OVERCOMING JURISDICTIONAL IMMUNITIES: A REMEDIES FRAMEWORK FOR EMPLOYEES OF INTERNATIONAL ORGANIZATIONS IN THE PHILIPPINES*

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ABSTRACT

For decades, domestic courts, including Philippine courts, have denied appropriate remedy to employees of international organizations ("IO") whose rights were breached in the course of official duties, in favor of the functional necessity doctrine and the State obligation to grant IO immunity arising from treaties. This Note contributes to the literature of IO immunities and employees' rights by arguing that the State obligation to ensure the rights (1) to equality before courts and tribunals and (2) to a fair and public hearing by a competent, independent, and impartial tribunal of persons, the IO employees in particular, under Article 14 (1) of the International Covenant on Civil and Political Rights, may not be unduly restricted by treaty obligations granting IO immunity. While recognizing the concurrent treaty obligations pursuant to the principle of *pacta sunt servanda*, it explores the potential of the Philippine legal concept of judicial review in relation to grave abuse of discretion as a basis to penetrate IO immunity, in cases where the ICCPR rights of IO employees are undermined. Informed by trends in other jurisdictions and by the progressive development of international law, this Note proposes a framework of analysis for Philippine domestic courts to overcome the jurisdictional bar of IO immunity and to provide remedies to employees that are adequate and compliant with international human rights law. Lastly, this

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Note seeks to explore policy and legal considerations faced by the Philippines in affording remedy to aggrieved IO employees.

I. INTRODUCTION

In the last hundred years, the world has seen a legal trend that increasingly favors, or at the very least recognizes, the value of labor. From a purely economic standpoint, labor had been long classified as a mere factor of production because of its apparent contribution to economic value or industrial growth and development. Years of treating labor as a mere *element* and a necessary cost to an economic enterprise, may it be agriculture, manufacturing, or service, have led to horrors upon horrors of abuses, exploitation, and maltreatment of persons for the sake of efficient, although gravely mistaken, concept of production.

It would take resistance from pockets in different parts of the world against such a seemingly flawed model to see that labor is not something that an industrialist at his whim can buy, use, and unfortunately dispose of. A rethinking and a more fundamental understanding of the role of labor in society would show that it is unlike any raw material in a supply chain; that it directly relates to human dignity and integrity and an orderly functioning of a society. It carries and deserves its protection in law, as we know it today, most especially because it involves the person and bodily integrity of the one providing labor. Indeed, labor does not only pertain to the factor of production, but it calls the very people who provide such.[1]

In contemporary legal history, the rights of labor were recognized in the Universal Declaration of Human Rights ("UDHR") in 1949, which states:

> Article 23.
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> (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
> (2) Everyone, without any discrimination, has the right to equal pay for equal work.
> (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence

[1] *See* Baron v. EPE Transport, Inc., G.R. No. 202645, 765 SCRA 345, 356, Aug. 5, 2015, *citing* Eastern Shipping Lines, Inc. v. Phil. Overseas Emp't Admin., G.R. No. 76633, 166 SCRA 533, 547, Oct. 18, 1988. "Labor is not a mere employee of capital but its active and equal partner."

> worthy of human dignity, and supplemented, if necessary, by other means of social protection.
> (4) Everyone has the right to form and to join trade unions for the protection of his interests.

The conventions we know today as the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR") were both concluded in 1966 to make the UDHR effective and bind the States to "guarantee and ensure the protection of these rights." Some of the rights enshrined in the ICCPR include freedom from slavery,[2] right not to be subjected to forced labor,[3] freedom of association,[4] freedom of expression,[5] right to equality before courts and tribunals,[6] and equal protection under the laws without discrimination.[7] The ICESCR, on the other hand, includes right to work,[8] right to just and favorable conditions of work,[9] right to form trade union,[10] and right to strike.[11]

On a more nuanced understanding of labor rights, the International Labour Organization ("ILO") has identified the fundamental rights that specifically protect labor: "(a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation."[12] The State parties, through various international conventions named b2y the ILO as *fundamental conventions*, bound themselves to uphold these rights.[13] As of 2019, the ratifications by the State parties of

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[2] International Covenant on Civil and Political Rights [hereinafter "ICCPR"], art. 8, ¶ 1, Dec. 19, 1966, 999 U.N.T.S. 171.

[3] Art. 8, ¶ 3(a).

[4] Art. 22, ¶ 1.

[5] Art. 19, ¶ 2.

[6] Art. 14, ¶ 1.

[7] Art. 26.

[8] International Covenant on Economic, Social, and Cultural Rights [hereinafter "ICESCR"], art. 6, ¶ 1, Dec. 13, 1966, 993 U.N.T.S. 3.

[9] Art. 7.

[10] Art. 8, ¶ 1(a)–(c).

[11] Art. 8, ¶ 1(d).

[12] Int'l Lab. Org., *ILO Declaration on Fundamental Principles and Rights at Work*, Adopted by the International Lab. Conf. at its Eighty-Sixth Session, Geneva, (June 18, 1998).

[13] The eight fundamental conventions are: (a) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); (b) Right to Organise and Collective Bargaining Convention, 1949 (No. 98); (c) Forced Labour Convention, 1930 (No. 29) (and its 2014 Protocol); (d) Abolition of Forced Labour Convention, 1957 (No. 105); (e) Minimum Age Convention, 1973 (No. 138); (f) Worst Forms of Child Labour Convention,

said conventions are at 92% of the number of possible ratifications, and only 121 ratifications short of achieving universal ratification across all conventions.[14]

In the Philippines, the 1987 Constitution guarantees an array of rights to labor in Article XIII, Section 3[15] in light of its foundational inclination to social justice. These rights are operationalized for instance by the Labor Code of the Philippines which creates a strong presumption in favor of workers' rights and welfare.[16]

More often than not, at least in the Philippine jurisdiction, the rights of employees in the private sector and public sector are clear,[17] aside from the perennial legal question on contractualization that hounds the labor sector. However, this is not the case for all employees, or labor, in the country.

In this Note, of primary concern are the rights of employees of international organizations ("IOs") headquartered in the Philippines, particularly their (1) right to equality before courts and tribunals and (2) right to a fair and public hearing by a competent, independent, and impartial

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1999 (No. 182); (g) Equal Remuneration Convention, 1951 (No. 100); (h) Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

[14] Int'l Lab. Org. ("ILO"), *Conventions and Recommendations*, ILO WEBSITE, *at* https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm (last visited Mar. 8, 2021).

[15] "The State shall afford full protection to labor, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all.

It shall guarantee the rights of all workers to self-organization, collective bargaining and negotiations, and peaceful concerted activities, including the right to strike in accordance with law. They shall be entitled to security of tenure, humane conditions of work, and a living wage. They shall also participate in policy and decision-making processes affecting their rights and benefits as may be provided by law.

The State shall promote the principle of shared responsibility between workers and employers and the preferential use of voluntary modes in settling disputes, including conciliation, and shall enforce their mutual compliance therewith to foster industrial peace.

The State shall regulate the relations between workers and employers, recognizing the right of labor to its just share in the fruits of production and the right of enterprises to reasonable returns to investments, and to expansion and growth."

[16] LAB. CODE, § 4.

[17] While labor rights are arguably clear in the Constitution and in the laws, the experience on the ground is still distant from the ideals set by them. *See, e.g.*, Paul L. Quintos, *A Century of Labour Rights and Wrongs in the Philippines*, ASIA PAC. LAB. L. REV. (2003). Bach M. Macaraya, *The Philippines: Workers' Protection in a New Employment Relationship*, ILO WEBSITE (2006), *available at* https://ilo.org/ifpdial/areas-of-work/labour-law/WCMS_205376/lang--en/index.htm; Lorenza Errighi, Sameer Khatiwada, & Charles Bodwell, *Business process outsourcing in the Philippines: Challenges for decent work*, ILO ASIA-PACIFIC WORKING PAPER SERIES (2016), *available at* https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/publication/wcms_538193.pdf.

tribunal under Article 14(1) of the ICCPR. As will be further discussed in the sections below, these employees are in a unique and challenging position, most especially in the recognition and assertion of their rights, due to the legal nature of IOs as an entity and an employer. There is a wide gray area that remains to be settled to successfully mark the boundaries of their corresponding rights and obligations.

More specifically, what is sought to be explored in this Note is the situation where an aggrieved IO employee, due to an employment dispute or rights violation, is denied relief by his IO employer, through an internal dispute mechanism, and upon seeking appropriate relief from the courts of law, is *again* denied on the ground of the IO's subsisting legal immunity granted by the State or by a constituent instrument.

Recognizing a prior grant of immunity to an IO, what is the appropriate judicial approach to ensure access to legal remedy and to grant of reliefs, when warranted, to said employee? While primarily related to labor law, these questions will be better analyzed from the spheres of international law within a right-obligation framework and relevant Philippine Supreme Court jurisprudence thereon. It is argued that an incomplete appreciation of the competing interests at play will necessarily lead to injustice and failure to fulfill a legal obligation. More fundamental to the foregoing question is, *in such context, how can the Philippines simultaneously fulfill its international obligations—first, to IO employees in the Philippines; second, to IOs headquartered in the Philippines?*

This Note is divided into five parts. Part II presents an overview of IOs and its nature, including its history in international law. The functional necessity doctrine that has helped protect IOs from domestic legal processes will also be discussed in relation to the experiences of IO employees in seeking relief for employment disputes and rights violations through a review of the leading cases involving IO immunity from both foreign and Philippine jurisprudence. Part III uses the classic right-obligation framework that is fundamental in understanding the scope and content of rights provided by sources of international law (i.e., ICCPR, Article 14 (1) concerning the employees' rights to equality before courts and tribunals and to a fair and public hearing by a competent, independent, and impartial tribunal and the IO's right to be immune from legal processes) with which the State is concurrently obligated to comply. Part IV proposes a legal framework of analysis to overcome the hurdles posed by the contending, and often interspersed, rights and obligations to give full force and effect to them, giving primacy to the principle that the State must perform its obligations in good faith. Lastly, Part V extends the discussion to the proposed framework's

possible legal and policy implications in terms of international law-making and the growing community of continuously evolving IOs.

II. INTERNATIONAL ORGANIZATIONS

A. In Context: International Organizations and Functional Immunity

Being the central actor considered in this Note, a historico-legal discussion of IOs is necessary to understand the premise of the arguments hereinafter.

The history of modern IOs started with organizations of technical nature, which did not need immunity from legal processes as understood in its current legal meaning.[18] Such immunity was developed into a 'necessity' after the First World War, when international peace and security in global governance became a priority of the League of Nations, the predecessor of the United Nations ("UN").[19] The officials of the League of Nations sought immunity equivalent to the diplomatic immunity enjoyed by representatives of States.

Later on, after the Second World War, during the re-building of international institutions of global governance, such as the UN, the immunity of IOs was guaranteed, giving the latter international legal personality and consequent protection to perform their functions free from State interference.[20] This was a response to the negative experience of IOs pre-Second World War. Some of these immunities were granted through treaties,[21] while other States granted immunities through domestic statutes.[22]

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[18] Daniel D. Bradlow, *Using a Shield as a Sword: Are International Organizations Abusing Their Immunity*, 31 TEMP. INT'L. & COMP. L.J. 45, 48 n.20 (2017).

[19] *Id.* at 48 n.22. *See* League of Nations Covenant, pmbl. *See also* Josef L. Kunz, *Privileges and Immunities of International Organizations*, 41 AM. J. INT'L. L. 828, 829–30 (1947).

[20] Bradlow, *supra* note 18, at 48 nn.24–25. *See* Kunz, *supra* note 19, at 839, for the discussion on the recognition of functional immunity of the UN after Second World War.

[21] *See* Convention on the Privileges and Immunities of the United Nations, art. 11(2), Feb. 13, 1946, 21 U.S.T. 1419, 1 U.N.T.S. 15.

[22] *See, e.g.,* International Organizations Immunities Act of 1945, 22 U.S.C. § 288a(b) (2012); Pres. Dec. No. 1620 (1979). Granting to the International Rice Research Institute (IRRI) the Status, Prerogatives, Privileges and Immunities of an International Organization. *See also* THE PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS IN DOMESTIC COURTS (August Reinisch ed., 2013).

The immunity granted to IOs is characterized as follows:[23]

1. "[S]ince the IOs are only granted functional immunity, it is important to identify their functions. These are stipulated in the IOs' founding treaties [or constituent agreements]."[24] For example, the UN's purposes are: "maintaining worldwide peace and security, fostering cooperation between nations in order to solve economic, social, cultural, or humanitarian problems, and promoting human rights."[25]

2. Unlike diplomatic immunity, the immunity granted to IO officials only applies when they are on official business, because the purpose of the immunity is to protect the functioning of the IO, rather than the official *per se*.[26]

3. "IOs should be willing to either waive their immunity when dealing with commercial suppliers or provide a reasonable alternative remedy[,]"[27] such as arbitration.[28]

4. "IOs have long recognized that, in order to attract qualified staff and out of respect for the rights of these employees, they needed to offer their employees some alternative forum to domestic courts for dealing with employment related issues."[29] For example, the International Labour Organization Administrative Tribunal ("ILOAT") was established to hear employment cases relating to IOs.

5. IOs may, on occasion, be a party in a tort claim.[30]

The transition to a grant of immunity to IOs was essential to the new roles that they had to play in international affairs. To avoid external influence and interference from States, the most effective way to protect IOs from such

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[23] Bradlow, *supra* note 18, at 51–53 nn.53–67.

[24] *Id.* at 51

[25] U.N. CHARTER, art. 1, ¶ 4.

[26] Bradlow, *supra* note 18, at 52.

[27] *Id.*

[28] *See* China Nat'l Machinery v. Santamaria [hereinafter "*China Nat'l Machinery*"], G.R. No. 185572, 665 SCRA 189, 212, Feb. 7, 2012. "An agreement to submit any dispute to arbitration may be construed as an implicit waiver of immunity from suit."

