights provided in the Convention are not yet guaranteed by the State Parties, then they are obligated, in accordance with their domestic constitutional processes, to enact legislative statutes or other government measures to guarantee the said rights. To monitor State Parties' progress, Article 40 obligates State Parties to submit reports on measures they have taken in order to give effect to the rights listed in the covenant. This

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[83] Ziegler, *supra* note 50.

[84] Giegerich, *supra* note 46.

[85] Roberto Concepcion, *International Law and Human Rights*, 2 PHIL. INT'L L.J. 572 (1963).

[86] International Covenant on Civil and Political Rights [hereinafter "ICCPR"], Mar. 23, 1976, 999 U.N.T.S. 171, *available at* https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

monitoring mechanism is operationalized through the Human Rights Committee, which consists of 18 members who are nationals of different State Parties to the Convention.

Article 41 empowers parties to monitor the compliance of fellow State Parties by submitting communications to the Committee with claims that another State Party is not fulfilling its obligations under the Covenant. However, this article comes with two caveats: *first*, that it is allowable only if State Parties themselves make a declaration that they recognize the Committee's authority to receive reports about their compliance with the Convention; and *second*, that it only becomes operational once ten State Parties make the express declaration required. The article also lists the procedure should the matter of monitoring be triggered by any of the State Parties. State Parties can also propose amendments to the Convention according to Article 51 of the Covenant. The Covenant also has an Optional Protocol that States can choose to adopt separately from the ICCPR.[87]

In conjunction with the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR) grants the right to work, to just and favorable conditions at work, to form and join trade unions without restriction, to social security, to an adequate standard of living, to health, to education, to take part in cultural life and enjoy the benefits of scientific progress, and the rights of families.[88] Other major human rights treaties have also been ratified.[89]

However, there are several important considerations in the Vienna Convention that affect the applicability of treaty obligations. In relation to the international community as a whole, Article 34 states that the general rule is that a treaty does not create obligations or rights for a third Party State without its consent. The succeeding articles discuss the obligations and rights of third

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[87] *Id.*

[88] International Covenant on Economic, Social and Cultural Rights [hereinafter "ICESCR"], Jan. 3, 1976, 993 U.N.T.S. 3, *available at* http://www.pwescr.org/PWESCR_Handbook_on_ESCR.pdf

[89] *The Core International Human Rights Instruments and their monitoring,* UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, *at* https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx; These are the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the International Convention for the Protection of All Persons from Enforced Disappearance, and the Convention on the Rights of Persons with Disabilities.

states who are not party to treaties. States can be obligated by a treaty if parties to the treaty intend the provision to be the means of establishing the obligation and the third party expressly accepts such obligation in writing. Third Party States exercising the rights arising from a treaty are also obligated to comply with the conditions for its exercise as provided in the treaty or established in conformity with the treaty.[90] Treaties also become binding upon third Party States once they are recognized as customary rules of international law.[91]

Article 19 allows Party States to "formulate a reservation to treaty obligations unless the following conditions are present: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; (c) or in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty."[92] The right to reservation differs in acceptance based on circumstances listed in Article 20. Its legal effects modify the relationship between the State Party making the reservation and other State Parties to the treaty under Article 21.[93] The second is Article 25, which provides for the provisional application of treaties.[94]

Harmonizing these treaties results in conflicting scenarios. States are able to use national standards of human rights protection to evade prosecution under international organs when they do not adopt international human rights standards into their own national law. On the other hand, international organizations could also be created and empowered to bypass national institutions, taking control from national courts.[95]

B. Background of Human Rights Law in the Philippines

Under Article II, Section 11 of the 1987 Constitution, "The State values the dignity of every human person and guarantees full respect for human rights."[96] Article III also provides for a comprehensive Bill of Rights that adopt the rights found in international instruments.[97] The Constitution

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[90] *Id.*

[91] *Id.*

[92] Vienna Convention, art. 19.

[93] Vienna Convention, art. 21.

[94] Vienna Convention, art. 25.

[95] Schorkopf & Walter, *supra* note 9.

[96] CONST. art. II, § 2.

[97] Alberto T. Muyot & Vincent Pepito F. Yambao, *Steps taken to ensure implementation of international humanitarian law in the Philippines,* 81 INT'L REV. RED CROSS 303 (1999).

also provides for the creation of an independent office, the Commission on Human Rights,[98] empowered to investigate human rights violations involving civil and political rights.[99]

Studies conducted on the adoption of international human rights law, often discussed alongside international humanitarian law, note that the Philippine legal system has more than adequate laws complying with international norms. However, the issue lies in the State's enforcement of these laws. According to Muyot and Yambao's study, the present legal system is abound with rules compliant with international humanitarian law standards as a result of intense non-governmental organization (NGO) lobbying on the subject. These NGOs created a system of documenting abuses and have urged the government to create "peace zones" in communities that would serve as safe havens for civilians against armed confrontations. The government and the insurgents have also signed the Comprehensive Agreement on the Respect for Human Rights and International Humanitarian Law, which is a crucial stepping stone in ending armed hostilities.[100]

However, in Sandoval's study on extrajudicial killings during the Arroyo administration, he posits that despite the many treaties and conventions the Philippines is a party to, the country is still plagued by many human rights abuses. There have, however, been subsequent reforms instituted due to the pressure induced by the international community and NGOs. One specific case of reform was the introduction of the *writs of amparo* and *habeas data*. This was a result of the efforts of the Department of Justice and the Supreme Court to investigate and resolve more extrajudicial killings and enforced disappearances cases. Alongside the *writ of habeas corpus*, the two aforementioned writs provide individuals with more power and remedies against governmental abuses.[101]

Lastly, a study on the death penalty in the Philippines questions the absolute nature of the international law obligations of the country. Article III, Section 19 of the Constitution purportedly permits the re-imposition of the death penalty for heinous crimes, according to judicial precedent. While the Philippines ratified the Second Optional Protocol in 2007—a valid sovereign act under international law—and committed to prohibit the imposition of the death penalty for all crimes, the House of Representatives of the 17th

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[98] CONST. art. XIII, § 17.

[99] CONST. art. XIII, § 18.

[100] Muyot and Yambao, *supra* note 97.

[101] Raymond Vincent G. Sandoval, *An Analysis of Extrajudicial Killings in the Philippines within the Framework of International Humanitarian Law and International Human Rights Law*, 3 ASIA-PAC. Y.B. INT'L HUMANITARIAN L. 317 (2007).

Congress, which was composed of a supermajority of President Duterte's allies, overwhelmingly passed a death penalty bill in 2017.[102] While the bill ultimately failed in the Senate, the president and his allies in the 18th Congress have again pushed for the enactment of a death penalty law.[103] International law does not permit withdrawal from nor denunciation of the Second Optional Protocol, making it binding and perpetual. Even if it did hypothetically allow for such withdrawal, it would take a minimum of 12 months to enact such procedure, making the aforesaid processing of the death penalty bills in the legislature contradictory thereto.[104]

C. The Monistic Conundrum in the Philippine Context: Background

From the onset, it must be established that the Philippines subscribes to both the theories of transformation and incorporation as embodied in the 1987 Constitution. Because of these provisions, it is unclear as to whether the Philippines follows a monistic or a dualistic perception in formulating the relationship of international and national law. Article VII, Section 21 declares the country's adherence to the theory of transformation through the treaty clause, as it states "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,"[105] thereby deviating from the conception of monism in present constitutionalization debates that emphasize the primacy of the international regime over the national one. By requiring the adoption of international law principles through domestic statutes before becoming binding on the state, this is also an expression of the dualist tendency of Philippine law.[106]

Meanwhile, Article II, Section 2 adopts the doctrine of incorporation, as it states, "The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of

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[102] RG Cruz, *House approves death penalty bill on final reading*, ABS-CBN NEWS, Mar. 7, 2017, *at* https://news.abs-cbn.com/news/03/07/17/house-approves-death-penalty-bill-on-final-reading

[103] CNN Philippines Staff, *Death penalty fails in 17th Congress, but may make a comeback.* CNN PHIL., June 4, 2019, *at* https://cnnphilippines.com/news/2019/6/4/death-penalty-18th-congress.html

[104] Commission on Human Rights of the Philippines & Dr. Christopher Ward, In Defense of the Right to Life: International Law and Death Penalty in the Philippines, *at* http://regnet.anu.edu.au/sites/default/files/uploads/2017-03/In-Defense-of-the-Right-to-Life-IL-and-Death-Penalty-in-the-Philippines.pdf

[105] CONST. art. VII, § 21.