[29] Bradlow, *supra* note 18, at 52.

[30] *Id.*

was to grant them, their officials, their property, and their records, immunity for acts performed in official capacity.

However, contrary to the assumption that States would generally want to intervene in the internal affairs of IOs, States have respected the legal and operational independence of IOs and their performance of broader functions.[31] Such broader functions allowed direct interactions between IOs and citizens of States, but the nature of immunity stayed the same. This development has been aptly characterized as follows: "[T]he immunity that IOs acquired to shield them from interference by their member-states and to protect their operational independence has become a sword with which they can ward off attempts by adversely affected people to hold IOs accountable for the way in which they use their power."[32]

For example, the UN now plays a greater role than what its constituent agreement expressly states. Due to the vagueness and flexibility of the purposes of the UN, together with its nature as the premier IO mandated to keep peace among States, its purpose has been interpreted liberally; thus, its functions have been understood to cover a wide range as well.[33]

This unexpected development in IO affairs has tipped the balance of powers among the actors in international law. IOs can now influence the policies and both international and domestic affairs of States, which directly affect the citizens of the latter.[34] The problem, however, lies in the 'shield' developed by the IOs, where they are not directly accountable due to their functional immunity and to the lack of legal relationship between IOs and citizens. This means that the latter cannot seek a forum to hold the IOs accountable. The result of this transformation has earned the skepticism of actors and observers in the international community.[35]

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[31] *Id.* at 53.

[32] *Id.* at 54.

[33] *See* Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. 174 (Apr. 11).

[34] Bradlow, *supra* note 18, at 56.

[35] *See, e.g.,* Robin Silverstein, *Revisiting the Legal Basis to Deny International Civil Servants Access to a Fundamental Human Right*, 25 MICH. ST. INT'L L. REV. 375 (2017); Greta L. Rios & Edward P. Flaherty, *International Organization Reform of Impunity - Immunity is the Problem*, 16 ILSA J. INT'L & COMP. L. 433 (2010); Philippa Webb, *The Immunity of States, Diplomats and International Organizations in Employment Disputes: The New Human Rights Dilemma?*, 27 EUR. J. INT'L L. 745 (2016). For a general overview, *see, e.g.,* August Reinisch, *The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals*, 7 CHINESE J. INT'L L. 285 (2008).

B. Employees

With the creation of IOs came the reality that they had to hire employees. Before the idea of international civil service that the world knows today, the staff of IOs were originally considered as civil servants of the host State, where the IO was headquartered, or were sourced from member-States on a 'secondment' basis, which meant that the staff were covered by the labor laws of the member-State.[36]

During the post-First World War, the international civil service—loyal only to the IO, and not to any member-State—that survives until today was successfully proposed by Sir Eric Drummond, the first Secretary-General of the League of Nations.[37] The League of Nations' officials "are exclusive international officials and their duties are not national but international."[38] This practice continued even after the Second World War under the UN. The UN Charter firmly proscribes the Secretary-General and the UN staff from "seek[ing] or receiv[ing] instructions from any government or from any other authority external to the Organization."[39] An equivalent declaration with regard to the UN staff is directed to the UN member-States "to respect the exclusively international character of the responsibilities" and "not to seek to influence them in the discharge of their responsibilities."[40]

The formation of a class of international civil servants is related to the functional immunity enjoyed by IOs. It was thought that if an IO was dedicated to a particular function, then consequently its staff and employees would have to be exclusively committed in pursuing that function. With this, the functional immunity granted to an IO was seen to extend to its employees.

The historical development also showed that functional immunity has caused IOs to be out of reach not only of citizens of member-States, but also of its own employees and staff. *What labor law would apply to an IO employee and staff, and to where does the employee go?* An example is the predecessor of the ILOAT, established in 1927, which serves as the internal administrative tribunal tasked to settle disputes arising from the legal relations between IO

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[36] Jan Klabbers, *The EJIL Foreword: The Transformation of International Organizations Law*, 26 EUR. J. INT'L. L. 9, 55 (2015). *See also* CHITTHARANJAN FELIX AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS (1996).

[37] Klabbers, *supra* note 36.

[38] *Id.* at 55, *citing* THOMAS G. WEISS, INTERNATIONAL BUREAUCRACY 35 (1975).

[39] U.N. CHARTER, art. 100, ¶ 1.

[40] Art. 100, ¶ 2.

and its staff, although numerous IOs currently have their own administrative tribunals.[41]

There has been a number of recognized circumstances when an IO was successfully sued before domestic courts, such as when the IO itself waived its immunity or consented to the suit or when the IO's constituent instrument specifically carved an exception to the immunity. However, domestic courts, whether due to the lack of express exception from immunity or some other reason, have been less willing to take jurisdiction over actions against IOs involving their employment relations, as narrated below.

This Note draws heavily from Professor Jan Klabbers' brief review of jurisprudence on employee suit against IO before domestic courts as early as 1931. In the cases of *International Institute of Agriculture v. Profili*,[42] the Italian Court of Cassation ruled to uphold the immunity of the International Institute of Agriculture, the predecessor of today's Food and Agriculture Organization under the UN, but noted that "such immunity may come with some unfairness."[43] The decision stated that the IO employee must only seek relief or appeal to the very organ that had dismissed him. It effectively ruled that even the judiciary of States, through the domestic courts, cannot interfere with the affairs of the IO.[44]

In 1978, a US court continued the trend of upholding immunity of IOs in the case of *Broadbent v. Organization of American States*.[45] However, in 1983, a Dutch court started a new line of jurisprudential possibility, stating that employment relations are not covered by 'official acts' of the IO; hence, the IO could not invoke immunity over such matters.[46] This was reversed on appeal by a higher court, but "it nonetheless contained a hint that organizations would not be completely untouchable, or, at the very least, it suggested that the immunity of [IOs] was in need of a theoretical justification."[47]

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[41] Klabbers, *supra* note 36, at 56. *See* Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. Rep. 47, 57 (July 13).

[42] International Inst. of Agric. v. Profili, Giur. Ital. I 1931, col. 738: 5 Ann. Dig. 413 (Court of Cassation, Italy, 1930).

[43] Klabbers, *supra* note 36, at 57.

[44] *Id.* at 57 n.246.

[45] 628 F.2d 27 (D.C. Cir. 1980).

[46] Klabbers, *supra* note 36, at 58, *citing* Iran–United States Claims Tribunal v. A.S., 94 ILR 321 (Decision of the Local Court of The Hague, 1985).

[47] *Id.* at 58.

Also included in Klabbers's discussion is the case of *Mendaro v. World Bank*.[48] Mendaro, a citizen of Argentina who was working as a researcher for the World Bank, filed an action before a US court claiming sexual harassment and discrimination by co-employees and inaction by supervisors. The US court upheld the World Bank's immunity, citing the functional necessity doctrine:

> "[A] waiver of immunity in employment disputes does not serve the Bank's purposes and might even come to damage its worldwide operations.
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> [T]he absence of immunity in employment relations 'would lay the Bank open to disruptive interference with its employment policies', and, not to put too fine a point to it, the Court gave as a hypothetical example that being subjected to national employment laws and employment cases before national courts might make it difficult for the Bank to 'establish and administer effective employment practices regarding Jewish employees in offices located in Middle Eastern countries'."[49]

C. International Organizations and Employees in Philippine Law

Philippine Supreme Court jurisprudence has been consistent in categorically denying jurisdiction over cases filed by IO employees and staff relating to employment relations on the ground of IO immunity.

In the consolidated case of *International Catholic Migration Commission ("ICMC") v. Calleja*,[50] a trade union filed with the Ministry of Labor and Employment a petition for certification election, a process where the sole and exclusive bargaining representative of the rank-and-file members employed by ICMC would be chosen. The latter opposed said petition on the ground that it enjoys immunity. The Supreme Court resolved the issue of whether or not the grant of immunities to ICMC extends to immunity from the application of Philippine labor laws. The respective immunities of ICMC and of the International Rice Research Institute ("IRRI") from Philippine labor laws were resolved in the same case, stating that:

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[48] 717 F.2d 610 (D.C. Cir 1983).

[49] Klabbers, *supra* note 36, at 58–59 nn.251–53.

[50] [Hereinafter "*ICMC*"], G.R. No. 85750, 190 SCRA 130, Sept. 28, 1990.

> The immunity granted being "from every form of legal process except in so far as in any particular case they have expressly waived their immunity," it is inaccurate to state that a certification election is beyond the scope of that immunity for the reason that it is not a suit against ICMC. A certification election cannot be viewed as an independent or isolated process. *It could trigger off a series of events in the collective bargaining process together with related incidents and/or concerted activities, which could inevitably involve ICMC in the "legal process," which includes "any penal, civil and administrative proceedings."* The eventuality of Court litigation is neither remote and from which international organizations are precisely shielded to safeguard them from the disruption of their functions. Clauses on jurisdictional immunity are said to be standard provisions in the constitutions of international organizations. "The immunity covers the organization concerned, its property and its assets. It is equally applicable to proceedings *in personam* and proceedings *in rem*."[51]

It is necessary, however, to discuss the incisive rebuke of Dean Merlin Magallona of the "gross errors and inaccuracies" found in the Supreme Court decisions considered to be the foundations of IO employment jurisprudence in the Philippines. In his article, *The Supreme Court and International Law: Problems and Approaches in Philippine Practice*,[52] Magallona points to two relevant fundamental errors that were made in the case of *ICMC*: (a) confusion between IOs recognized under international law and those that are *not* recognized; and (b) unauthorized grant by the Philippine State of international legal status or personality, and consequently of immunity, to IOs of the latter category.

Magallona explains the first error by defining what an IO recognized under international law exactly means:

> In international law, international organization characterized as persons in law are intergovernmental organizations; the States establishing it in a multilateral treaty comprise its membership. Thus, in the law of treaties the term "international organization" means an intergovernmental organization. Article 5 of the Vienna Convention on the Law of Treaties provides that it applies to any treaty "which is the constituent instrument of an international organization[.]" [...] As a person under international law, an international organization of this category is a bearer of rights and obligations as defined in its constituent instrument.[53]

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[51] *Id.* at 145. (Emphasis supplied.)

[52] Merlin Magallona, *The Supreme Court and International Law: Problems and Approaches in Philippine Practice*, 85 PHIL. L.J. 1 (2010).

[53] *Id.* at 76–77. (Citations omitted.)

Magallona then argues that ICMC is not an IO recognized under international law, because such is an "[IO] of the non-governmental category, the type not created under international law as an international person."[54] Instead, it is a private corporation incorporated under laws of the State of New York, not created through a constituent agreement among States.[55] Thus, ICMC, according to Magallona, cannot derive its rights and obligations from international law, which consequently means that "ICMC [cannot] establish diplomatic immunity or international immunity under international law."[56]

The second error centers on the fact that the basis for the immunity recognized in favor of ICMC was the Memorandum of Agreement between the Philippine Government and ICMC, which granted to the latter the "status of a specialized agency" or "similar to that of a specialized agency."[57] It is from this *status* that ICMC was covered by the privileges and immunities under the Convention on the Privileges and Immunities of the Specialized Agencies,[58] as argued and affirmed in the decision. Magallona argues that this violates principles of international law as follows: "In effect, by unilateral act, the Philippine Government has achieved two results: transforming ICMC into a specialized agency and placing it under the system of privileges and immunities of the Convention on Specialized Agencies—acts which are way beyond the competence of the Philippine Government."[59] In summary, Magallona argues that the grant of immunity to ICMC is not binding under international law.

How then must such immunity be appreciated in light of other State obligations, specifically the ICCPR obligations analyzed in this Note? Magallona briefly answers that "the Agreement in question [referring to Agreement granting immunity to IO *not* recognized under international law] *does not constitute a treaty*; it stands merely as an *agreement with a private corporation* and must be *subordinated to constitutional mandates and statutory rights.*"[60]

In effect, immunities granted to IOs recognized under international law are of treaty status, which then binds the Philippine State to an international obligation to respect such immunity. On the other hand,

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[54] *Id.* at 77.
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] Nov. 21, 1947, 33 U.N.T.S. 261.
[59] Magallona, *supra* note 52, at 77.
[60] *Id.* at 80. (Emphasis supplied.)

immunities granted to IOs *not* recognized under international law are of mere contract status, which does not bind the Philippine State to an international obligation.

For the purposes of this Note, unless and until the Supreme Court in a future decision recognizes the gross errors pointed out by Dean Magallona, there remains significant value in using the line of jurisprudence created by *ICMC* as a starting point. Such characterization of IO immunity in *ICMC* reflects the judicial philosophy and trend in the Philippine legal system on IO immunities—whether they are properly granted to IOs recognized under international law or otherwise.

It is wise, however, to keep in mind that if and when Magallona's distinction soon prevails in jurisprudence, then this Note's analysis is fit to face and harmonize the apparent conflict between ICCPR obligations and immunities granted to IOs recognized under international law—both of which are considered treaty obligations. Subscribing to Magallona's observation, this Note considers, on the other hand, that there is no further conflict or genuine legal issue to settle between ICCPR obligations and immunities granted to IOs *not* recognized under international law, precisely because they do not occupy the same tier in the hierarchy of laws.

It is unfortunate that despite the on-going debates on IO immunity in other jurisdictions at that point in time, the Philippine Supreme Court religiously subscribed to IO immunity as if it was the *only* possible way that these cases could have been decided.[61]

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[61] It is noteworthy, although merely an *obiter dictum*, that the Court discussed the alternative modes of settlement that supposedly could be the proper venue of the employees' grievances in that particular case. The discussion, however, was pertaining to the right to self-organization under the Philippine Constitution, and not to the ICCPR rights in consideration in this Note. The Court said:

> For, ICMC employees are not without recourse whenever there are disputes to be settled. Section 31 of the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations 17 provides that "each specialized agency shall make provision for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of private character to which the specialized agency is a party."
>
> * * *
>
> Neither are the employees of IRRI without remedy in case of dispute with management as, in fact, there had been organized a forum for better management-employee relationship as evidenced by the formation of the Council of IRRI Employees and Management (CIEM) wherein "both management and employees were and still are represented for purposes of maintaining mutual and beneficial cooperation between IRRI and its employees.

This was continued by the cases of *Southeast Asian Fisheries Development Center v. National Labor Relations Commission (NLRC)* in 1992,[62] *Southeast Asian Fisheries Development Center ("SEADFC") v. Acosta* in 1993,[63] *SEADFC v. NLRC* in 1995,[64] *Callado v. IRRI* in 1995,[65] and *Department of Foreign Affairs (DFA) v. NLRC* in 1996.[66]

This Note is a response to this line of jurisprudence that has made it nearly impossible for employees of an IO headquartered or operating in the Philippines to have access to remedies and consequent reliefs from the country's judicial system. Like the decision of the Dutch court in 1983,[67] in matters, especially those involving the law, that have earned the reputation of being unfair, an alternative legal perspective and analysis must definitely be explored for there must be no closed doors where there is injustice.

III. CLASSIC RIGHTS-OBLIGATIONS FRAMEWORK

The starting point is to examine the specific rights and obligations, particularly: (a) their sources, (b) the holders and bearers of said rights and obligations, respectively, and (c) their scope and content. Besides these, the classic rights-obligations framework is used to inquire more importantly into which instances or situations a breach of such obligation occurs.

There are two sets of rights and obligations that are pertinent in this Note: *first*, that between the State and persons within its jurisdiction, and *second*, that between the State and the IO. In both cases, it is the State that has the obligation to comply with the guarantees provided by sources of law in favor of persons or IOs.[68]

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[62] [Hereinafter "*SEAFDEC*"], G.R. No. 86773, 206 SCRA 283, Feb. 14, 1992.

[63] G.R. No. 97468, 226 SCRA 49, Sept. 2, 1993.

[64] G.R. No. 82631, 241 SCRA 580, Feb. 23, 1995.

[65] G.R. No. 106483, 244 SCRA 210, May 22, 1995.

[66] [Hereinafter "*DFA*"], G.R. No. 113191, 262 SCRA 39, Sept. 18, 1996.

[67] *See supra* note 46.

[68] A third set of rights and obligations, that between the IO and the IO employee, may be examined in a future research. The said rights and obligations may be viewed either from the perspective of various sources of international law, such as treaties and customs, or of a particular contract of engagement (i.e., employment, consultancy, or service contracts) entered into by the IO and the IO employee. While an inclusion of this set of rights and obligations would make the understanding more comprehensive, this Note refrained from incorporating the third stream into the analysis due to its intended focus on State obligations.

At the end of this Part, the tension between the two sets of rights and obligations will be explored and clarified to build the foundations of the framework to be proposed in Part IV.

A. Between State and Persons (i.e., Employee)

1. Source of Right/Duty

The (1) right to equality before courts and tribunals, and the (2) right to a fair and public hearing by a competent, independent, and impartial tribunal are provided in Article 14 of the ICCPR, a treaty entered into by State parties, including the Philippines, for the purpose of recognizing "the inherent dignity and of the equal and inalienable rights of all members of the human family."[69] Such source of international law falls under "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states."[70]

Aside from substantive rights in the ICCPR, there are procedural rights as well that State parties equally value as essential to the plethora of rights that must be guaranteed to every person. These procedural rights are all the same important for the protection of human rights and upholding of the rule of law and are complementary to the protections of substantive rights.

An excerpt of the ICCPR relevant to the scope of this Note is as follows:

> Article 14
>
> 1. All persons shall be equal before the courts and tribunals. In the determination [...] of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...] [A]ny judgement rendered [...] in a suit at law shall be made public[.]

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[69] ICCPR, pmbl. ¶ 1.

[70] Statute of the International Court of Justice [hereinafter "ICJ Statute"] (1946), art. 38, ¶ 1(a). As will be discussed later on, this categorization of the source of international law does not preclude other possible determination that may consider said right and obligation as 'international custom' or 'general principles of law,' still under art. 38 ¶ 1 of the ICJ Statute.

2. Right-Holder

The right-holders of these rights are all persons under the territorial jurisdiction of the State party. As explained by the UN Human Rights Committee ("UN HRC"), these rights must be "available to *all* individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party."[71]

It is inherent in the nature and purpose of IOs to have a multi-cultural workforce composed of professionals from various countries, although sometimes limited by the regional or geographical focus of said IO. It is also a standing practice for IOs, like the UN specialized agencies, to establish a hiring or recruitment mechanism that will ensure that their pool of employees mirror the diversity of countries and cultures of the international community. For instance, any IO headquartered in the Philippines, definitely has employees who are not Filipino citizens and residing within the country for the sole purpose of his employment at said IO.

Thus, an IO employee working in an office or headquarters in the Philippines, regardless of citizenship, nationality, or status, is protected by and is considered a right-holder of Article 14(1) of the ICCPR.

3. Duty-Bearer

The Philippines, as a State party to the ICCPR, is the duty-bearer of the rights enclosed therein. By virtue of the Philippines' signature in 1966 and subsequent ratification in 1986 of the ICCPR; signature in 1966 and subsequent ratification in 1989 of the Optional Protocol to the ICCPR that recognized the UN HRC, the Philippines, through its government, obligated itself to comply with the legally demandable international obligations arising from the ICCPR.

4. Scope and Content of Right/Duty

This Note primarily considers the issuances by the UN HRC, particularly its General Comment on particular rights covered by the ICCPR, to determine the scope of the (1) right to equality before courts and tribunals,

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[71] UN Hum. Rts. Comm., General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial [hereinafter "GC No. 32"], at ¶ 9, CCPR/C/GC/32 (Aug. 23, 2007). (Emphasis supplied.)

and the (2) right to a fair and public hearing by a competent, independent, and impartial tribunal.[72] The UN HRC is the body of independent experts that monitors implementation of the ICCPR by its State parties. The First Optional Protocol to the ICCPR recognizes the UN HRC's competence to receive and consider communications from individuals subject to its jurisdiction which concern claims of ICCPR rights violations by any State party.[73]

For this Note's purposes, the scope of the right or duty that is discussed is limited to the remedy of IO employees in an employee dispute or rights violation. Further, it must be established early on that this Note assumes that these rights are inseparable and must concur to guarantee an appropriate and just remedy to IO employees, which means that the State parties must fulfill *all* necessary and component obligations demanded by the two rights.

i. Right to equality before courts and tribunals

Scope:

- Courts and tribunals, including whenever domestic law entrusts a judicial body with a judicial task;[74] and

- First instance procedures, not the right to appeal or other ancillary remedies.[75]

The State party is obligated:

- To ensure equal access, such that no individual is deprived, in procedural terms, of his/her right to claim justice;[76]

- To ensure equality of arms, such that same procedural rights are to be provided to all the parties unless distinctions are

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[72] *See* HELLEN KELLER AND LEENA GROVER, *General Comments of the Human Rights Committee and their legitimacy*, UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 117 (2012). "General Comments have been defined as follows: [They are] a means by which a UN human rights expert committee distils its considered views on an issue which arises out of the provisions of the treaty whose implementation it supervises and presents those views in the context of a formal statement of its understanding to which it attaches major importance. In essence the aim is to spell out and make more accessible the 'jurisprudence' emerging from its work." (Citations omitted.)

[73] Optional Protocol to the International Covenant on Civil and Political Rights, pmbl., Dec. 16, 1996, 999 U.N.T.S. 171.

[74] GC No. 32, at ¶ 7 n.6.

[75] *Id.* at ¶ 12 n.12.

[76] *Id.* at ¶ 9.

based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant;[77]

- To ensure that the parties to the proceedings are treated without any discrimination;[78]

- To ensure that each side be given the opportunity to contest all the arguments and evidence adduced by the other party;[79] and

- To ensure that similar cases are dealt with in similar proceedings, unless objective and reasonable grounds are provided to justify the distinction.[80]

A failure to comply with the aforementioned obligations would entail a breach of international obligation.

To illustrate, the UN HRC has enumerated instances where the State party fails to fulfill the obligation based on previous communications sent to it. These are when an individual's attempts to access the competent courts or tribunals are systematically frustrated *de jure* or *de facto*,[81] when there are distinctions regarding access to courts and tribunals that are not based on law and cannot be justified on objective and reasonable grounds,[82] when certain persons, by reason of their race, color, sex, language, religion, political opinion, national or social origin, property, birth, or other status, are barred from bringing suit against any other persons,[83] and when there is imposition of fees on the parties to proceedings that would *de facto* prevent their access to justice.[84]

ii. Right to a fair and public hearing by a competent, independent, and impartial tribunal

Scope:

- Determination of rights and obligations in a suit at law; and

[77] *Id.* at ¶ 13 n.13.
[78] *Id.* at ¶ 8.
[79] *Id.* at ¶ 13 n.15.
[80] *Id.* at ¶ 14.
[81] *Id.* at ¶ 9 n.7.
[82] *Id.* at ¶ 9.
[83] *Id.* at ¶ 9 n.8.
[84] *Id.* at ¶ 11 n.10.

The UN HRC has discussed that to determine what questions are covered by "a suit at law," the nature of the right in question must be examined, rather than the status of one of the parties or the particular forum provided by domestic legal systems for the determination of particular rights.[85] Such determination of what comprises "a suit at law" is crucial to identify which parties have rights arising from Article 14 of the ICCPR.

Further, the following are considered "a suit at law" within the meaning of Article 14: (a) the areas of contract, property, and torts in the area of private law; (b) equivalent notions in the area of administrative law such as the termination of employment of civil servants for other than disciplinary reasons,[86] the determination of social security benefits[87] or the pension rights of soldiers,[88] or the taking of private property; and (c) other procedures which must be assessed on a case by case basis in the light of the nature of the right in question.[89]

On the other hand, Article 14 of the ICCPR may not be applied to the following situations: where domestic law does not grant any entitlement or demandable right to the person concerned,[90] where the persons concerned are confronted with measures taken against them in their capacity as persons subordinated to a high degree of administrative control,[91] and where it involves extradition, expulsion, and deportation procedures.[92]

- Competence, independence, and impartiality of a tribunal.

For a body established by law to be independent, regardless of its denomination (e.g., court, tribunal, or forum) and its scope (e.g., general jurisdiction or special jurisdiction),[93] it must be free from intervention by the executive and legislative branches of government or enjoy freedom from restraint and punishment in deciding legal matters in proceedings that are

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[85] *Id.* at ¶ 16 n.18.
[86] *Id.* at ¶ 16 n.19.
[87] *Id.* at ¶ 16 n.20.
[88] *Id.* at ¶ 16 n.21.
[89] *Id.* at ¶ 16.
[90] *Id.* at ¶ 17.
[91] *Id.* at ¶ 17 n.26.
[92] *Id.* at ¶ 17 n.27.
[93] *Id.* at ¶ 22.

judicial in nature.[94] A right to a competent, independent, and impartial tribunal is absolute and not subject to any exception.[95]

> The State party is obligated:
>
> - To ensure that *at least* one stage of the proceedings for determination of rights and obligations in a suit of law be done by a tribunal within the meaning of Article 14 (1);[96]
>
> - To establish a competent tribunal to determine such rights and obligations;[97]
>
> - To allow access to such competent tribunal, *except in specific cases when said limitations are*:
>   - Based on domestic legislation;
>   - Necessary to pursue legitimate aims such as the proper administration of justice;
>   - Not based on exceptions from jurisdiction deriving from international law such, for example, as immunities; or
>   - Present so that the said limitation would not undermine the very essence of the right.[98]
>
> - To ensure independence of such tribunal through domestic legislation governing:[99]
>   - Procedure and qualifications for the appointment of judges;
>   - Guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office;
>   - Conditions governing promotion, transfer, suspension and cessation of their functions,

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[94] *Id.* at ¶ 18.
[95] *Id.* at ¶ 19 n.29.
[96] *Id.* at ¶ 18.
[97] *Id.*
[98] *Id.*
[99] The following situations have been viewed by the UN HRC as incompatible with the independence of a tribunal: where the functions and competencies of the judiciary and the executive are not clearly distinguishable, where the executive is able to control or direct the judiciary, where the executive may dismiss judges, without any specific reason and without effective judicial protection being available to contest the dismissal, where the executive dismisses judges on allegations of corruption, without following any of the procedures for such dismissal as provided for by the law. *Id.* at ¶¶ 19–20, 32, nn.31–33.

where judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution of the law;

- Actual independence of the judiciary from political interference by the executive branch and legislature;[100]

- To ensure impartiality of such tribunal;[101] and

- To ensure a fair and public hearing of such tribunal.[102]

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[100] *Id.* at ¶ 19 & n.30.

[101] There are two aspects of impartiality, which could be described as internal and external. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor express preconceptions about the particular case before them, nor conduct the proceedings in such a manner that would promote the interests of one of the parties to the detriment of the other. Second, the tribunal must not only act with impartiality, but it must also appear to a reasonable observer to be impartial. The UN HRC has noted that a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial. *Id.* at ¶ 21, nn.34–35.

[102] As to the right to a fair hearing, fairness of proceedings entails the absence of any direct or indirect influence, pressure, intimidation, or intrusion from whatever party and for whatever motive. It was previously ruled that fairness is impaired by "[e]xpressions of racist attitudes by a jury that are tolerated by the tribunal, or a racially biased jury selection." *Id.* at ¶ 25 n.47.