[106] Romel R. Bagares, *The Direct Effect of International Law in Contemporary Philippine Practice*, *in* OXFORD HANDBOOK OF INTERNATIONAL LAW IN ASIA AND THE PACIFIC (Simon Chesterman, Hisashi Owada & Ben Saul eds., 2019).

the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations."[107] This is an expression of the monistic tendency of Philippine practice of international law.[108] By stating that the country adopts the generally accepted principles of international law, it recognizes the incorporation of international norms in the national legal order.

Contrary perceptions supporting both monism and dualism can also be observed in Philippine jurisprudence. Therefore, from both a legislative and judicial perspective, it is not definite as to whether the Philippines follows a monistic or dualistic system.

Bagares also explores these contradicting perceptions. He explains the "tensions, conflations, and paradoxes of monist and dualist tendencies in constitutional adjudication of international legal questions in Philippine courts"[109] in four entry points: the incorporation clause, the treaty clause, judicial decisions, and constitutionalism. These entry points expand the traditional monist-dualist debates of international law in practice. He also notes that, "[w]ith the exception of politically charged issues, when it frequently used international law as a shield, the Supreme Court has largely given direct effect to international law as a sword for the protection of rights."[110]

Philippine jurisprudence is replete with examples of this conflict, generally revolving around the application of the incorporation and treaty clauses.[111] For instance, in *US v. Guinto*,[112] the Supreme Court recognized the doctrine of sovereign immunity as a generally accepted principle of international law adopted under the incorporation clause. Because the Philippines is a member in a society of nations, it is automatically bound to recognize and obligated to comply with the doctrine of sovereign immunity under the doctrine of incorporation. Meanwhile, in *Bayan Muna v. Romulo*,[113] the Court recognized that the applicability of the treaty clause depends on the kind of international agreement that the state enters into, since not all international agreements are subject to ratification by the Senate. For instance, the president may enter into executive agreements with other states without requiring the ratification of the Senate.

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[107] CONST. art. II, § 2.
[108] Bagares, *supra* note 106.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] U.S. v. Guinto, G.R. No. 76607, 182 SCRA 644, Feb. 26, 1990.
[113] Bayan Muna v. Romulo, G.R. No. 159618, 641 SCRA 244, Feb. 1, 2011.

Because of these conflicting stances, an alternative explanation to the differing perceptions should be explored. Maduro, in his study, pinpoints the tension between the differences of constitutionalization and Europeanization and how these two strands intersect in determining the legitimacy of legal systems in Europe.[114] A similar attempt focused on the application of the international human rights regime in the Philippines can be achieved using the principles of Haas' theory of integration. By exploring the underlying political motivations of state actors' decisions regarding the local applications of international law and subsequent state actions guided by these decisions, the conflicting stances on the monistic and dualistic legal order in the Philippines can be interrogated.

D. The Monistic Conundrum in the Duterte Administration's Responses to International Human Rights Obligations

Returning to Haas' analysis of the UN in the previous section, the phases of integration are most evident in the realm of universal human rights. While human rights issues can be an integrative force at the regional level, this may not occur on a global scale. The UN's focus on universal human rights is because of the Member States' desire to "score propaganda points off one another: initially the West used the issue to embarrass the Soviet Union."[115] However, he says that, "now the Afro-Asian, Latin American, and Soviet blocs are tactically united in using the issue to embarrass the West on the colonial and overseas investment issues."[116]

While Haas provided an analysis of integration occurring in the international community through the UN, this paper will analyze the specific operation of international law in the Philippine context. Through an analysis of a specific context, it aims to illustrate the issues presented by Kelsen's theory of international law as well as highlight the presence of these issues in the process of the constitutionalization of international law.

To illustrate the monistic conundrum in the Philippine context, two divergent events based on the issue of human rights abuses committed during the war on drugs will be evaluated: (1) the Philippines' withdrawal from the ICC; and (2) the Philippines' bid for a seat on the UNHRC. Guided by Haas

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[114] Maduro, *supra* note 13.

[115] *Id.*

[116] *Id.*

and Kelsen's theories, the succeeding discussion will be centered on answering these key questions:

(1) What are the state obligations found in these treaty obligations?

(2) How did actors respond to the Philippines' adoption of these treaty obligations?

(3) What conflicts and controversies emerged during the Duterte administration as a result of these treaty obligations?

(4) How did the Philippines respond to these conflicts and controversies?

(5) How did the binding power and the type of sanctions that may be imposed by the ICC and UNHRC affect the Philippines reaction to the former as compared to the latter?

1. The Philippines' withdrawal from the ICC

i. Factual Background and the Jurisdiction of the ICC

On July 17, 1998, 120 countries, including the Philippines, voted to approve the Rome Statute (*hereinafter*, "Statute"),[117] a multilateral agreement which established the ICC. By July 17, 2002, a total of 60 countries had ratified the agreement and the ICC became effective. At that time, the Philippine representative had signed the agreement, but the treaty was not yet ratified by the president nor concurred with by the Senate.[118]

The ICC's jurisdiction, by design, is limited to cases involving crimes against humanity, crimes of aggression, war crimes, and genocide.[119] The ICC does operate on the principle of territoriality and nationality, and it may gain jurisdiction over crimes committed in territories, and over persons who possess the citizenship of non-member countries if granted authorization by the UN Security Council.[120] However, the ICC's jurisdiction is further limited

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[117] Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court*, AMERICAN SOCIETY OF INTERNATIONAL LAW, Aug. 11, 1998, *available at* https://web.archive.org/web/20120414184236/http://www.asil.org/insigh23.cfm

[118] CONST. art. VII, § 21.

[119] Scharf, *supra* note 117.

[120] *Id.*

by its adherence to the principle of complementarity, operationalized in Article 17 of the Statute,[121] which states that member countries retain principal jurisdiction and have the primary obligation to prosecute and try their citizens who commit international crimes.[122] For legal and economic purposes, the ICC only takes cognizance of cases where the crime involved is sufficiently grave and when a State with primary jurisdiction is unwilling or genuinely unable to prosecute the accused.[123] The Statute characterizes a State as unwilling when the actions of its government are made to shield a person from prosecution or when its judicial proceedings are not independent, not impartial, and encounter unjustified delay.[124]

As of May 2019, the ICC has 123 member nations. Four State Parties have attempted to withdraw from the ICC. Burundi's withdrawal became effective on October 27, 2017[125] while the Philippines retreated on March 17, 2019. Gambia and South Africa also attempted to withdraw, but the election of a new president in the former[126] and a High Court decision in the latter[127] caused them to rescind their respective withdrawal notices.

ii. Ratification Process

Despite signing the Rome Statute on December 28, 2000, the Philippines only became a member of the ICC on November 30, 2011.[128] The delay had both political and legal reasons. While the president of the Philippines is the chief architect of the nation's foreign policy and possesses the sole power to ratify treaties,[129] the Constitution, as a checks-and-balance measure, conditions the validity of the treaty upon the concurrence of "at least two-thirds of all the members of the Senate."[130]

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[121] ROME STATUTE, art. 17, May 6, 2011, *available at* https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf

[122] *Implementing Legislation on the Rome Statute,* PARLIAMENTARIANS FOR GLOBAL ACTION, *at* https://www.pgaction.org/ilhr/rome-statute/implementing-legislation.html

[123] ROME STATUTE, art. 17.

[124] Art. 17.

[125] *What is the Rome Statute?*, WORLD ATLAS, May 16, 2018, *at* https://www.worldatlas.com/articles/what-is-the-rome-statute.html (last visited May 2019).

[126] *Id.*

[127] Democratic Alliance v. Minister of International Relations and Cooperation, Case No. 83145 (2016).

[128] Perfecto Caparas, *EXPLAINER: Yes, Int'l Criminal Court can prosecute Duterte for killing spree,* RAPPLER, Mar. 11, 2018, *at* https://www.rappler.com/newsbreak/iq/150285-international-criminal-court-trial-duterte-killings

[129] Pimentel v. Exec. Sec'y [hereinafter "Pimentel"], G.R. No. 158088, 462 SCRA 622, July 6, 2005.

[130] CONST. art. VII, § 21.