However, it must be emphasized that Article 14 only guarantees procedural equality and fairness and cannot be interpreted as ensuring the absence of error on the part of the competent tribunal. Absent any showing that there indeed was clearly arbitrary judgment that led to a manifest error or denial of justice or the court violated its obligation of independence and impartiality, the competent courts of State parties may review facts and evidence and adjudicate the factual and legal issues presented before it. *Id.* at ¶ 26 nn.48–49.

The UN HRC also points out that delays in civil proceedings that cannot be justified by the complexity of the case or the behavior of the parties is contrary to the principle of a fair hearing. *Id.* at ¶ 27 n.51.

As to the right to a public hearing, all trials related to a "suit at law" must in principle be conducted orally and publicly. The public nature of the hearings is an important safeguard for the interest of the litigants, which consequently contributes to the proceeding's transparency. Courts must make information regarding the time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits. However, this right does not necessarily apply to proceedings that merely require written memoranda and submissions, as well as preliminary decisions such as those of prosecutors and other administrative authorities. *Id.* at ¶ 28 nn.53–55.

While there are cases in which the public is excluded from the trial, if there is a public trial to begin with, the judgment, including the essential findings, evidence and legal reasoning must be made public. *Id.* at ¶ 29.

A failure to comply with the aforementioned obligations would entail a breach of international obligation.

B. Between State and IO

For the purposes of showing the correlative rights and obligations due to and from each party (i.e., State and IO), this Note will discuss, by illustration, the case of the Asian Development Bank ("ADB") and its legal immunity from actions brought before Philippine courts.[103] The ADB was created on December 4, 1965 through a constituent agreement, *Agreement Establishing the Asian Development Bank* ("ADB Charter"), among State parties which include the Philippines. The ADB's purpose is "to foster economic growth and co-operation in the region of Asia and the Far East [...] and to contribute to the acceleration of the process of economic development of the developing member countries in the region, collectively and individually."[104]

The ADB Charter provides that the principal office of the ADB shall be in Manila, Philippines.[105] To operationalize said provision, the Philippines and the ADB entered into a Headquarters Agreement, known officially as *Agreement Between the Asian Development Bank and the Government of the Republic of the Philippines Regarding the Headquarters of the Asian Development Bank* ("Headquarters Agreement").[106] Within said Agreement are specifics as to the rights, privileges, and obligations of either party related to the establishment of said headquarters.

Of particular interest in this Note is the provision on immunity from judicial proceedings granted by the said legal instruments to the ADB, its

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[103] As will be discussed *infra*, the ADB's immunity from legal processes and the Philippine State's obligation to uphold such immunity may be sourced from the Agreement Establishing the Asian Development Bank (ADB) [hereinafter "ADB Charter"], the IO's constituent agreement, or from the Agreement Between the ADB and the Government of the Republic of the Philippines Regarding the Headquarters of the Asian Development Bank [hereinafter "Headquarters Agreement"]. It must be noted that there is a possibility where the scope of the constituent agreement and of the headquarters agreement, which are two distinct legal instruments, may differ as to rights and obligations covered by each legal instrument. This may be explored when examining other IOs, because such distinction is not applicable in the case of ADB. The process how this issue can be settled is beyond the scope of this Note, and would be better addressed by a research that closely focuses on it.

[104] ADB Charter, art. 1, Dec. 4, 1965, 571 U.N.T.S. 123, 608 U.N.T.S. 380.

[105] Art. 37 ¶ 1. As a result of this, the Philippine Congress, through Rep. Act No. 4649, authorized the President of the Republic to reserve certain parcel of lands for the free use of the ADB as its office or headquarters.

[106] Headquarters Agreement, ASIAN DEV'T BANK, Dec. 22, 1966, *available at* https://www.adb.org/documents/headquarters-agreement

governors, directors, alternates, officers, and employees, including experts who are performing missions.

Before proceeding with the detailed analysis, it is important to note that while this part of the Note focuses on the ADB as an IO granted with immunity by constituent agreement and treaty, the analyses and framework in the succeeding parts of the Note may as well be applied to other IOs headquartered or operating an office in the Philippines that were granted legal immunities through a treaty or an act of the Philippine state.[107]

Likewise, the discussion in this Part is only illustrative of the rights and obligations, in this case between the State and the IO, understood using the rights-obligations framework. Fully aware that the ADB has an institutionalized Administrative Tribunal, the mere presence or absence of an IO dispute mechanism is not determinative of the consequent presence or absence of tension or conflict between the subject rights and obligations. Thus, the ADB remains a valid example at this point of the Note.[108]

Nevertheless, a case-to-case examination of the sources of rights and obligations is still necessary. The choice of the ADB as an illustration is solely based on circumstance that its immunity has been previously examined and reaffirmed by the Philippine Supreme Court.[109]

1. Source of Right/Duty

The right to be immune from every form of legal process is provided in Article 50[110] of the ADB Charter on the part of the ADB, and in Article

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[107] *See supra* Part II.C, for the discussion on "IOs recognized under international law and those IOs that are *not* recognized [under international law]" and, for the purposes of this Note, how the analysis herein is still arguably applicable to both categories of IOs.

[108] This Note was purposefully organized in a manner that isolates the discussion of (i) rights and obligations and (ii) proposed framework and standards, to articulate that, *regardless of the efficacy of the IO dispute mechanism*, there will always be, at the first instance, a tension between the rights and obligations. Instead, it is through the dispute mechanism that the said tension is diffused, but *all examinations* must look into the dispute mechanisms of every IO (*see infra* Part IV), whether such dispute mechanism is as complex as the ADB Administrative Tribunal or not quite.

[109] A comparative legal analysis of legal instruments granting varying forms of immunities from legal processes in favor of IOs may be examined in a future research.

[110] Art. 50. "IMMUNITY FROM JUDICIAL PROCEEDINGS:

1. The Bank shall enjoy immunity from every form of legal process, except in cases arising out of or in connection with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities, in which cases actions may be brought against the Bank in a court of competent jurisdiction in the territory of a country

55[111] on the part of the ADB personnel. Said immunity is also provided in the Headquarters Agreement. Such agreement falls under the category of "international conventions" under Article 38(1)(a) of the ICJ Statute.

> The Headquarters Agreement provides the following:
>
> ARTICLE III
> Immunity from Judicial Proceeding
>
> Section 5
>
> The Bank shall enjoy immunity from every form of legal process, except in cases arising out of or in connection with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities, in which cases actions may be brought against the Bank in a court of competent jurisdiction in the Republic of the Philippines.
>
> ARTICLE XII
> Privileges and Immunities of Governors and Other Representatives of Members, Directors, President, Vice-President and Others

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in which the Bank has its principal or a branch office, or has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.

2. Notwithstanding the provisions of paragraph 1 of this Article, no action shall be brought against the Bank by any member, or by any agency or instrumentality of a member, or by any entity or person directly or indirectly acting for or deriving claims from a member or from any agency or instrumentality of a member. Members shall have recourse to such special procedures for the settlement of controversies between the Bank and its members as may be prescribed in this Agreement, in the by-laws and regulations of the Bank, or in contracts entered into with the Bank.

3. Property and assets of the Bank, shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank."

[111] Art. 55. "IMMUNITIES AND PRIVILEGES OF BANK PERSONNEL:

All Governors, Directors, alternates, officers and employees of the Bank, including experts performing missions for the Bank:

(i) shall be immune from legal process with respect to acts performed by them in their official capacity, except when the Bank waives the immunity;

(ii) where they are not local citizens or nationals, shall be accorded the same immunities from immigration restrictions, alien registration requirements and national service obligations, and the same facilities as regards exchange regulations, as are accorded by members to the representatives, officials and employees of comparable rank of other members; and

(iii) shall be granted the same treatment in respect of travelling facilities as is accorded by members to representatives, officials and employees of comparable rank of other members."

> Section 44
>
> Governors, other representatives of Members, Directors, the President, Vice-President and executive officers as may be agreed upon between the Government and the Bank shall enjoy, during their stay in the Republic of the Philippines in connection with their official duties with the Bank:
>
> * * *
>
> (b) Immunity from legal process of every kind in respect of words spoken or written and all acts done by them in their official capacity;
>
> Section 45
>
> Officers and staff of the Bank, including for the purposes of this Article experts and consultants performing missions for the Bank, shall enjoy the following privileges and immunities:
>
> (a) Immunity from legal process with respect to acts performed by them in their official capacity except when the Bank waives the immunity[.][112]

2. Right-Holder

The right-holders of the right to be immune from every form of legal process are: the ADB;[113] its Governors, other representatives of Members, Directors, the President, Vice-President, and executive officers as may be agreed upon between the Philippines and ADB;[114] and its officers and staff.[115] While there are apparent three classes of immunity provided in the Headquarters Agreement, there will only be a single treatment for their immunities, at least for this Note as will be discussed further below.

3. Duty-Bearer

The Philippines, as a State party to the ADB Charter and consequently to the Headquarters Agreement, is the duty-bearer of the rights enclosed therein. By virtue of its signature in 1965 and subsequent ratification

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[112] Headquarters Agreement, §§ 5, 44(b), 45(b).
[113] § 5.
[114] § 44(a).
[115] § 45(b).

in 1966 of the ADB Charter; signature in 1966 and subsequent ratification in 1967 of the Headquarters Agreement, the Philippines, through its government, obligated itself to comply with the legally demandable international obligations arising from said international convention or treaty.

4. Scope and Content of Right/Duty

This Note will primarily consider the decisions of the Philippine Supreme Court, particularly its rulings concerning the ADB and its immunity under the ADB Charter and Headquarters Agreement, to determine the scope of its right to be immune from every form of legal process.

As similarly done in the rights-obligations analysis on the ICCPR rights, the scope of the right and duty discussed herein is limited to those applicable to the issue at hand—the right of IO employees to a remedy in an employee dispute or rights violation.

To further clarify the earlier statement that there will only be a single treatment of the immunities despite the seeming distinction among the immunities granted to the three classes (i.e., ADB, its executives, its officers and employees), the said employee dispute or rights violation is predicated on the assumption that, considering the nature of the acts from which these disputes arise, it is done only in an official capacity, not in an otherwise personal capacity. Such distinction is crucial, because, first, the nature of the cause of action of the IO employee determines whether the IO immunity applies. For instance, the Supreme Court previously ruled that where a criminal act is committed by an IO employee against a fellow IO employee, the immunity does not apply because IO immunity could not possibly include a protection of one's illegal acts, or those done with malice or in bad faith or beyond the scope of his or her authority or jurisdiction.[116] Second, it is crucial, because the common element shared by the immunities among the three classes is that the act must be done in an official capacity. With this, there can be wider leeway to generalize the analysis and framework of this Note.

Scope:

- Every form of legal process, *except in cases*:
    - Arising out of or in connection with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities;

[116] Liang v. People [hereinafter "*Liang*"], G.R. No. 125865, 323 SCRA 692, 696, Jan. 28, 2000.

- When the ADB waives the immunity

The Supreme Court has previously ruled that, being an IO that has been extended diplomatic status, the ADB is independent of municipal law.[117] One of the basic immunities of an IO is immunity from local jurisdiction, i.e., immunity from the legal writs and processes issued by the tribunals of the State where it is found. The Court has further ratiocinated its regard of IOs, such as the ADB, as follows:

> The obvious reason for this is that the subjection of such an organization to the authority of the local courts would afford a convenient medium thru which the host government may interfere in their operations or even influence or control its policies and decisions of the organization; besides, such subjection to local jurisdiction would impair the capacity of such body to discharge its responsibilities impartially on behalf of its member-states.[118]

With this, the Court has in effect adopted the functional necessity doctrine earlier discussed to justify the continued grant of immunity to IOs as prevailing in the Philippine legal system.[119]

- Acts done or performed in official capacity.

In the case of *DFA*, which involved service contracts entered into by an IO, i.e., the ADB, the Supreme Court ruled that such service contracts were not intended by the ADB for profit or gain, but were official acts over which a waiver of immunity[120] would not attach.[121]

In attempting to distinguish acts done in an official capacity from acts of other nature, the Court traced the two concepts of sovereign immunity. First, according to the absolute theory of immunity, a sovereign cannot, without its consent, be made a respondent in the courts of another sovereign. Second, according to the restrictive theory of immunity, the immunity of the

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[117] *SEAFDEC*, 206 SCRA 283, 287. Although for Dean Magallona, the grant of diplomatic status is not within the competency of the Philippine State.

[118] Se. Asian Fisheries Dev. Ctr. v. Acosta, G.R. No. 97468, 226 SCRA 49, 53, Sept. 2, 1993. (Citations omitted.)

[119] *See supra* Part II.C.

[120] *See China Nat'l Machinery*, 665 SCRA 189, 212. "An agreement to submit any dispute to arbitration may be construed as an implicit waiver of immunity from suit."

[121] *DFA*, 262 SCRA 39, 48.

sovereign is recognized only with regard to "public acts or acts *jure imperii* of a state, but not with regard to private act or acts *jure gestionis*."[122]

The question then is "whether the foreign state is engaged in the activity in the regular course of business."[123] If the act is in pursuit of a sovereign activity, or an incident thereof, then it is an act *jure imperii*, especially when it is not undertaken for gain or profit.[124]

There must be caution in appreciating this analysis. The Court only used the concepts of *jure gestionis* and *jure imperii*, admittedly drawing its origins from the concept of sovereign immunity, *only for the purpose* of determining whether the act involved was done in an "official capacity." There was no categorical conclusion that the Court used this framework of sovereign immunity loosely to IO immunity.