The Philippines became a signatory to the Rome Statute during the presidency of Joseph Estrada. However, Estrada was removed from office shortly thereafter, preventing the commencement of the ratification process. Estrada's successor, President Gloria Macapagal-Arroyo, in alignment with the stance of then-U.S. President George W. Bush, refused to ratify the treaty. Arroyo's refusal became the subject of the Supreme Court case *Pimentel v. Executive Secretary*. Senator Aquilino Pimentel Jr. argued that President Arroyo had a ministerial duty to send the signed copy of the Rome Statute to the Senate so that the latter could exercise its discretion over the ratification of treaties.[131] The High Court ultimately dismissed Pimentel's petition for *mandamus*. Due to Arroyo's refusal, the Philippines' ratification of the Statute was put on hold from January 2001 to June 2010.

The breakthrough eventually came under the Presidency of Arroyo's successor, Benigno Aquino III. Aquino, who after a lobbying effort led by Senator Miriam Defensor-Santiago, signed the Instrument of Ratification on May 6, 2011.[132] The Senate, voting 17-1,[133] expressed its concurrence shortly thereafter.

The lone dissenting vote came from then-Senate President Juan Ponce Enrile, who warned about the several repercussions involved in the Philippines' decision to join the ICC. Chief among Enrile's concerns was the fact that under the Rome Statute, an incumbent president could be prosecuted before the ICC. Enrile also expressed doubts as to whether the ICC would allow a sitting president to invoke the long-standing national doctrine of presidential immunity from suit. This is in reference to Article 27, which reads: "[i]mmunities 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."[134]

Enrile added that joining the ICC might bring adverse consequences on the country's national security and defense efforts.[135] He expressed fears that mere negligence in the enforcement of the penal laws covered by the ICC may subject a president or military commander to ICC prosecution, in turn,

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[131] *Pimentel*, 462 SCRA 622.

[132] Caparas, *supra* note 128.

[133] Raissa Robles, *OPINION: 17 senators backed the ICC, fully aware it could prosecute a sitting President*, ABS-CBN NEWS, Dec. 8, 2018, *at* https://news.abs-cbn.com/blogs/opinions/03/20/18/opinion-17-senators-backed-the-icc-fully-aware-it-could-prosecute-a-sitting-president

[134] ROME STATUTE, art. 27.

[135] Robles, *supra* note 133.

weakening the government's efforts against insurgents and rebels. He also pointed out that even if a suit against a Philippine government official before the ICC turns out to be benign, the mere worry of a verdict will inevitably distract the said official and prevent him from effectively fulfilling his duties.[136]

Finally, Enrile pointed out that the Philippines' duty to enforce an ICC arrest order against a foreign leader may lead to retaliation by the arrested person's home country.[137]

iii. Provisions and Obligations under the Rome Statute

State Parties to the ICC are required to comply with all provisions of the Rome Statute. No reservations can be made.[138] Aside from its primary obligation to investigate and prosecute criminal acts committed by its citizens and/or within their territories, State Parties are mandated to comply with the ICC's request to arrest and surrender wanted persons.[139] Moreover, if a person challenges the admissibility of his person before the ICC in a domestic court, the State Party has a duty to consult with the ICC on whether there has been a ruling on the matter. If a ruling has declared the ICC's jurisdiction over the person, the State is obliged to proceed with the arrest and surrender the accused before the ICC.[140] However, a State Party is given the option to postpone the surrender of a person to the ICC if the same person is also being investigated or prosecuted domestically, provided that the delay shall not be any longer than is necessary to finish the proceedings.[141] Additionally, the ICC cannot compel a State Party to comply with a request to arrest and surrender if it will violate the State's obligations to honor diplomatic immunity or international agreements, unless the ICC can secure the consent of the home State of the accused.[142]

As a result of the principle of complementarity, a State may challenge the ICC's jurisdiction over a case if it had already investigated and prosecuted the person of interest.[143] In addition, double jeopardy applies to the ICC. A person's previous trial before a competent court bars a subsequent trial before

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[136] *Id.*
[137] *Id.*
[138] ROME STATUTE, art. 120.
[139] Art. 89, §1.
[140] Art. 89, §2.
[141] Art. 94.
[142] Art. 98.
[143] Art. 19.

the ICC for the same alleged crimes.[144] However, if the trial is attended by fraud, such as partiality or the intent to shield a person from potential criminal liability, the rule shall not prevent a new trial in the ICC.

Similar to the Philippines' method of interpreting penal laws, Article 22 of the Statute provides that ambiguities in definition of terms shall be construed in favor of the accused. [145] But unlike in Philippine law, international crimes are not subject to prescription.[146] The Statute also grants certain rights to the accused also provided for by the Philippine Constitution, such as the presumption of innocence unless guilt is proven beyond reasonable doubt,[147] the right against self-incrimination,[148] to be free from coercion or torture during investigation,[149] to remain silent,[150] to have a counsel of his preference,[151] and to a fair and impartial trial.[152]

Lastly, Article 127 declares the process for withdrawal from the Rome Statute. The State Party must write a written notification of withdrawal to the UN Secretary-General. The withdrawal shall only take effect after one year.[153] Withdrawal neither exempts a State Party from paying outstanding financial obligations to the ICC nor protects its citizens from becoming subjects of criminal investigations and trials for crimes covered by the Rome Statute committed during the duration of the State's membership in the ICC.[154]

iv. Conflict and controversy

On March 13, 2018, President Duterte released a statement expressing his decision to immediately withdraw from the ICC,[155] claiming the "ICC is being utilized as a political tool against the Philippines."[156] The president's ire was directed towards the actions of ICC Prosecutor Fatou Bensouda. Prior to this, on February 8, 2018, the ICC Office of the Prosecutor

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144 Art. 20.
145 Art. 22.
146 Art. 29.
147 Art. 66.
148 Art. 55, § 1(a).
149 Art. 55 § 1(b).
150 Art. 55, § 2(b).
151 Art. 55, § 2(c).
152 Art. 55.
153 Art. 127.
154 Art. 127.
155 Rappler.com, *FULL TEXT: Duterte's statement on the Int'l Criminal Court withdrawal*, RAPPLER, Mar. 11, 2019, *at* https://www.rappler.com/nation/198171-full-text-philippines-rodrigo-duterte-statement-international-criminal-court-withdrawal
156 *Id.*

announced that it had launched a preliminary examination into the extrajudicial killings of thousands of suspected drug pushers and users which transpired in the course of Duterte's "war on drugs." Prosecutor Bensouda emphasized that this was not yet an investigation and reiterated that under the Rome Statute's principle of complementarity, the Philippines retained the "primary responsibility to investigate and prosecute those responsible for international crimes."[157] In an earlier statement, Prosecutor Bensouda also noted that "public statements of high officials of the Republic of the Philippines seem to condone such killings and further seem to encourage State forces and civilians alike to continue targeting these individuals with lethal force."[158] She added that extrajudicial killings are crimes that may "fall under the jurisdiction of the [ICC] if they are committed as part of a widespread or systematic attack against a civilian population pursuant to a State policy to commit such an attack."[159]

To justify his decision to withdraw from the ICC, Duterte explained that the legal framework of the Rome Statute was contrary to the Philippine Constitution and domestic laws, arguing that even if generally accepted principles of international law are incorporated,[160] they will not apply if they are contrary to the Constitution. He further argued that in the hierarchy of laws, domestic laws are above international law and treaties that contravene the Constitution may be invalidated.[161]

The president provided several reasons as to why the ICC neither had jurisdiction over his person nor his alleged crimes.[162] *First*, he pointed out that the "war on drugs" did not qualify as any of the crimes defined and covered by the Rome Statute. Specifically, Duterte insisted that the killing of the suspects as a result of the drug war did not constitute crimes against humanity because they happened as part of lawful police operations. He further added that under Philippine penal laws, the fact that the officers were merely acting in self-defense and in lawful exercise of their duties are justifying circumstances that absolve any criminal liability.[163]

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[157] *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela,* INTERNATIONAL CRIMINAL COURT WEBSITE, Feb. 8, 2018, *at* https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat

[158] *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda concerning the situation in the Republic of the Philippines,* INTERNATIONAL CRIMINAL COURT WEBSITE, Oct. 13, 2016, *at* https://www.icc-cpi.int//Pages/item.aspx?name=161013-otp-stat-php

[159] *Id.*

[160] CONST. art. II, § 2.

[161] Rappler.com, *supra* note 155.