Further, it is important to note that the Court's discussion of the development of the concept of sovereign immunity relates only to the distinction between acts performed in an official capacity and those that are not; and not a legal conclusion that the immunity enjoyed by IOs is equal to that of States. Clearly, this is not the case, because state immunity is recognized as part of customary international law, while IO immunity is recognized as derived from international convention or treaty. There has been no consensus that IO immunity has crystallized into a customary rule of international law.[125]

The State is obligated:

- To ensure immunity from every form of legal process, except in specific cases under Section 5 of the Headquarters Agreement or in cases where the ADB waives its immunity.[126]

There is a procedural doctrine that Philippine courts have long upheld. In the landmark case of *World Health Organization v. Aquino*,[127] the Supreme Court categorically ruled that diplomatic immunity is a political question.[128] Once the executive branch of government, through the exclusive

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[122] Holy See vs. Rosario [hereinafter "*Holy See*"], G.R. No. 101949, 238 SCRA 524, 535, Dec. 1, 1994. (Citations omitted.)

[123] *Id.* at 536.

[124] *Id.*

[125] *See* Magallona, *supra* note 52, at 72 on the distinction of diplomatic immunity and international immunity.

[126] Headquarters Agreement, §§ 5, 44(b), 45(a).

[127] [Hereinafter "*WHO*"], G.R. No. 35131, 48 SCRA 242, Nov. 29, 1972.

[128] *Id.* at 248.

determination of the DFA,[129] determines and affirms the plea of diplomatic immunity brought before it by the IO concerned and subsequently transmits it to the courts through a letter,[130] telegram,[131] 'suggestion' in a manifestation as amicus curiae,[132] memorandum,[133] and petition,[134] courts should refuse to look beyond such determination. Further, the Court characterized this as "duty of the courts" to accept the claim of immunity when affirmed by the executive branch.

This judicial temperament of *preventing the embarrassment of the executive*[135] has continued for decades, until the more recent case of *Liang* was decided by the Court, as discussed above. The Court emphatically took a strong stand on, and a redirection of, the doctrine that the DFA's determination of immunity is beyond the courts' examination. The Court held: "[C]ourts cannot blindly adhere and take on its face the communication from the DFA that [an IO, or its personnel] is covered by any immunity. The DFA's determination that a certain person is covered by immunity is only preliminary which has no binding effect in courts."[136]

A summary dismissal of complaints filed against an IO or its personnel merely on the basis of the DFA's determination, without any opportunity for the complainant to challenge said determination, amounts to a violation of the latter's right to due process.[137] Mere invocation of the immunity clause does not *ipso facto* result in the dismissal of the action.

The Court then made an important directory pronouncement in actions involving a grant of immunity. The complainant must be accorded the opportunity to rebut the DFA's determination and affirmation of the IO's immunity by presenting controverting evidence to show that the IO's immunity is not applicable to the case at bar.[138] It shows that, after decades of treating immunity as a political question, it is now within the courts' purview and most importantly within the complainant's capacity to challenge.

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[129] *Holy See*, 238 SCRA 524, 531–32; German Agency for Technical Cooperation (GTZ) v. Ct. of Appeals [hereinafter "*GTZ*"], G.R. No. 152318, 585 SCRA 150, 174–75, Apr. 16, 2009; *China Nat'l Machinery*, 665 SCRA 189, 209–12.

[130] *ICMC*, 190 SCRA 130,139.

[131] *WHO*, 48 SCRA at 245.

[132] Baer v. Tizon, G.R. No. 24294, 57 SCRA 1, 6, May 3, 1974.

[133] *Holy See*, 238 SCRA 524, 532.

[134] *DFA*, 262 SCRA 39, 44.

[135] *WHO*, 48 SCRA 242, 248–49.

[136] *Liang*, 323 SCRA 692, 695.

[137] *Id.*

[138] *Id.* at 695–96.

Notwithstanding the ruling in *Liang*, a failure to comply with the aforementioned obligation to ensure immunity from every form of legal process, save for exceptions, would entail a breach of international obligation.

However, as mentioned earlier, the case of *Liang* involves a *criminal act* by an IO employee, which immediately removes such from the category of *official acts* protected by immunity. The said distinction must be considered in understanding the relatively liberal approach took by the Court in this case. *Liang* is rather an exception in the line of cases on IO immunity. In this Note, however, the subject of inquiry are *official acts* that result in employment dispute or rights violation, which most likely would not earn the Court's favorable consideration as exhibited in *Liang*.

Again, the Supreme Court has already had the opportunity to distinguish those acts of IOs, such as the ADB, its executives, and its officers and employees, that are covered by immunity, including the exceptions from the agreements themselves, and those that are not covered. At a glance, there seems to be no problem with the said determination: official acts, generally, are covered; personal acts, again generally, are not covered. However, this is the point where the problematization explored by this Note enters. A closer look would show that there is a void in the legal scheme that prevents IO employees from seeking relief from an IO employer in an employee dispute or rights violation from which they suffered. Applying the current trend of rulings, an employee dispute or rights violation done in an official capacity, not with malice or in bad faith that would remove it from the coverage of official acts, by the IO employer is immune from every form of legal process, including resort to courts of law and administrative tribunals of the State where the IO is headquartered. If the analysis stops at this point, there will undoubtedly be a resulting deprivation of rights.

C. Tension and Apparent Conflict

The previous Sections have discussed the two competing rights problematized by this Note using the classic right-obligation framework. On the one hand, the ICCPR obligates the Philippine State to guarantee the rights to equality before courts and tribunals, and to a fair and public hearing by a competent, independent, and impartial tribunal of IO employees working in the Philippines. On the other hand, the ADB Charter and Headquarters Agreement[139] obligates the Philippine State to guarantee the right to be

[139] Again, the choice of these sources of rights and obligations on the part of the IO's immunity is merely illustrative, and does not preclude the application of these analyses to grants of immunity to other IOs, if the particular facts allow.

immune from every legal process of ADB, its executives, and its officers and employees.

The apparent conflict between the two rights and corresponding obligations can be immediately seen on their intersection: whether Philippine courts can assume jurisdiction over actions filed by IO employees against the IO on the ground of employment disputes and rights violations. In this case, the ICCPR demands that the IO employee must be given access to court,[140] while the IO agreement demands that the IO must be immune from legal processes. The former allows the process to proceed, while the latter prevents it. Past judicial decisions would readily show that this tension serves as hindrance for most IO employees from seeking relief from domestic courts, precisely because they have not been accorded the access to a remedy. An unusual and undue advantage and protection are then provided to IOs.

A possible explanation why in most cases undue advantage is given to IOs is the recognized exception to the State obligation to allow access to such competent tribunal under the right to a fair and public hearing by a competent, independent, and impartial tribunal, which is reproduced herein:

- To allow access to such competent tribunal, *except in specific cases when said limitations are*
    - Based on domestic legislation;
    - Necessary to pursue legitimate aims such as the proper administration of justice;
    - *Not based on exceptions from jurisdiction deriving from international law such, for example, as immunities;* or
    - Present so that the said limitation would not undermine the very essence of the right.[141]

Coupled with the functional necessity doctrine that has pervaded both international and domestic jurisprudence, the UN HRC's recognition of the express exception to the State obligation to allow access to a competent tribunal would lead to a problematic conclusion that indeed immunity, *regardless to whom it was granted*, would automatically make the State obligation ineffective.

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[140] It must be noted that the ICCPR does not in any degree obligate State parties to guarantee reliefs, e.g., compensation, damages; such only guarantees remedy consistent with the rights to equality before courts and tribunals and to a fair and public hearing by a competent, independent, and impartial tribunal.

[141] GC No. 32, ¶ 18. (Emphasis supplied.) *See supra* Part III.A.

This Note refuses to accept that such big of a loophole or void, one that renders the foundational procedural right in the ICCPR ineffective, was intended by the UN HRC in recognizing immunity as an exception.

While the discussion in *A. Between State and Persons (i.e., Employee)* under Part III referred heavily on UN HRC's General Comment No. 32 on the scope, content, and violations of—including exceptions to—Article 14 (1) of the ICCPR, this Note recognizes the on-going and unsettled debate on the legal significance of a General Comment in the plethora of sources of international law.[142] Notwithstanding the debate, a principle commonly acknowledged by scholars and practitioners is that General Comments are not legally binding, and, at best, are "secondary soft law instruments."[143] While not considered as binding precedents, "the legal analysis in General Comments is presumptively correct," yet rebuttable by registering disapproval in the proceedings.[144] Thus, recognizing the nature of General Comments, discussions therein, including the enumerated exceptions, do not foreclose any further development of said areas, metes, and bounds of international human rights law or state practice as to such matters.

With this premise, there is sufficient basis to appreciate the said exceptions liberally, rather than strictly and by themselves individually limiting the ICCPR rights. Instead of focusing only on a single exception, "not based on exceptions from jurisdiction deriving from international law such, for example, as immunities" or immunity *per se*, in a piecemeal manner, it is argued that these exceptions may be collectively viewed. In so arguing, it must be noted that the manner by which the UN HRC stated the exceptions in its General Comment is similar, *yet not the same*, with the wording of the defense

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[142] *See* KELLER & GROVER, *supra* note 72, at 117–18. "General Comments are central to understanding human rights treaty obligations and have been described as 'indispensable' sources of interpretation. [ ] In spite of their prevalence, reactions to General Comments have ranged from regarding them as 'authoritative interpretations' of treaty norms, to 'broad, unsystematic, statements which are not always well founded, and are not deserving of being accorded any particular weight in legal settings.' Similarly, states critical of certain General Comments have asserted that their content is an 'unacceptable attempt to attribute to treaty provisions a meaning which they do not have." (Citations omitted.) *See also* Joanna Harrington, *The Human Rights Committee, Treaty Interpretation, and the Last Word*, EJIL: TALK! (2015), *at* https://www.ejiltalk.org/the-human-rights-committee-treaty-interpretation-and-the-last-word/); Gabriella Citroni, *The Human Rights Committee and its Role in Interpreting the International Covenant on Civil and Political Rights vis-à-vis States Parties*, EJIL: TALK! (2015), *at* https://www.ejiltalk.org/the-human-rights-committee-and-its-role-in-interpreting-the-international-covenant-on-civil-and-political-rights-vis-a-vis-states-parties/, for the debate on UN HRC's role as having 'last word' or 'best word' on interpreting ICCPR.

[143] *Id.* at 129. Soft law instruments are "sources of non-binding norms that interpret and add detail to the rights and obligations contained in the respective human rights treaties."

[144] *Id.* at 129–30.

raised by Greece, the State party in the UN HRC case of *Sechremelis v. Greece.*[145] It ruled:

> The right to a fair trial, although of paramount importance for every democratic society, is not absolute in every aspect. Certain limitations can be imposed and tolerated since, by implication, the right of effective judicial protection, by its very nature, calls for regulation by the state. To this extent, the contracting states enjoy a certain margin of appreciation. Still, it has to be secured that any limitation applied does not restrict or reduce the judicial protection left to the individual in such a way or to such an extent that the *very essence of the right is impaired.* Furthermore, any limitation imposed has to *pursue a legitimate aim* and keep *a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.*[146]

In *Sechremelis*, the UN HRC ruled that the *limitation* rendered by state immunity does not impair the *very essence of the right* to effective judicial protection of the applicants, because the State (Greece) may in a later and future period waive its immunity, which would then allow the award of damages in favor of the applicants.[147] While state immunity is the limitation referred to in this case, it reflects how the UN HRC resorts to the *very essence of the right* in its analysis of exceptions to ICCPR, Article 14 (1) rights.

Further, it may then be inferred that Greece in *Sechremelis* framed its defense by following the line of decisions by the European Court of Human Rights ("ECtHR"), such as the case of *Waite and Kennedy v. Germany,*[148] where nearly the same formula on limitations to "right of access to the courts" was pronounced by ECtHR.[149] In contrast to *Sechremelis*, *Waite* is more appropriate

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[145] Communication No. 1507/2006, Sechremelis v. Greece, Hum. Rts. Comm., 100th sess., Oct. 11–29, 2010.

[146] *Id.* at ¶ 8.2. (Emphasis supplied.)

[147] *Id.* at ¶ 10.5. *See also* LOUISE DOSWALD-BECK, HUMAN RIGHTS IN TIMES OF CONFLICT AND TERRORISM 325–26 (2011); SARAH JOSEPH & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 36-38 (2013).

[148] *See infra* note 191.

[149] *Id.* at 7, ¶ 43. "The Court recalls that the *right of access to the courts* secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the *very essence of the right is impaired.* Furthermore, a limitation will not be compatible with Article 6, § 1 if it *does not pursue a legitimate aim* and if there

in examining specifically IO immunity, since it was the subject of *Waite*. However, the latter's applicability and legal significance in the ICCPR rights analysis cannot be concluded.[150]

Nonetheless, there are two principal things that *Sechremelis* and *Waite* contribute to the analysis herein: *first*, that the determinative test of exception or valid limitation to the "right to a fair trial" or "right of access to courts," or more generally, ICCPR, Article 14 (1) rights subject of this Note, is whether the "[limitation] applied [does] not restrict or reduce the judicial protection left to the individual in such a way or to such an extent that the *very essence of the right is impaired*";[151] and *second*, that immunity deriving from international law *per se*, including IO immunity, cannot be used as a blanket limitation to the application of said rights, but must be examined through the lens of the *very essence of the right*.

Proceeding in looking at the apparent conflict of rights (i.e., ICCPR rights and IO immunity), while international law undoubtedly recognizes the immunities granted to IOs by State parties in a multilateral agreement or by a single State in a headquarters agreement, a sweeping application of said exception that would lead to the negation of an equally effective and enforceable right, such as the ICCPR rights, is an absurdity. Applying the test discussed above, if upholding IO immunity would result in the impairment of the *very essence of the right*, then it arguably may not be a valid limitation to the ICCPR rights.

On the other hand, the IO immunity may be considered as an exception to the State obligation and a valid limitation to the ICCPR rights, *provided that the State complies with such other equally enforceable rights in a manner that would not impair the rights' very essence*. It is within this perspective that the State party can comply with its obligation under the IO immunity agreement, but simultaneously, without any form of derogation, comply with its obligations under the ICCPR.