[162] *Id.*

[163] *Id.*

Second, Duterte, citing the case of *Tañada v. Tuvera*,[164] argued that since the Rome Statute was neither published in the Official Gazette nor in a newspaper of general circulation, [165] the law was not binding, thus ineffective.[166] Subsequent publication could not cure the defect as it would become an *ex post facto* application.

Third, Duterte argued that Article 27 of the Rome Statute violates the constitutional doctrine of presidential immunity. *Fourth*, Duterte claimed that his right to presumption of innocence[167] was violated by Prosecutor Bensuoda who allegedly implied that there was a significant likelihood that he is responsible for committing international crimes. [168] *Finally*, Duterte also criticized Bensuoda for not following the principle of complementarity. He asserted the primacy of national jurisdictions and insisted that Bensuoda was not able to establish that the Philippine government was unwilling or unable to investigate the alleged international crimes.[169]

v. Question on the Constitutionality of the Withdrawal

There have been moves, both in the legislative and judicial branches, to challenge the constitutionality of President Duterte's unilateral withdrawal. On February 2017, Senator Franklin Drilon, along with 13 other senators, sponsored Senate Resolution No. 289 which sought to declare the Senate's legal position that any attempts by Malacañang to withdraw from a treaty would need the Senate's concurrence to be valid. [170] Senator Emmanuel "Manny" Pacquiao blocked the resolution, saying the President had the sole power to abrogate a treaty.[171]

Opposition senators subsequently filed a case[172] before the Supreme Court. They argued that Article VII, Section 21 of the Constitution necessarily

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[164] G.R. No. No. L-63915, 146 SCRA 446 (1986).

[165] CIVIL CODE., art. 2.

[166] Rappler.com, *supra* note 155.

[167] CONST. art. III, § 4(2).

[168] Rappler.com, *supra* note 155.

[169] *Id.*

[170] Camille Elemia, *Can Senate stop PH's withdrawal from ICC? Pacquiao blocked the resolution,* RAPPLER, Mar. 11, 2019, *at* https://www.rappler.com/nation/198162-pacquiao-blocked-resolution-senate-stop-philippines-treaty-withdrawals-international-criminal-court

[171] Camille Elemia, *Pacquiao files resolution blocking Drilon, contradicts own votes*, RAPPLER, Mar. 18, 2017, *at* https://www.rappler.com/newsbreak/fact-check/164481-manny-pacquiao-resolution-drilon-contradict-votes

[172] Pangilinan v. Cayetano, G.R. No. 238875.

implies that the president cannot withdraw from any treaty or international agreement without concurrence of two-thirds of all the members of Senate.[173] On the other hand, the government, asserting the president's role as chief architect of foreign policy, pointed out the lack of a textual basis for the necessity of the Senate's concurrence in withdrawing from a treaty.[174] This case is currently pending.[175]

Meanwhile, on February 11, 2020, Duterte terminated the Philippines' Visiting Forces Agreement (VFA) with the U.S., as a retaliation to the U.S. State Department's cancellation of his political ally, Senator Ronald dela Rosa's visa.[176] As former head of the Philippine National Police (PNP), dela Rosa was known as the chief architect of Duterte's "war on drugs." Duterte also cited U.S. Senate Resolution No. 142 as another reason for his decision to withdraw from the VFA. In the said resolution, which was adopted in January 2020, the U.S. Senate condemned the Philippine government and PNP's role in "state-sanctioned extrajudicial killings [...] as part of the 'War on Drugs,'" the "arrest and detention of human rights defenders,"[177] as well as the harassment and unjustified prosecution of journalists. The U.S. Senate also urged President Donald Trump to enforce the Global Magnitsky Act—an American statute which seeks to sanction human rights abusers through the cancellation of their visas and the freezing of their assets in the U.S.—against Philippine government and security officials responsible for the extrajudicial killings.[178]

In reaction to Duterte's decision to withdraw from the VFA without the Senate's advice and consent, the Philippine Senate adopted Resolution No. 337,[179] asking the Supreme Court to rule on whether Senate concurrence is required for the abrogation of a treaty. The resolution noted that while the

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[173] CONST. art. VII, § 21.

[174] Lian Buan, *ICC pullout: Are there limits to Duterte's presidential discretion?* RAPPLER, Mar. 11, 2019, *at* https://www.rappler.com/nation/210603-international-criminal-court-withdrawal-case-tackles-duterte-presidential-discretion-limits

[175] Nicole-Anne C. Lagrimas, *Senators urge Supreme Court to rule on Senate role in termination of treaties.* GMA NEWS ONLINE, Mar. 9, 2020, *at* https://www.gmanetwork.com/news/news/nation/728914/senators-urge-supreme-court-to-rule-on-senate-role-in-termination-of-treaties/story

[176] Sofia Tomacruz, *TIMELINE: Duterte's threats to terminate the Visiting Forces Agreement,* RAPPLER, Feb. 11, 2020, *at* https://www.rappler.com/newsbreak/iq/251558-timeline-duterte-threats-terminate-visiting-forces-agreement

[177] Aika Rey, *U.S. Senate panel OKs ban on PH officials in De Lima case, urges dropping charges vs Ressa,* RAPPLER, Dec. 12, 2019, *at* https://www.rappler.com/nation/247072-us-senate-approves-ban-philippine-officials-de-lima-ejk-cases

[178] *Id.*

[179] S. Res. No. 337, 18th Cong., 1st Sess. (2020).

validity of a treaty is explicitly conditioned on the concurrence of two-thirds of all the members of the Senate, the Constitution is silent as to whether the same condition is required for the termination of a treaty. While the Senate did not express a formal position in its resolution, it pointed out that the pending legal question involves "an issue of transcendental importance that impacts on the country's constitutional checks and balances" and one that affects the "country's relations with the international community."[180] Senate President Vicente Sotto III, on behalf of the Senate as a body, filed a petition for declaratory relief and mandamus before the Supreme Court on March 19, 2020.[181]

2. The Philippines' Seat on the UNHRC

i. The UNHRC

The UNHRC was established by resolution of the UN General Assembly on March 15, 2006.[182] The successor of the UN Commission on Human Rights, the UNHRC is composed of 47 Member States who are elected to three-year terms, with 13 seats reserved for Asian countries. Elected members may serve two consecutive terms,[183] with the meeting of council members occurring thrice a year. A key initiative of the UNHRC is the Universal Periodic Review ("UPR") where all UN Member States are required to report "what actions they have taken to improve the human rights situations in their countries."[184] The UNHRC has the power to inquire into human rights situations in UN Member States, check the status of the national implementing programs, and recommend solutions.[185] So far, the UNHRC has completed 2 cycles of UPR involving all Member States.

Another important initiative is the Complaint Procedure. This is a mechanism for individuals and organizations to confidentially report human

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[180] *Id.*

[181] Pleading of the petitioners in Senate v. Medialdea, G.R. No. 251977, *available at* https://pinglacson.net/2020/03/09/read-senate-petition-before-the-supreme-court-g-r-no-251977

[182] *UN: Philippines, Eritrea Don't Belong on Rights Council,* HUMAN RIGHTS WATCH, Oct. 11, 2018, *at* https://www.hrw.org/news/2018/10/11/un-philippines-eritrea-dont-belong-rights-council

[183] Human Rights Council, Resolution adopted by the General Assembly 60/251, U.N. Doc. A/RES/60/251 (Apr. 3, 2006), *available at* https://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf

[184] *Universal Periodic Review*, UNITED NATIONS HUMAN RIGHTS COUNCIL, *at* https://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx

[185] *Id.*

rights violations to the UNHRC.[186] When the Council receives several repeated complaints on the same issue, it has the discretion to assign a special rapporteur to the subject State. The special rapporteur is tasked to examine and publicly report on the matter.[187]

The UNHRC also conducts fact-finding missions and investigations regarding possible serious violations of human rights or international law upon the instruction of the Secretary-General, the General Assembly and the Security Council, among other bodies.[188] Presently, the UNHRC has assigned commissions on inquiry for the human rights situations in the Syrian and Yemeni civil wars and the general conditions in North Korea and Burundi.[189] In September 2018, the UNHRC created a quasi-special prosecutor unit to investigate and gather evidence regarding the Rohingya crisis in Myanmar. In June 2018, under the Trump administration, the U.S. bolted out of the UNHRC,[190] accusing the Council of being biased against Israel and for allowing membership to countries which have gained notoriety for violating human rights.

ii. Obligation of Members of the UNHRC

As an incumbent Council member, the Philippines has to comply with several general obligations laid out in UN General Resolution 60/251, which is essentially the founding document of the UNHRC.[191] Under the said resolution,[192] it is the duty of the Philippine State "to respect human rights and fundamental freedoms for all"[193] regardless of "race, colour, sex, language or religion, political or other opinion, national or social origin, property, birth or other status."[194]

It must be noted that Resolution 60/251, as is the case with most GA Resolutions, is not a legally binding document. The same is true for

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[186] *Welcome to the Human Rights Council,* UNITED NATIONS HUMAN RIGHTS COUNCIL, *at* https://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx

[187] *Id.*

[188] *International Commissions of Inquiry, Commissions on Human Rights, Fact-Finding missions and other Investigations,* UNITED NATIONS HUMAN RIGHTS COUNCIL, *at* https://www.ohchr.org/EN/HRBodies/HRC/Pages/COIs.aspx

[189] United Nations Human Rights Council, *supra* note 186.