At this point of the Note, while there definitely is tension and apparent conflict, the scaffolding of rights and obligations becomes the central theme. There is a need to recognize that there is no hierarchy between the ICCPR rights and IO immunity to the effect that one shall be prioritized over the other because both are sourced from international conventions

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is *not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved* [.]" (Emphasis supplied.)

[150] The basis of the *Waite* decision is Article 6, § 1 of the European Convention on Human Rights, not the ICCPR.

[151] *See infra* note 191 at 7, ¶ 43.

entered into by the State party precisely to comply with the corresponding obligations therein and with full knowledge of its other subsisting obligations. As will be discussed in the framework below, it would be contrary to good faith on the part of the State party if it will refuse to comply with an obligation merely because there is an apparent conflict with compliance with another. There must be a way to reconcile and ensure that both obligations are complied with in a manner that would give the most robust effect to both.

IV. PROPOSED REMEDIES FRAMEWORK

The previous section has established that indeed there is a conflict of the respective rights and obligations among the three parties derived from two sources of law. With this, a legal framework is needed to determine the metes and bounds of the corresponding rights and obligations as applied in the Philippine setting. Historically, IOs have been guaranteed their legal immunities on employment issues, except for very few cases. Perhaps, it is time to explore a systematic approach in ensuring that the rights of IO employees are given effect, not because the latter is more important than the former, but because such right, like any other legal right, must be equally protected. It bears to emphasize that this Note does not attempt to propose a hierarchy among these rights and obligations; it merely proposes an approach to ensure that they are harmonized.

A. Guiding Principles

1. Doctrines of Transformation and Incorporation

The Philippines recognizes the dualist view of legal systems, particularly that of domestic law and that of international law. There are two doctrines by which the domestic legal system adopts a rule of international law: *transformation* and *incorporation*. "The transformation method requires that an international law be transformed into a domestic law through a constitutional mechanism such as local legislation. The incorporation method applies when, by mere constitutional declaration, international law is deemed to have the force of domestic law."[152]

Transformation may be done through the constitutional mechanism, specifically (a) by ratification of a treaty under Section 21, Article VII of the

[152] Pharmaceutical & Health Care Ass'n of the Phil. v. Duque [hereinafter "*PHAP*"], G.R. No. 173034, 535 SCRA 265, 289, Oct. 9, 2007, *citing* JOAQUIN BERNAS, CONSTITUTIONAL STRUCTURE AND POWERS OF GOVERNMENT (NOTES AND CASES) PART I (2005 ed.).

1987 Constitution;[153] or (b) by enactment of an enabling law adopting a treaty obligation.

On the other hand, the incorporation method has a relatively wider scope than the transformation method. It is embodied in Section 2, Article II of the Constitution, which states that "The Philippines [...] adopts the generally accepted principles of international law as part of the law of the land[.]" This is applicable to sources of international law that do not derive from treaty obligations,[154] which means that although there is no binding agreement where the Philippines is a party, such rule or principle of international law may be deemed binding upon Philippine courts.

Further, "[']generally accepted principles of international law['] refers to norms of general or customary international law which are binding on all States, [i.e.] renunciation of war as an instrument of national policy, the principle of sovereign immunity, a person's right to life, liberty and due process, and *pacta sunt servanda*, among others."[155] It goes without saying that generally accepted principles of international law also includes customary international law, which is then deemed incorporated into the Philippine domestic system.

Nonetheless, for the relevant discussion in this Note, it is sufficient to note that the ICCPR and the treaties granting legal immunity to IOs were entered into by the Philippines and transformed into domestic law according to the constitutional mechanism of ratification.

This Note reserves any discussion on the possible nature of such obligations as part of customary international law, and instead focuses its analysis on the legal conclusion that such obligations, and consequently sources of law, are deemed part of the Philippine laws as a result of *transformation*.[156]

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153 "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."

154 Mijares v. Ranada, G.R. No. 139325, 455 SCRA 397, 421, Apr. 12, 2005.

155 *PHAP*, 535 SCRA at 291. (Citations omitted.)

156 It must be noted, however, that Philippine jurisprudence had already espoused that the State obligations contained in the ICCPR, such as the subject obligations in this Note, are deemed part of customary international law, and thus deemed incorporated into Philippine laws. On the other hand, scholars have argued that the obligation to grant legal immunity to IOs is still not considered a part of customary international law due to lack of *opinio juris* among States as to said matter, which considering the trend of international law-making and scholarship, is far from fruition.

2. Harmonious Construction

It has been established in Philippine jurisprudence as it is considered basic a principle in statutory construction that interpreting and harmonizing laws is the best method of interpretation. The legal maxim *interpretare et concordare leges legibus est optimus interpretandi modus*, or "[t]o interpret and reconcile laws so they harmonize is the best mode of construction,"[157] is applied by courts, especially when cases of apparent conflicts in statutory provisions are brought before them. Instead of making a sweeping conclusion that there indeed is conflict and subsequently proceeding to rule that a certain statute prevails over another, courts, in most of such cases, have managed to find a way to reconcile or harmonize the seemingly conflicting statutes for the purposes of forming "a uniform, complete, coherent, and intelligible system of jurisprudence."[158]

In international law, the Vienna Convention on the Law of Treaties ("VCLT") does not explicitly provide a rule of interpretation[159] between two treaties on matters that may have apparent conflict, such as the subject question in this Note. The rules presently talk about how a particular provision, phrase, or term of a treaty may be interpreted. Moreover, what the VCLT provides are rules where there is a treaty conflicting with an existing peremptory norm of general international law or *jus cogens*,[160] or when an existing treaty conflicts with a new *jus cogens*.[161] However, the analysis in this Note does not involve *jus cogens*; thus, these are not applicable.

Instead, the analysis will draw from the general rule of interpretation in Article 31 of the VCLT, which states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." This means that a treaty may be interpreted not only in a manner that will give effect to its literal meaning, but also in relation to the context in which it was made and as to its goal and purpose, provided that such interpretation is done

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[157] BLACK'S LAW DICTIONARY 1726 (8th ed. 2004).

[158] Pabillo v. Comm'n on Elections, G.R. No. 216098, Apr. 21, 2015. *See also* DANTE GATMAYTAN, LEGAL METHOD ESSENTIALS 3.0 411–12 (2016). Courts are even cautious of immediately annulling an administrative rule or regulation that seem to be in conflict with a statute, a higher source of law, as the two originates from two different branches of government. Again, the proper course of action is not to uphold one and annul the other, but to give effect to both by harmonizing them if possible.

[159] *See* Vienna Convention on the Law of Treaties [hereinafter "VCLT"] (1969), art. 31–33, May 23, 1969, 1155 U.N.T.S. 331.

[160] Art. 53.

[161] Art. 64.

in good faith or in a manner that does not prejudice the end hoped to be attained by the treaty.

In light of the general rule of interpretation and the basic principle of harmonious construction, this proposed framework shall be based on the goal of reconciling the seeming differences and conflicts between the rights and obligations discussed above. In so doing, the provisions of the respective treaties involved will be interpreted in good faith to give effect to both of their goals in the holistic way possible.

3. Pacta Sunt Servanda

The last guiding principle of the framework highlights the binding nature of the treaty obligations to the Philippines as a State party. International law, as enshrined in the VCLT, upholds the principle of *pacta sunt servanda.* "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."[162]

Pacta sunt servanda is the fundamental principle of the law of treaties. Its importance is underlined by the fact that it is enshrined in the Preamble to the Charter of the United Nations, Article 2(2) of which provides that Members are to "fulfill *in good faith* the obligations assumed by them in accordance with the present Charter."[163]

As stated earlier, it is this Note's intention to reconcile the conflicting rights of IO employees, on one hand, and the right to legal immunity of IOs, on the other. With this premise, it is from *pacta sunt servanda* where this analysis proceeds. As a State party to these treaties, it is imperative for the Philippines, acting through its courts in this case, to commit its best efforts to comply with its legal obligations in good faith, not only to either but to *both* parties as right-bearers. It must not conveniently, and without sufficient justification, dismiss or reject compliance to one obligation in favor of another.

B. Analysis

1. Jurisdiction

The crux of the issue is fundamentally the question of jurisdiction of Philippine domestic courts on actions brought by IO employees before them arising from employment disputes and rights violations. Jurisdiction is defined

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[162] Art. 26.

[163] U.N. CHARTER, art. 2, ¶ 2. (Emphasis supplied.)

as the power and authority of a court to hear, try and decide a case, which flows from the grant of judicial power by the Constitution to the Supreme Court and lower courts "to settle actual controversies involving rights which are legally demandable and enforceable."[164]

In order for the court or an adjudicative body to have authority to dispose of the case on the merits, it must meet the requisites for the exercise of jurisdiction.[165] In the present case, once an IO employee files an action against the IO before domestic courts for employment dispute or rights violation, the court assumes jurisdiction over the petitioner. However, the jurisdiction of the court over the respondent IO in this case is not as straightforward as over the petitioner.

While the court may proceed to the service of summons or coercive process against the IO, IOs do not necessarily consent to be subjected to such coercive processes, as a review of jurisprudence has shown. Instead, they invoke their immunity from legal processes through the aid of the DFA. There is a process recognized in jurisprudence on how a grant of immunity from legal processes could be appreciated by Philippine courts, which will be discussed in detail in the following Section.

The court's acceptance of an invocation of immunity would then effectively bring the respondent IO beyond the jurisdiction of said court, which would lead to the eventual dismissal of the action. Further, in one case, the Supreme Court adopted the view of C. Wilfred Jenks who stated that "The immunity covers the organization concerned, its property and its assets. It is equally applicable to proceedings *in personam* and proceedings *in rem*."[166] At this point of the procedure, the IO employee may either file an appeal or a petition for certiorari on the ground of grave abuse of discretion on the part of the judicial or quasi-judicial body that dismissed his action, but in most cases that path had been futile. Thus, with a finality of judgment, the IO employee has no more remedy and is in effect prevented from seeking an adjudication from Philippine courts.

The analysis up to this point has only covered the usual scenario where a Philippine court's appreciation of IO immunity leads to the dismissal of the action against the IO. A determination by the DFA of immunity and the consequent dismissal of the action complies with the State obligation to

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[164] CONST. art. VIII, § 1.

[165] De Joya v. Marquez, G.R. No. 162416, 481 SCRA 376, 382, Jan. 31, 2006.

[166] *ICMC*, 190 SCRA 130, 145, *citing* C. WILFRED JENKS, INTERNATIONAL IMMUNITIES 38 (1961).

ensure immunity from every form of legal process of IOs. However, as pointed out by this Note, an analysis that simply ends in this manner creates a void such that it prevents IO employees from enjoying their rights under the ICCPR. Consequently, a possible failure of the State to comply with its international obligation follows.

2. Judicial Review

How then can a question on the propriety of immunity come within the purview of courts? In essence, to surpass this legal obstacle, a re-maneuvering of the aspects of judicial power used in cases similar to this is needed: from the duty of the courts "to settle actual controversies involving rights which are legally demandable and enforceable"[167] to the correlative and more expansive duty "to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."[168]

A key premise is that the determination of immunity by the DFA is a political question.[169] The issue being a political question, the tipping point thus is *whether the determination of immunity by the DFA is clothed with grave abuse of discretion amounting to excess or lack of jurisdiction* on its part, primarily on the ground that such immunity when granted would negate a positive treaty right and would prejudice the State's compliance with its treaty obligation under the ICCPR. A finding of grave abuse of discretion is hinged on the question of whether a ruling in favor of immunity, on one hand, would place the State at a position of breach of its other obligation.

3. Judicial Power

Judicial power is the power of courts to adjudicate cases brought before them, subject to the requirements of law.[170] The expansion of the concept of judicial power in the 1987 Constitution vests in the courts the power of judicial review that seeks to determine whether or not a branch or instrumentality of the government acted in a way that is so whimsical and capricious, leading to an exercise of grave abuse of discretion amounting to lack or excess of jurisdiction.

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[167] CONST. art. VIII, § 1 ¶ 2.
[168] Art. VIII, § 1 ¶ 2.
[169] *WHO*, 48 SCRA 242, 248.
[170] CONST. art. VIII, § 1, ¶ 2.

Philippine jurisprudence is replete with cases where the Court struck down an act of a branch of government, invoking the expanded judicial review under the Constitution, such as in the cases of *Araullo v. Aquino*,[171] *Belgica v. Ochoa*,[172] *Chavez v. Gonzales*,[173] *David v. Macapagal-Arroyo*,[174] and *Samahan ng mga Progresibong Kabataan v. Quezon City*,[175] among others. Thus, it is now the courts' *duty* to look into the lack or excess of jurisdiction arising from grave abuse of discretion, and not reject passing upon the case on the ground of such act or omission being a 'political question.'[176]

4. Political Question Doctrine

Political questions refer "to [those questions] which[,] under the constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislative or executive branch of the government."[177] Thus, if an issue is clearly identified by the text of the Constitution as a matter for discretionary action by a particular branch of government or to the people themselves, then it is held to be a political question. United States jurisprudence adds that a political question also involves a lack of judicial standards for resolving such delegation of power, or the impossibility of deciding a question without a determination of policy, or the impossibility of deciding without overstepping the boundaries of separation of powers, among others.[178]

On the issue considered by this Note, the determination of immunity based on international conventions and other legal instruments by the executive department, through the DFA, has been deemed a political question beyond the reach of courts. However, by the expanded power of judicial review, the courts may inquire into grave abuse of discretion in such determination.

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[171] G.R. No. 209287, 728 SCRA 1, July 1, 2014.

[172] G.R. No. 208566, 710 SCRA 1, Nov. 19, 2013.