[190] *Why the US left the UN Human Rights Council – and why it matters,* THE CONVERSATION, June 20, 2018, *at* http://theconversation.com/why-the-us-left-the-un-human-rights-council-and-why-it-matters-98644

[191] Human Rights Council, *supra* note 183.

[192] *Id.*

[193] *Id.*

[194] *Id.*

resolutions of the HRC.[195] Prior to the conception of the HRC, there were initially strong calls from many Member States to designate the Council as a principal organ of the UN and to grant its resolutions legally binding power.[196] These plans were successfully opposed by some key developing countries.[197]

Still, the aforementioned duties adopted by the Philippines through Resolution 60/251 are also reflected in the ICCPR, particularly Article 2, Section 1,[198] and the ICESCR, specifically Article 2, Section 2[199] and Article 13, Section 1.[200] The ICCPR and ICESCR, which the Philippines ratified in October 1986 and June 1974 respectively, are legally binding treaties.

As a candidate for the term periods of 2016-2018 and 2019-2021, the Philippines also made specific campaign promises. During its 2016 bid, which was campaigned for by the Aquino administration but served by the Duterte government, the Philippines committed to: strong support and compliance with the UPR; providing voluntary and annual financial contribution to the UN High Commissioner for Human Rights; close working relationships with national and international civil society organizations in the process of crafting legislation to protect human rights; strengthening the implementation of human rights treaty obligations; actively cooperating with special rapporteurs and other mechanisms of the UNHRC; and supporting the initiatives of the national Commission on Human Rights.[201] In 2018, the Duterte government launched an ultimately successful re-election campaign to the Council.

While recognizing that Resolution 60/251 operates on soft law principles,[202] the national Commission on Human Rights has pointed out that as an elected Member State of the Council, the Philippines has a heightened

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[195] *The Human Rights Council: A practical guide*, PERMANENT MISSION OF SWITZERLAND TO THE UNITED NATIONS OFFICE, 2014, *available at* https://www.eda.admin.ch/dam/eda/en/documents/publications/InternationaleOrganisationen/Uno/Human-rights-Council-practical-guide_en

[196] *The Human Rights Council: A New Era in UN Human Rights Work*, ETHICS & INTERNATIONAL AFFAIRS, March 2007, *available at* https://www.ethicsandinternationalaffairs.org/2007/the-human-rights-council-a-new-era-in-un-human-rights-work-full-text

[197] *Id.*

[198] ICCPR, art. 2, § 1.

[199] ICESCR, art. 2, § 1.

[200] ICESCR, art. 13, § 1.

[201] United Nations General Assembly Note verbale dated 9 October 2015 from the Permanent Mission of the Philippines to the United Nations addressed to the President of the General Assembly, U.N. Doc. A/70/424 (Oct. 15, 2015), *available at* https://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/424

[202] Permanent Mission of Switzerland to the United Nations Office, *supra* note 195.

responsibility to comply with the specific duties in the said document.[203] The aforementioned duties include: to participate in tackling gross and systemic human rights violations, to voluntarily subject itself to and recommend solutions to other State Parties' human rights-related problems through the UPR, to attend the three UNHRC sessions per year which last for a duration of at least ten weeks,[204] and to help in the development of international and legally binding standards and protocols to more effectively address complaints of human rights violations.[205]

The 2019 bid, commenced and to be fully served by the Duterte administration, echoed many of the declarations of the 2016 bid. Worth reiterating are the following campaign pledges that the Philippines vowed to comply with in the country's second term: being sensitive to human rights problems; active cooperation with special rapporteurs and other mechanisms of the UNHRC; supporting the initiatives of the national Commission on Human Rights; and fostering close working relationships with national and international civil society organizations in the process of crafting legislation to protect human rights.[206]

iii. Compliance & Conflict: The Duterte Administration & The International Community

The Duterte administration and international human rights organizations have had an unsteady relationship. The tension stems from international actors' views on the thousands of alleged extrajudicial killings resulting from the "war on drugs," as well as the president's personal hostility against the ICC, and ironically, towards the UNHRC's special rapporteurs.[207]

Then-DFA Secretary Alan Peter Cayetano was often critical of the UNHRC despite the Philippines' current membership in the Council. In a

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[203] Philstar.com, *CHR to government: Fulfill UN human rights council obligations,* PHILSTAR GLOBAL, May 28, 2019, *available at* https://www.philstar.com/headlines/2018/10/16/1860479/chr-government-fulfill-un-rights-council-obligations

[204] United Nations General Assembly Resolution adopted by the General Assembly 60/251. HUMAN RIGHTS COUNCIL, U.N. Doc. A/RES/60/251 (Apr. 3, 2006), *available at* https://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En

[205] Permanent Mission of Switzerland to the United Nations Office, *supra* note 195.

[206] United Nations General Assembly Note verbale dated 1 October 2018 from the Permanent Mission of the Philippines to the United Nations addressed to the President of the General Assembly, U.N. Doc. A/73/408 (Oct. 3, 2018), *available at* https://undocs.org/en/A/73/408

[207] ABS-CBN News, *Philippines wins seat in UN Human Rights Council,* ABS-CBN NEWS, Oct. 13, 2018, *at* https://news.abs-cbn.com/overseas/10/13/18/philippines-wins-seat-in-un-human-rights-council

statement before the UNHRC, Cayetano lamented that human rights were being weaponized as a political tool to defame the Philippine government. He also noted that the Council seemed to have taken a name and shame approach against President Duterte's drug war.[208]

Cayetano added that, moving forward, the UNHRC should take a more constructive approach given that the Philippines was ready to cooperate and be subjected to scrutiny by the UNHRC. Cayetano's statement, however, did not seem to be in line with the president's own stance. Duterte has ordered the PNP not to cooperate with any examination by the UNHRC.[209] He has also publicly antagonized several of the UNHRC's special rapporteurs, who are responsible for scrutinizing the human rights situation in UN Member States such as the Philippines.

Specific targets of Duterte's ire have included UN Special Rapporteur on extrajudicial killings, Agnes Callamard,[210] and Special Rapporteur on the independence of judges and lawyers, Diego Garcia-Sayan, whom he repeatedly cursed for allegedly meddling in internal Philippine affairs.[211] The Duterte government also filed charges against the UN Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz. Tauli-Corpuz, a Filipino citizen, was accused of being a member of the New People's Army and Communist Party of the Philippines.[212] The Regional Trial Court dismissed the criminal complaint against her. Additionally, in response to UN Special Rapporteur Michael Forst's report that "the detention of Senator Leila de Lima, ouster of Chief Justice Maria Lourdes Sereno, and arrest of Rappler chief executive officer Maria Ressa" were engineered by the government to

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[208] Ian Nicolas Cigaral, *Cayetano to UN rights body: Drug war meant to save lives,* PHILSTAR GLOBAL, Feb. 27, 2018, *available at* https://www.philstar.com/headlines/2018/02/27/1791938/cayetano-un-rights-body-drug-war-meant-save-lives

[209] Chad de Guzman, *Roque: PH does not need call from 38 states to uphold human rights,* CNN PHIL., Jum. 26, 2018, *at* http://nine.cnnphilippines.com/news/2018/06/23/Harry-Roque-human-rights-United-Nations.html

[210] Pia Ranada, *Duterte threatens to slap UN rapporteur if she probes drug war,* RAPPLER, Nov. 10, 2017, *at* https://www.rappler.com/nation/187899-duterte-threat-slap-un-rapporteur-callamard

[211] ABS-CBN News, *Duterte: UN special rapporteur 'can go to hell',* ABS-CBN NEWS, June 3, 2018, *at* https://news.abs-cbn.com/news/06/03/18/duterte-un-special-rapporteur-can-go-to-hell

[212] *The Philippines: UN experts urge further action to remove names on Government's "terror list",* UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, Aug. 20, 2018, *at* https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23466&LangID=E

stifle dissent, Spokesperson Salvador Panelo stated that the claims were based on fake information.[213]

Duterte and his officials also seem to share the tendency to respond to international criticism by invoking the sovereignty of the Philippine State. In June 2018, 38 of the 47 members of the UNHRC urged the Philippine government to stop the extrajudicial killings committed by policemen and other vigilantes in the course of the "war on drugs."[214] The same group of countries also reminded the Duterte administration that, as a member of the UNHRC, they had a heightened responsibility to set a good example by protecting the fundamental rights of freedom of speech and freedom of the press, particularly of human rights workers and journalists. [215] Former Spokesperson Harry Roque responded by saying that other countries should refrain from "commenting on domestic sovereign decisions."[216] Roque added that the government was already implementing domestic laws that protected human rights.

Perhaps the most tangible point of cooperation between the Duterte administration and the UNHRC was the 2nd cycle of UPR which was released in 2017. Upon the release of the results, the DFA claimed that the Philippines had a "big victory" and that the Council had "overwhelmingly adopted Manila's human rights report card."[217] However, other members of the UNHRC expressed disappointment that the Philippines had "accepted only 103 out of 257 recommendations"[218] made by the other council members. The Philippines did not accept 44 recommendations regarding extrajudicial killings committed in the "war on drugs."[219] They also refused to implement 13 recommendations relating to the "protection of journalists and human rights defenders" and "allow[ing] access of the UN special rapporteur on extrajudicial killings."

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[213] *UN Special Rapporteur report 'highly misplaced': Palace,* REPUBLIC OF THE PHILIPPINES PHILIPPINE NEWS AGENCY, Feb. 19, 2019, *at* https://www.pna.gov.ph/articles/1062391

[214] Ian Nicolas Cigaral, *38 UN rights council members urge Philippines to stop drug war deaths,* PHILSTAR GLOBAL, June 23, 2018, *available at* https://www.philstar.com/headlines/2018/06/23/1827213/38-un-rights-council-members-urge-philippines-stop-drug-war-deaths

[215] *Id.*

[216] De Guzman, *supra* note 209.

[217] Philstar.com, *Ignoring issues raised, Philippines claims 'victory' in UN review,* PHILSTAR GLOBAL, Sept. 23, 2017, *available at* https://www.philstar.com/headlines/2017/09/23/1741912/ignoring-issues-raised-philippines-claims-victory-un-review

[218] *Id.*

[219] *Id.*

iv. Reactions to the Philippines' re-election to the UNHRC under the Duterte Administration and subsequent controversies

The Philippines has had a historic role in the development of human rights advocacy in the international sphere. It is an original signatory of the UDHR. General Carlos P. Romulo, who went on to become president of the UN General Assembly, fought to have "articles on the equal dignity and freedom of all human beings and non-discrimination" in the document.[220] Moreover, the Philippines is currently serving its second consecutive term and fifth overall term as an elected member of the UNHRC.

However, the Philippines' most recent election as a UNHRC member has been the subject of much controversy because of the actions of the Duterte administration. Both Presidential Spokesperson Salvador Panelo and then-DFA Secretary Alan Peter Cayetano painted the country's re-election as the international community's endorsement of the drug war as the Philippine government's brand of human rights advocacy.[221] Panelo also said that the campaign against illegal drugs is necessary to protect "the right to life, liberty and property of every peace-loving and law-abiding citizen."[222]

Opposition senators Leila de Lima and Risa Hontiveros did not share the Cabinet members' jubilance with the UNHRC election results. The senators pointed out that there was no real competition in the elections. The Asia-Pacific bloc, based on a prior agreement, nominated five Member States for the five vacant seats allotted to Pacific countries.[223] This practice, utilized for the first time in UNHRC history, was replicated in all other regional blocs. As such, all 18 nominees ran unopposed and were effectively assured victory.[224] Despite these circumstances, the Philippines still attained the lowest number of votes among the Asia-Pacific countries, with 28 of the 193 countries dissenting to its election.[225]

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[220] Philippine News Agency, *supra* note 213.

[221] Cigaral, *supra* note 214.

[222] *Id.*

[223] Jeline Malasig, *5 candidates for 5 seats: How Philippines got a seat on UN Human Rights Council,* INTERAKSYON, Oct. 16, 2018, *available at* http://www.interaksyon.com/politics-issues/2018/10/16/135990/5-candidates-for-5-seats-how-philippines-got-seat-on-un-human-rights-council

[224] Philstar.com, *Cayetano hails Philippines' uncontested election to UN rights body,* PHILSTAR GLOBAL, Oct. 13, 2018, *available at* https://www.philstar.com/headlines/2018/10/10/1859756/cayetano-earning-seat-un-rights-council-shows-philippines-respects-human-rights#V7EfbwtV7f0yYSx4.99

[225] Malasig, supra *note* 223.

International NGO, Human Rights Watch ("HRW"), explicitly campaigned against the Philippines' election to the UNHRC. HRW opposed the Philippines' candidacy due to its ongoing human rights crisis. It also noted that the drug war may amount to a crime against humanity and added that the Duterte government was engaging in efforts to harass critics in an attempt to silence dissent.[226]

In July 2019, the UNHRC voted to investigate the extrajudicial killings committed in Duterte's "war on drugs." The Resolution on the matter was proposed by Iceland. It required the Philippine government to prevent extrajudicial killings and cooperate with UN High Commissioner for Human Rights Michelle Bachelet's investigation. Despite the Philippine delegation's efforts to lobby against the resolution, it was adopted with 18 countries voting in favor, 14 against, and 15 abstaining. Panelo argued that the criticisms were invalid given that majority of Filipinos agreed with the president's policy.[227] He also commented that it "reeks of nauseating politics completely devoid of respect for the sovereignty of our country, even as it is bereft of the gruesome realities of the drug menace."[228] DFA Secretary Teodoro Locsin also commented that the UN investigators have already prejudged the Philippines, thus they should not be allowed to conduct their investigation in the country.[229]

UN Special Rapporteur on extrajudicial, summary, or arbitrary executions, Agnes Callamard, said that regardless of the Duterte administration's reaction to the probe, the findings of the inquiry would eventually lead to sanctions if the government does not proceed with the recommendations given by the UNHRC. After the Resolution was passed by the UNHRC, Callamard stated that the UN's next step was to determine how to conduct the probe given the Philippine government's refusal to cooperate.[230]

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[226] Human Rights Watch, *supra* note 182.

[227] Stephanie Nebehay & Marina Depetris, *U.N. to probe Philippines drug war deaths,* REUTERS, Jul. 11, 2019, *at* https://www.reuters.com/article/us-philippines-drugs/u-n-to-probe-philippines-drug-war-deaths-idUSKCN1U61FV

[228] *Id.*

[229] Martin Petty & Paul Tait, *'Not a chance' – Philippine minister says no access for U.N. drugs war probe,* REUTERS, Sep. 10, 2019, *at* https://www.reuters.com/article/us-philippines-drugs/not-a-chance-philippine-minister-says-no-access-for-un-drugs-war-probe-idUSKCN1VW0JL

[230] Elmor Santos, *Callamard: Philippines can condemn UN probe now, but rejecting findings would draw sanctions,* CNN PHIL., Jul. 12, 2019, *at* https://cnnphilippines.com/news/2019/7/12/callamard-duterte-unhrc-probe.html

As a response to this probe, the Philippines suspended all negotiations on financial assistance like loans and grant agreements with the 18 countries that voted in favor of the probe. The suspension was ordered due to the Philippines' reassessment of its relationship with these countries. However, the administration had contradictory narratives about the source of the orders. The memorandum ordering the suspension was signed by Executive Secretary Salvador Medialdea. It stated that such was by the order of the president. However, Salvador Panelo claims that President Duterte himself had not issued any memorandum on the matter.[231] Despite Panelo's initial denial, the Bureau of Customs published a copy of the memorandum on its website.[232]