[173] G.R. No. 168338, 545 SCRA 441, Feb. 15, 2008.

[174] G.R. No. 171396, 489 SCRA 160, May 3, 2006.

[175] G.R. No. 225442, 835 SCRA 350, Aug. 8, 2017.

[176] Ass'n of Med. Clinics for Overseas Workers, Inc. v. GCC Approved Med. Cts. Ass'n, G.R. No. 207132, 812 SCRA 452, 478, Dec. 6, 2016. "This is not only a judicial power but a duty to pass judgment on matters of this nature." (Citations omitted.)

[177] Tañada v. Cuenco, G.R. No. 10520, 103 Phil. 1051, 1066 (1957). (Emphasis omitted.)

[178] Integrated Bar of the Phil. v. Zamora, G.R. No. 141284, 338 SCRA 81, 105, Aug. 15, 2000.

5. Grave Abuse of Discretion

When a political question, such as the determination of immunity, is involved, judicial review limits the determination as to whether there has been grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the official whose action is being questioned.

Grave abuse of discretion has been defined as "such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction or, in other words, where the power is exercised in an arbitrary manner by reason of passion, prejudice, or personal hostility, and it must be so patent or gross as to amount to an *evasion of a positive duty* or to a *virtual refusal to perform the duty enjoined* or to *act at all in contemplation of law*."[179]

What is important to note here is that the measure of grave abuse of discretion is not merely limited to the arbitrary or whimsical manner of the exercise of power, but most importantly to its result such that it amounts to an *evasion of a positive duty required by law*.

At this point of the Note, the nature of the DFA determination shall be closely examined to see whether such determination is really a *discretionary act* that could result in a finding of grave abuse of discretion as defined above. A *discretionary act*, as opposed to a *ministerial act*, has been defined in case law as contemplating a situation where "the law imposes a duty upon a public officer and gives him the right to decide how or when the duty shall be performed,"[180] or "when the discharge of the same requires [...] the exercise of official discretion or judgment."[181]

While an examination of a document describing the processes or guidelines on how DFA issues such determination of immunity is ideal, currently there unfortunately is no publicly available document that discusses the exact process that this analysis requires. Earnest efforts have been done by the author to secure such official document, but to no avail. Indeed, it is a roadblock for this Note that must be disclosed for transparency.

However, in light of the limitation discussed above, this Note instead resorts to a survey of relevant Supreme Court decisions that shed light on the

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[179] Land Bank of the Phil. v. Ct. of Appeals, G.R. No. 129368, 409 SCRA 455, 481, Aug. 25, 2003. (Emphasis supplied.)

[180] Espiridion v. Ct. of Appeals, G.R. No. 146933, 490 SCRA 273, 277, June 8, 2006, *citing* Codilla v. De Venecia, G.R. No. 150605, 393 SCRA 639, 681, Dec. 10, 2002.

[181] *Id.*

discretionary nature of the DFA determination, although not expressly declared as such by the Court. There are three main decisions that developed the understanding of the DFA determination in relation to IO immunities: *Holy See v. Rosario*,[182] *German Agency for Technical Cooperation v. Court of Appeals*[183] ("*GTZ*"), and *China National Machinery v. Santamaria*[184] ("*China National Machinery*").

Holy See traced the DFA determination to the process in international law where in a situation "when a state or international agency wishes to plead sovereign or diplomatic immunity in a foreign court, it requests the Foreign Office of the state where it is sued to convey to the court that said defendant is entitled to immunity."[185] In US law, such is called the process of *suggestion*.[186] While the same process is recognized and done in Philippine law, cases decided prior and after *Holy See* showed that there is variation as to how the DFA conveys such endorsement to the courts.[187] What is common, however, among those cases is the involvement of the Secretary of Foreign Affairs, or his authorized representative acting in the former's name or by his authority.

GTZ affirmed the process discussed in *Holy See*, and added that while it may not be imperative for the entity invoking immunity to secure a DFA endorsement, "such certification from the [DFA] [...] would have provided factual basis for its claim of immunity that would, at the very least, establish a disputable evidentiary presumption that the foreign party is indeed immune which the opposing party will have to overcome with its own factual evidence."[188] It further enunciated the *exclusive* authority of the DFA in issuing such determination, after the Court rejected the manifestation of the Solicitor General as not sufficient to substitute the DFA certification.

Lastly, *China National Machinery* again affirmed *Holy See* and *GTZ*, although what further defined the jurisprudence was the Court's position that "*[e]ven with a DFA certification, however, it must be remembered that this Court is not precluded from making an inquiry into the intrinsic correctness of such certification.*"[189]

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[182] *Holy See*, 238 SCRA 524.

[183] *GTZ*, 585 SCRA 150.

[184] *China Nat'l Machinery*, 665 SCRA 189.

[185] *Holy See*, 238 SCRA 524, 531–32.

[186] *Id.* at 532.

[187] *Id. See also supra* text accompanying notes 130–34.

[188] *GTZ*, 585 SCRA 150, 174.

[189] *China Nat'l Machinery*, 665 SCRA 189, 211–12. (Emphasis supplied.) This observation is consistent with the fact that the source of immunity is not the DFA determination itself, which is merely the domestic court's confirmation process of the nature of the immunity. Instead, the source of immunity remains to be the actual international agreement or convention that grants such immunity to a legal entity.

This Note argues that this line of decisions characterizes the DFA determination as discretionary. The involvement of the Secretary of Foreign Affairs in the DFA determination is crucial. Following the established doctrine of qualified political agency or 'alter ego doctrine'[190] in conjunction with the doctrine on the nature of discretion involved in foreign policy, which was described in one case as requiring "a wider degree of discretion" and requiring to be "adjudged under less stringent standards,"[191] the DFA determination is thus clothed with discretion. However, due to the sensitivity of foreign relations, which includes the issue of recognizing immunities, there needs to be a clear showing of an *evasion of positive duty required by law*, before the courts can declare that an act was done with grave abuse of discretion.

What cements this Note's assertion that the DFA determination is indeed a discretionary act is informed by the Supreme Court's view towards the DFA's role in foreign relations:

> The DFA's function includes, among its other mandates, *the determination of persons and institutions covered by diplomatic immunities, a determination which, when challenged, entitles it to seek relief from the court so as not to seriously impair the conduct of the country's foreign relations.* The DFA must be allowed to plead its case whenever necessary or advisable to enable it to help keep the credibility of the Philippine government before the international community.[192]

Ultimately, this view shows that the DFA determination is essentially an act by the executive branch of government to assert the immunities granted by the Philippine State to legal entities before judicial courts, whenever its judgment deems necessary.

However, it must be clarified at the onset that a ruling in favor of immunity by the DFA, and consequently by the courts, to the prejudice of an IO employee on his claim of relief would not *automatically* connote grave abuse of discretion. The DFA and the courts in doing so are fulfilling the State obligation to ensure the IO's immunity from every form of legal process, a treaty obligation. An act within the bounds of the law cannot amount to grave abuse of discretion.

This Note so argues that it is not sufficient that the DFA and the courts fulfill the State obligation in favor of IOs, precisely because there is an

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[190] Constantino v. Cuisia, G.R. No. 106064, 472 SCRA 505, 533, Oct. 13, 2005.

[191] Sec'y of Justice v. Lantion, G.R. No. 139465, 322 SCRA 160, 221–22, Jan. 18, 2000 (Puno, *J., dissenting*).

[192] *DFA*, 262 SCRA 39, 48. (Emphasis supplied.)

equally demandable obligation in favor of IO employees to which the State, through its instrumentalities, cannot turn a blind eye. Both sources of rights and obligations are valid, subsisting, and must be construed as scaffolding—not negating each other, but giving effect to both while drawing their boundaries.

Thus, when the DFA's determination of immunity results in an unavoidable conclusion that the ICCPR rights of IO employees will be negated, there is grave abuse of discretion that needs correction. The State, through the DFA and the courts, cannot whimsically appreciate the IO's immunity, when it results in an evasion of a positive duty required by law, such as a treaty obligation on the part of the State. In addition, such evasion of a positive duty is contrary to the principle of *pacta sunt servanda* required from States in the fulfillment of international obligations arising from conventions.

6. Standards of Judicial Review

When may the upholding of IO immunity be deemed an evasion of positive duty? The landmark case of *Waite and Kennedy v. Germany*[193] decided by the ECtHR, a case of equivalent nature to the matter under consideration, speaks of a formula to be applied by domestic courts in determining whether to uphold IO immunity: whether the applicants, or plaintiffs, had available reasonable alternative means to protect effectively their rights under the Convention, where 'applicant' refers to the IO employee, while 'Convention' refers to the European Convention on Human Rights.

While this particular decision and formula has no direct legal traction in Philippine jurisdiction, as it was decided by the ECtHR using Article 6 of the Convention on fair trial,[194] it is used as an inspiration or guide-post by this Note in crafting a framework similar, although more rigorous, to the one mentioned.

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[193] Merits, App No 26083/94, ECHR 1999-I, Feb. 18, 1999.

[194] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6(1), Nov. 4, 1950, Europ.T.S. No. 5. "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a *fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.* Judgment shall be *pronounced publicly* but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." (Emphasis supplied.)

This Note proposes that the standards of judicial review to be used in answering the question mentioned above are, at the very least,[195] the ICCPR rights and their guarantees. As discussed in Part III, the inseparable rights to equality before courts and tribunals and to a fair and public hearing by a competent, independent, and impartial tribunal are to be used as the minimum standards of procedural rights on the part of IO employees. The State obligations discussed in Part III are reproduced hereinafter.[196]

With regard to the right to equality before courts and tribunals, the State party is obligated:

1. To ensure equal access, such that no individual is deprived, in procedural terms, of his/her right to claim justice;

2. To ensure equality of arms, such that same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant;

3. To ensure that the parties to the proceedings are treated without any discrimination;

4. To ensure that each side be given the opportunity to contest all the arguments and evidence adduced by the other party; and

5. To ensure that similar cases are dealt with in similar proceedings, unless objective and reasonable grounds are provided to justify the distinction.[197]

With regard to the right to a fair and public hearing by a competent, independent, and impartial tribunal, the State party is obligated:

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[195] The ICCPR rights serve as the minimum standard of procedural rights to be guaranteed by the Philippine State. The theoretically higher bar set by domestic law, primarily by the Constitution, as the standard of judicial review is reserved for future research on the topic.

[196] The order of State obligations in the enumeration does not pertain to any hierarchy as to which obligation must be prioritized by the State for compliance.

[197] *See supra* Part III.A. (Citations omitted.)

1. To ensure that at least one stage of the proceedings for determination of rights and obligations in a suit of law be done by a tribunal within the meaning of Article 14 (1);

2. To establish a competent tribunal to determine such rights and obligations;

3. To allow access to such competent tribunal, *except in specific cases*;

4. To ensure independence of such tribunal;

5. To ensure impartiality of such tribunal; and

6. To ensure a fair and public hearing of such tribunal.[198]

A table of guarantees summarizing the aforementioned is provided by this Note to serve as a checklist of courts of these standards, as shown below:

TABLE 1. Summary of State Obligations under ICCPR, Art. 14 (1).

Right to equality before courts and tribunals	**ICCPR Obligations (numbers refer to preceding enumerations)**
Equal access	1
Equality of arms	2, 4
Equal treatment (w/o discrimination)	3, 5
Right to a fair and public hearing by a competent, independent, and impartial tribunal	
Access to competent tribunal (One stage)	1, 2, 3
Independence	4, 6
Impartiality	5, 6
Public hearing	6

Where can these standards be examined against by courts? With these standards within domestic courts' reach, it would be without question that the obvious path in meeting these is that Philippine domestic courts themselves fulfill said obligations. However, in the matter under consideration of this Note, the IO employee, as plaintiff, has not even 'walked' into the courts that supposedly are obligated to grant these guarantees. It is not sufficient that the court acquires jurisdiction over the person of the IO employee and immediately tosses the case due to some powerful formula from an executive

[198] *Id.*

agency. It is not an uncommon situation where the courts close their doors because of IO immunity.

As discussed above, IO immunity closes whatever remedy the ICCPR procedural rights open to IO employees. One can imagine a door wide open fortified by the ICCPR for an IO employee, but even before the IO employee can walk through it and be heard by the court, the door is prematurely shut by IO immunity. This situation effectively removes the courts from the position to fulfill State obligations; the IO employees are then deprived of their ICCPR rights.

This Note argues that the legal path that Philippine domestic courts can take to cross this hurdle is to look towards the respondent IO itself. There must be an examination of the procedural options *made available to* and *actually taken* by the IO employee with regard to the alleged employment dispute or rights violation, before said IO employee went to Philippine domestic courts. In so doing, the Philippine domestic courts can decide on the merits, using the standards summarized above, on whether the ICCPR procedural rights of the IO employee were fulfilled, not by Philippine domestic courts, but by the IO invoking immunity. In such a way, for IO immunity to be upheld, the Philippines, through its domestic courts, must ensure that the IO employee was guaranteed their rights, in one way or another—the most potent of which is through the IO dispute mechanisms.[199]

While this argued path may seem, at the first instance, to be an overstepping into the IO's international legal personality, the said path is rather a modest attempt to ensure that the Philippines, as a State party to international conventions, can fulfill its obligations in the *most effective* way possible.