This suspension was eventually lifted on February 27, 2020.[233] According to Secretary Panelo, the suspension was imposed as an outrage reaction to the passage of the resolution. The resumption of aid from these countries was triggered by the U.S. government's donation to the Philippines to aid in its efforts against the COVID-19 pandemic.[234]

IV. ANALYSIS OF THE MONISM CONUNDRUM USING THE PHILIPPINES' COMPLIANCE WITH INTERNATIONAL LAWS ON HUMAN RIGHTS DURING THE DUTERTE ADMINISTRATION

From the onset, it must be emphasized that there is no clear state or scholarly perspective on the relationship of national and international law in the Philippines as being either dualist or monist. This illustrates that, in practice, Kelsen's theory may not be as clear cut. Further, the assumption that increasing international constitutionalization can forward a monist perspective of international law through integration may not always hold from a state perspective. Because of this ambiguity, it becomes necessary to describe the preferences of actors in the underlying political community and the constitutional authority embedded in the process of constitutionalization, to understand its functionality. The analysis in this section illustrates the importance of political actors on two levels: *first*, in making sense of the

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[231] Elmor Santos, *Philippines suspends aid from countries that back UN drug war probe,* CNN PHIL., Sep. 21, 2019, *at* https://cnnphilippines.com/news/2019/9/21/united-nations-philippines-duterte-drug-war-probe-.html

[232] Elmor Santos, *PH resumes accepting aid from countries that backed UN drug war probe,* CNN PHIL., Mar. 4, 2020, *at* https://www.cnnphilippines.com/news/2020/3/4/malacañang-lifts-aid-suspension-united-nations-drug-war.html

[233] *Id.*

[234] Glee Jalea, *Palace admits: Loan, grants suspension over rights resolution just an 'outrage reaction',* CNN PHIL., Mar. 5, 2020, *at* https://www.cnn.ph/news/2020/3/5/Duterte-outrage-reaction-loan-grants-Iceland-UN-resolution-drug-war.html

different instruments outlining state obligations to the international community; and *second*, in showing the primacy of state actors in dictating their compliance with the rules outlined in international law.

As illustrated in the previous discussion, despite the relative similarity of the ICC and UNHRC as international bodies tasked with the enforcement of human rights law, the Duterte administration's reactions towards the recent developments in the two bodies differed. The contrast is a result of the differences between the Rome Statute and Resolution 60/251 regarding their nature, binding power and imposable sanctions. Both the ICCPR and the Rome Statute obligate states to enforce human rights laws. However, the first confers rights while the second serves as a sanctioning mechanism. The ICCPR lists the rights individuals have that must be safeguarded by the state. Meanwhile, the Rome Statute allows the international community to have jurisdiction over specific individuals, including elected public officials and security personnel, who have committed crimes against humanity, crimes of aggression, war crimes, and genocide, all of which are specific violations of human rights to a grave degree and are punishable by up to a term of life imprisonment.[235]

By ratifying both the Convention and the Statute, the Philippines subjected itself to fulfill obligations laid out by the international community and accepted the international community's sanctioning power over its officials and citizens. Through this expression of state consent, the Philippines recognized that there is a higher legal order that has the ability to shape, monitor and even penalize its conduct: the international community. However, despite these complementary functions of the ICCPR and the Rome Statute, it seems that there has been a failure to logistically harmonize them into a monistic legal order which can consistently and effectively regulate the conduct of states in the field of human rights.

The lack of a cohesive, monistic order among these rules is illustrated by the international community's reaction to the "war on drugs." The ICC's Office of the Prosecutor, as a result of concerns regarding the extrajudicial killings that have transpired in the course of the drug war, has launched and is currently in the final stages of a preliminary examination which could result in the commencement of a formal investigation. Meanwhile, the UNHRC, particularly through the Iceland-led adopted resolution, expressed concerns over the human rights violations that occurred in the course of the drug war and urged the Philippines to cooperate with the UN High Commissioner for Human Rights in the latter's monitoring of the former. While these two bodies

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[235] ROME STATUTE, art. 77, § 1(b).

were constituted for different purposes, the UNHRC and ICC have interrelated goals. However, this scenario also illustrates that these bodies operate autonomously from each other because despite the ICC's opening of the probe on possible human rights violations by the Philippines in February 2018, the country was re-elected to the UNHRC in October of the same year.

Because of their autonomous operation, conflicting positions emerge. The Philippines is simultaneously permitted to have a seat in the UNHRC while being subject to an ICC inquiry. This is symptomatic of a lack of integration. The laws and mechanisms governing each body do not affect the other despite the two being functionally similar and arguably, complementary. The ICC and UNHRC, despite both being international bodies tasked to ensure states' compliance with human rights laws, logistically do not operate parallel, much less in conjunction with each other. This indicates that states possibly entered into these agreements without upgrading their common interests because despite both the Convention and the Statute being about human rights, they do not operate harmoniously in practice.

Philippine state actors have also adopted contradictory positions on the international community's response to the "war on drugs" depending on the institutional body involved in making the investigation. While Secretaries Panelo and Cayetano characterized the country's re-election to the UNHRC as the international community's endorsement of the drug war, Duterte criticized the ICC as a "political tool"[236] used by the UN against the Philippines.

However, it must be noted that in its ratification of the ICCPR, the Philippines made the following statement: "The Philippine Government, in accordance with Article 41 of the said Covenant, recognizes the competence of the Human Rights Committee set up in the aforesaid Covenant, to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Covenant."[237] Therefore, it recognizes the right of other states to monitor and examine the country for human rights violations. Then-DFA Secretary Cayetano also expressed that the Philippines was ready to cooperate and be subjected to the UNHRC's scrutiny. But despite his claims, the Philippine government reacted to the approval of the Iceland-led UNHRC Resolution by suspending

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[236] Rappler.com, *supra* note 155.

[237] *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, May 31, 2019, *available at* https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND

negotiations with the 18 countries who voted for it. This suspension was only lifted due to the Philippines' need for financial aid.

Moreover, while Duterte has personally threatened the UN Special Rapporteur on extrajudicial killings and has refused to grant the UN access to conduct an investigation,[238] the country did not even give up its seat in the UNHRC nor were there any attempts to revoke the country's membership from the Council.

The action of Philippine officials reinforces the idea that even within the international legal system, the bodies of law states adhere to do not form a cohesive set of rules to govern actual state behavior. Theoretical assumptions on the monism-dualism debate seem to assume that the body of international law in itself is a cohesive body of laws. The Philippines' example shows that Kelsen's views of international law as being based on existing state behavior and of states being sanctioned through customary international law for not conforming with the behavior expected of them, is still not adequate to make a legal system internally cohesive. Sanctions being imposed by the ICC would have limited effect if the Philippines can choose to withdraw from the treaty at any time and refuse to comply with its obligation to allow foreign officials to conduct investigations inside the country, even if the text of the treaty itself does not allow State Parties to make reservations as to any of the provisions of the Rome Statute. Moreover, the effect of sanctions, even if imposed by one body, can seemingly be ignored or weakened by a different international body. In this case, the possible effects of the ICC sanction were mitigated by the fact that the Philippines was not only allowed to be a candidate but was actually re-elected into the UNHRC despite being subject to an ICC preliminary examination for human rights abuses.

This also illuminates deficiencies in present constitutionalization literature, which assumes that integration will occur due to the formation of a body enforcing treaties that seemingly adapt features of a constitution. Literature on the subject often focuses on identifying an international organization or a treaty that evidences the occurrence of this constitutionalization process. However, these studies fail to account for the existence of multiple sources of international law, which could be applied simultaneously but lead to different results. Moreover, they fail to account for differing state responses to its treaty obligations that could cause contradictory

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[238] Reuters, Philippine minister refuses to grant UN access to investigate war on drugs, saying it is prejudiced, SOUTH CHINA MORNING POST, Sep. 11, 2019, *at* https://www.scmp.com/news/asia/southeast-asia/article/3026744/philippine-minister-refuses-grant-un-access-investigate

applications of international law. Should international law take precedence over national law, state applications of international law derived from different sources should, in theory, lead to similar results because what occurs is a process of adapting international law standards into national law. But as seen in practice, adoption of these different laws into national legislation can lead to differing results because states still have a choice on how to respond to them.

Comparing these cases is also instructive on how state responses to the application of international law in the Philippines are mostly driven by state actors. For instance, the Philippines' assent to the Rome Statute was delayed for several years due to President Arroyo's refusal to ratify the treaty. However, once the ICC exercised its jurisdiction to investigate the Duterte administration for extrajudicial killings in the "war on drugs," the Philippines expressed its desire to withdraw from the treaty obligation. Further, the Philippine government portrayed the "war on drugs" as its mechanism for protecting human rights and used this to justify its re-election bid into the UNHRC. After the election was held, the government claimed that their victory was an affirmation of the international community's support of the "war on drugs" as a human rights advocacy.

The Philippine experience with international human rights institutions show that while it may seem that the adherence to human rights standards is a product of states upgrading their common interests, this is clearly not the case. The agreement is based on a minimum common denominator because states can claim that they observe the standards and directory provisions provided by these international laws without actually having to subject themselves to the supposedly mandatory provisions and sanctions in cases of non-compliance as determined by the international community. Additionally, states have the choice to withdraw at any time the authority they delegated to international bodies to monitor and sanction their performance of treaty obligations. Even if the ICC has asserted that the Philippine government can still be the subject of an ICC investigation and prosecution, the fact that State Parties have the option to unilaterally withdraw in itself shows that the degree of authority delegated to the ICC can be temporal in nature. Literature on constitutionalization suggests that the splitting of sovereignty occurs in state adherence to international law, but these do not seem to factor in internal decision-making processes motivating states to adhere to these laws.

Another means of illustrating the monistic conundrum is the use of national laws by the Duterte administration as basis for interpreting its treaty obligations and defenses against non-compliance. This is significant because

such arguments are based on conflicting theories of monism, which are harmonized to support the Philippine government's position externally despite remaining internally ambiguous. For instance, the Duterte administration invokes the principle of state sovereignty when criticized on human rights violations. The president has also ordered the PNP not to cooperate with examinations by the UNHRC. These actions are inherently contradictory to the election promises that the Philippines made in its re-election bid in the UNHRC. Further, state actors have grounded their interpretation of and adherence to the Rome Statute based on national law. Both Enrile—in explaining his dissenting vote—and Duterte—in his justification for withdrawing from the ICC—focused on the contradiction between the Philippine constitution, which grants an incumbent president immunity from suit, and the Rome Statute, which does not exempt an incumbent president from suit in the ICC. Also worthy of note is Duterte's use of the publication requirement mandated in *Tañada v. Tuvera*[239] as a justification for the inapplicability of the Rome Statute, which effectively invokes the doctrine of transformation.

However, despite the treaty and incorporation clauses being used to defend the Philippine government's position in the international community, there are still internal ambiguities regarding how the different branches of government interpret, apply, and evaluate the hierarchical value of these clauses. After the executive decision to withdraw from the ICC, the legislative contested the decision based on the treaty clause while the executive justified its decision using the incorporation clause. The judiciary has not yet resolved the matter.

Since the methods of incorporating international law into national law can come from different sources, this in itself highlights the difficulty of creating a monistic international and national law system. Since there is no internal hierarchical order in the international legal system giving weight to these clauses, which are based on customary international law, states can choose the value to be given to these norms from their perspective. This internal valuation can be used to either defend or oppose their subjection to the international legal system, giving states the power to justify their concessions based on normative rules accepted as part of the system.

But even the state's internal valuation of international norms is not a sufficient organizing principle harmonizing national and international law. The state actors, even amongst themselves, may not be unanimous as to how these clauses apply, especially if there is ambiguity in the national law that

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[239] G.R. No. No. L-63915, 146 SCRA 446 (1986).

serves as a guiding principle to the evaluation of these international norms. As such, the mechanisms for integrating international law to national law are themselves questionable.

While the international legal order can have co-existing and complementary laws, there is nothing within the system that organizes it to make it internally cohesive and self-regulating. However, it appears that the movement of constitutionalization mimics Kelsen's perception of the Grundnorm of national legal order—the principle of efficiency—on an international scale. However, this movement contradicts the very foundation of international law as being based on state consent and customs resulting from actual state behavior. Ultimately, in this situation, state actors can choose how to justify their compliance with international law and direct their behavior accordingly. In effect, such compliance or lack thereof is still a matter rooted in individual state interests rather than collective upgraded interests of the international community. State actors decide when national law should be considered as supreme over international law, or vice versa. The operationalization of these two bodies of law into a single system is still dependent on how much states are willing to concede and how they choose to organize and value the principles found in these separate spheres of law to their advantage.

This discussion does not support Haas' idea that the achievement of universal human rights through a global integrative force may be possible due to the interest of state actors in pursuing this goal. Quite the opposite, it illustrates that states are focused on their own interests and goals. Because they are self-preserving, the creation of a monistic legal system which upholds the primacy of international law faces the challenge of factoring in the interests of these actors. Additionally, as this discussion illustrates, these interests are shifting, possibly temporal, and relatively unstable. State interests can be assessed based on the level of accommodation states make in constituting international agreements and their shifts in concessions when confronted with the obligations and sanctions resulting from these agreements. The viability of international laws and the international legal order can be better understood and evaluated in these terms.

Alone, Kelsen's theories of harmonizing national and international law based on organizing legal orders around basic norms is insufficient to explain the problems of creating a monistic legal system. This is because the norm's applicability would always be mediated through states. By using the integration theory, the challenges of monism are further highlighted by showing gaps in the literature on international law theories in both its traditional and modern iteration. These theories do not factor state agency in

regulating their conduct when engaging with the international community. This is imperative considering the conception of international law as dependent on the consent of states and the foundation of the international legal order as based on the actual conduct of states in its relations with other states.

V. CONCLUSION

Returning to the central question of this preliminary inquiry, it is necessary to determine the underlying political context that motivates state adherence to international law in order to understand the process of constitutionalization occurring in the international arena. Assessing these through demands made, concessions exchanged, and degree of delegation of authority among states shows the challenges that face the monistic theory of international law, in both its traditional and present iteration. Following Kelsenian thought, the primacy of the domestic law over international law as a reference point in the unification of the international human rights regime reigns supreme, contrary to the present models of monism that suggest a unification of the regime through constitutionalization from the perspective of the primacy of international law. As Kelsen illustrated, only one paradigm can be supreme; they cannot co-exist within the same system. However, the present political reality of the existing international legal order is that actors engage with two competing conceptions of harmonizing the national and international legal orders, operating simultaneously and battling for authority.

Through international organizations, norms are created by the international legal order to regulate the behavior of member states in the international arena. However, these organizations themselves recognize state compliance with international norms is dependent on state consent. This creates a situation wherein there are international norms to be complied with, but effective compliance would depend on the state upgrading its internal standards to conform with these norms. States, in the exercise of their sovereignty, can choose whether or not to adapt these international norms in their existing legal orders. For instance, the presence of incorporation and treaty clauses in national constitutions already assert the primacy of domestic law. These serve as guiding principles in organizing the domestic and international legal regimes into a single, unitary system operating within a state. They determine which norms are adopted into the national legal order, and the terms for their adoption as dictated by state actors' preferences. This is evidently shown by the conflicting responses of the Philippines to international human rights law. The country asserts its role in the international arena as a champion of these rights, but it does not want to be held

accountable or subjected to penal sanctions for its non-compliance with these standards, and has invoked the primacy of national law through the incorporation clause to defend its position.

The international legal order itself is also not cohesive in its conceptualization and application of international law as a body of regulations governing the relationship of states. In the context of human rights law, laws constituted in different treaties and conventions involving separate international organizations may be facially similar but may yield contradictory results. These contradictions create conflicting but simultaneously valid and applicable results that generate confused applications of international law according to Kelsen's theory. Additionally, they illustrate gaps in theories on the constitutionalization of international law that do not consider the international legal order in its entirety but focus on specific treaties that are emblematic or demonstrative of constitutionalization from a federal standpoint.

As these cases illustrate, using domestic law as a reference point shows the lack of integration within Haas' conceptualization of upgrading common interests. State actors' preferences control their adherence to international norms. The international community is rendered incapable of enforcing sanctions to ensure compliance on nation-states or forcibly excluding them from international legal regimes. Moreover, this commonality of the primacy of states over international norms is illustrated by the election of other problematic states into the UNHRC, indicating that the Philippine experience is not unique. For legal monism from the reference point of the primacy of international law to occur, there must be upgrading of common interests underlying the process of constitutionalization. If the constitutionalization process occurs without it, then the creation of new norms may fail the Kelsenian sense of establishing new constitutions in the transcendental-logical sense.

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