Before proceeding with the analyses, it must be clarified further that the ICCPR standards may be used by Philippine domestic courts to IO dispute mechanisms, principally because the ICCPR rights are not exclusive to the domestic judicial/quasi-judicial mechanisms of the State party. These rights merely cover, in a general and broad manner, the obligation of the State

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[199] *See e.g.,* Int'l Lab. Org. Adm. Tribunal, UN Internal Justice System, & International Monetary Fund Adm. Tribunal. While the preceding enumeration consists of examples of highly developed and complex IO dispute mechanisms, not all IOs are capable of instituting their own dispute mechanisms of such magnitude. IO dispute mechanisms, as used in this Note, include any form of dispute settlement processes as well that are internal to any IO where employees may file actions or claims related to employment dispute or rights violation. A subsequent research is needed to individually examine in great detail the various IO dispute mechanisms in relation to the proposed framework herein.

party to ensure that such rights will be enjoyed by the person involved, without specification, on the other hand, that the person involved must enjoy these rights *before a domestic mechanism* created by the State party itself. Without this exclusivity, domestic courts may rightly examine whether such standards have already been met by the IO dispute mechanisms and, in effect, have already fulfilled the aggrieved IO employee's rights as mentioned. To illustrate, if the examination of domestic courts of these standards against IO dispute mechanisms leads to a favorable result (i.e., IO dispute mechanism processes, as experienced by the IO employee, are compliant with ICCPR standards), the concerned IO's immunity from legal processes must be respected. However, if the examination results in an unfavorable result, then the domestic courts are bound by international obligation to acquire jurisdiction over the action.

There are caveats as well that need to be expressly made at the onset. *First*, while Philippine domestic courts look into the IO dispute mechanisms and the procedural options made available and actually taken by the IO employee, the courts do not have the power to arrogate upon itself and compel the IO on its prerogative to set up its choice of dispute mechanism. *Second*, Philippine domestic courts do not have the power of control or supervision over IO dispute mechanisms and their procedures. *Third*, Philippine domestic courts do not prefer one party over the other (i.e., IO employee vis-à-vis IO), nor operate presumptions of law.

It is most important to note that the Philippine domestic courts can only go beyond the DFA's determination of immunity, when there exists a *prima facie* case that the invocation of immunity would negate a treaty obligation, such as those arising from the ICCPR, and thus amount to an evasion of a positive duty on the part of the State.

The proposed examination of the IO dispute mechanism is as follows: Philippine domestic courts examine the processes and safeguards placed by the IO dispute mechanism, coupled with the procedural remedy already pursued by the IO employee against the ICCPR standards, as shown below:

TABLE 2. ICCPR, Art. 14 (1) State Obligations as Applied to IO Dispute Mechanism.

Right to equality before courts and tribunals	
Equal access	Does the IO employee have access to the IO dispute mechanism similar to that of employees of the same class?

Equality of arms	Does the IO employee have the same opportunity to contest the arguments and evidence presented by the other party?
Equal treatment (w/o discrimination)	Are the IO employee and his or her case free from discrimination and similarly treated as those in similar class of cases?
Right to a fair and public hearing by a competent, independent, and impartial tribunal	
Access to competent tribunal (One stage)	Does the IO employee have access to *at least* one stage of proceedings before a lawfully established IO dispute mechanism?
Independence	Is the IO dispute mechanism independent?
Impartiality	Is the IO dispute mechanism impartial?
Public hearing	Is the IO dispute mechanism's proceeding and/or decision publicly conducted and published?

A failure to meet any of the foregoing standards would result in the staying of the immunity's application and the proceeding of the action in Philippine domestic court.

Further, once the action proceeds in a Philippine domestic court, the same ICCPR rights must also be ensured by the courts for the benefit of the IO employee.[200] A consequent failure of the domestic court to ensure such rights, specifically the rights to equality before courts and tribunals and to a fair and public hearing by a competent, independent, and impartial tribunal, will result in a failure to comply with the State obligation under the ICCPR. This *extension* of analysis prevents the absurdity of a case where the Philippine domestic court has finally overcome the IO immunity, but it then fails to comply with the standards of the ICCPR rights during the proceedings before it.

At this point, it must be noted that the question of propriety—and even justness—of the relief sought by the IO employee or awarded by the court to said employee, whether in the form of damages, compensation, restitution, or whatever form necessary, is not covered by the legal analysis in this Note, because it already goes beyond the State obligations required on the basis of the international conventions discussed herein.

[200] To reiterate, ICCPR rights serve as minimum standards of procedural rights accorded to the IO employee. The Philippine Constitution and jurisprudence interpreting the former guarantee arguably a higher bar of standards for procedural due process for persons before the courts. However, these domestic constitutional standards will not be applied in the analysis at bar, and instead focus on the standards set in the treaty obligation.

C. Scenarios and Test Cases

There are a number of predictable scenarios that could happen before the Philippine domestic courts once the IO employee files an action before it. TABLE 3 summarizes the flow of each scenario and determines whether the Philippines complies with its State obligations under the ICCPR and IO agreement in these scenarios. However, the scenarios enumerated below are not exhaustive of the gamut of scenarios that could happen in the course of the proceedings.

The following scenarios assume that there is a *valid and binding* treaty from which an obligation to uphold the grant of IO immunity from legal processes arises. Further, as stated in the preceding Section, this analysis covers only the remedy guaranteed under the ICCPR, and not the reliefs to be awarded by the court.

1. Scenario 1 – DFA Refuses to Determine Immunity

i. Scenario 1.a – Court Fails to Protect ICCPR Rights

An IO employee files an action before a Philippine domestic court praying for an award of compensatory damages on the ground that his or her IO employer discriminated him or her on the basis of his or her nationality. The IO employer seeks assistance from DFA in invoking its immunity from legal processes.

The DFA then refuses to make a determination of immunity of said IO, and no manifestation is forwarded to the court. The court consequently acquires jurisdiction over the IO employer. However, in the proceeding before the court, the ICCPR rights[201] of the IO employee are not protected.[202]

Does the State fulfill its obligation to IO? – No
Does the State fulfill its obligation to IO employee? – No

ii. Scenario 1.b – Court Protects ICCPR Rights

An IO employee files an action before a Philippine domestic court praying for an award of compensatory damages on the ground that his or her

[201] Such pertain to rights to equality before courts and tribunals and to a fair and public hearing by a competent, independent, and impartial tribunal.

[202] This refers to the *extension* of analysis, where the same ICCPR rights must be ensured by the Philippine domestic court in the proceedings before it, regardless of whether IO immunity was upheld or not.

IO employer discriminated against him or her on the basis of his or her nationality. The IO employer seeks assistance from DFA in invoking its immunity from legal processes.

The DFA then refuses to make a determination of immunity of said IO, and no manifestation is forwarded to the court. The court consequently acquires jurisdiction over the IO employer. In the proceeding before the court, the ICCPR rights of the IO employee are protected.[203]

Does the State fulfill its obligation to IO? – No
Does the State fulfill its obligation to IO employee? – Yes

2. Scenario 2 – Philippine Domestic Court Refuses to Uphold IO Immunity

i. Scenario 2.a – Court Fails to Protect ICCPR Rights

An IO employee files an action before a Philippine domestic court praying for an award of compensatory damages on the ground that his IO employer discriminated against him or her on the basis of his or her nationality. The IO employer seeks assistance from DFA in invoking its immunity from legal processes.

The DFA makes a determination of immunity of said IO, and a manifestation is forwarded to the court. The court refuses to uphold the DFA determination and the immunity of the IO employer. The court consequently acquires jurisdiction over the IO employer. However, in the proceeding before the court, the ICCPR rights of the IO employee are not protected.[204]

Does the State fulfill its obligation to IO? – No
Does the State fulfill its obligation to IO employee? – No

ii. Scenario 2.b – Court Protects ICCPR Rights

An IO employee files an action before a Philippine domestic court praying for an award of compensatory damages on the ground that his or her IO employer discriminated against him or her on the basis of his or her nationality. The IO employer seeks assistance from DFA in invoking its immunity from legal processes.

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[203] *Id.*
[204] *Id.*

The DFA makes a determination of immunity of said IO, and a manifestation is forwarded to the court. The court refuses to uphold the DFA determination and the immunity of the IO employer. The court consequently acquires jurisdiction over the IO employer. In the proceeding before the court, the ICCPR rights of the IO employee are protected.[205]

Does the State fulfill its obligation to IO? – No
Does the State fulfill its obligation to IO employee? – Yes

3. Scenario 3 – Philippine Domestic Court Upholds IO Immunity

i. Scenario 3.a – Court Refuses to Examine IO Dispute Mechanism against ICCPR Standards

An IO employee files an action before a Philippine domestic court praying for an award of compensatory damages on the ground that his or her IO employer discriminated against him or her on the basis of his or her nationality. The IO employer seeks assistance from DFA in invoking its immunity from legal processes.

The DFA makes a determination of immunity of said IO, and a manifestation is forwarded to the court. The court upholds the DFA determination and the immunity of the IO employer. The court consequently refuses to acquire jurisdiction over the IO employer, and dismisses the action.

This is the usual scenario of cases before domestic courts where this Note finds a legal void as previously discussed. An immediate upholding of IO immunity and dismissal of the action by the court, without regard for the other equally enforceable duty (i.e., ICCPR obligations), arguably constitutes grave abuse of discretion in itself.[206]

Does the State fulfill its obligation to IO? – Yes
Does the State fulfill its obligation to IO employee? – No

The following scenarios 3.b, 3.c, and 3.d explore this Note's proposed examination by the court of the IO dispute mechanism and the extent of remedy provided to IO employee against ICCPR standards.

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[205] *Id.*

[206] The particular finding of grave abuse of discretion is on the part of the domestic court, which may then be reviewable by a higher court having jurisdiction over original actions concerning grave abuse of discretion or petitions for *certiorari*. This is a separate finding of grave abuse of discretion from what was described earlier in the Note. *See supra* Part IV.B.

ii. Scenario 3.b – Court Examines IO Dispute Mechanism Against ICCPR Standards; IO Dispute Mechanism Fails to Meet the ICCPR Standards; Court Fails to Protect ICCPR Rights

An IO employee files an action before a Philippine domestic court praying for an award of compensatory damages on the ground that his or her IO employer discriminated against him or her on the basis of his nationality. The IO employer seeks assistance from DFA in invoking its immunity from legal processes.

The DFA makes a determination of immunity of said IO, and a manifestation is forwarded to the court. The court preliminarily appreciates the DFA determination and the immunity of the IO employer. The court consequently determines whether there is grave abuse of discretion on the part of DFA when the latter made a determination upholding IO immunity. To exact whether such determination amounts to an evasion of positive duty based on a treaty obligation, the court examines the IO dispute mechanism and the extent of remedy provided to IO employee against the ICCPR standards.

The court finds that the IO dispute mechanism and the extent of remedy provided to IO employee failed to meet the ICCPR standards. The court consequently acquires jurisdiction over the IO employer. However, in the proceeding before the court, the ICCPR rights of the IO employee are not protected.[207]

Does the State fulfill its obligation to IO? – Yes
Does the State fulfill its obligation to IO employee? – No

iii. Scenario 3.c – Court Examines IO Dispute Mechanism Against ICCPR Standards; IO Dispute Mechanism Fails to Meet the ICCPR Standards; Court Protects ICCPR Rights

An IO employee files an action before a Philippine domestic court praying for an award of compensatory damages on the ground that his or her IO employer discriminated against him or her on the basis of his or her

[207] *See supra* note 202.

nationality. The IO employer seeks assistance from DFA in invoking its immunity from legal processes.

The DFA makes a determination of immunity of said IO, and a manifestation is forwarded to the court. The court preliminarily appreciates the DFA determination and the immunity of the IO employer. The court consequently determines whether there is grave abuse of discretion on the part of DFA when the latter made a determination upholding IO immunity. To exact whether such determination amounts to an evasion of positive duty based on a treaty obligation, the court examines the IO dispute mechanism and the extent of remedy provided to IO employee against the ICCPR standards.

The court finds that the IO dispute mechanism and the extent of remedy provided to IO employee failed to meet the ICCPR standards. The court consequently acquires jurisdiction over the IO employer. In the proceeding before the court, the ICCPR rights of the IO employee are protected.[208]

Does the State fulfill its obligation to IO? – Yes
Does the State fulfill its obligation to IO employee? – Yes

iv. Scenario 3.d – Court Examines IO Dispute Mechanism Against ICCPR Standards; IO Dispute Mechanism Meets the ICCPR Standards

An IO employee files an action before a Philippine domestic court praying for an award of compensatory damages on the ground that his or her IO employer discriminated against him or her on the basis of his or her nationality. The IO employer seeks assistance from DFA in invoking its immunity from legal processes.

The DFA makes a determination of immunity of said IO, and a manifestation is forwarded to the court. The court preliminarily appreciates the DFA determination and the immunity of the IO employer. The court consequently determines whether there is grave abuse of discretion on the part of DFA when the latter made a determination upholding IO immunity. To exact whether such determination amounts to an evasion of positive duty based on a treaty obligation, the court examines the IO dispute mechanism

[208] *Id.*

and the extent of remedy provided to IO employee against the ICCPR standards.

The court finds that the IO dispute mechanism and the extent of remedy provided to IO employee met the ICCPR standards. The court consequently refuses to acquire jurisdiction over the IO employer, and dismisses the action.

Does the State fulfill its obligation to IO? – Yes
Does the State fulfill its obligation to IO employee? – Yes

4. Scenario 4 – Court Refuses to Acquire Jurisdiction Over the IO Employee

An IO employee files an action before a Philippine domestic court, praying for an award of compensatory damages, on the ground that his IO employer discriminated against him or her on the basis of his or her nationality. The court consequently refuses to acquire jurisdiction over the IO employee on the ground of jurisdictional and procedural defects, such as failure to pay docket fees, failure to implead a real party-in-interest, or failure to file the action in a court of proper jurisdiction or venue, and thereafter dismisses the action.

Does the State fulfill its obligation to IO? – Yes
Does the State fulfill its obligation to IO employee? – Y

TABLE 3. Summary of Scenarios and Test Cases Using the Proposed Framework

		ACTOR								
		PH Court	**DFA**	**PH Court**	**PH Court**	**IO**	**PH Court**	**PH Court**	**State**	**State**
		Acquires jurisdiction over IO employee?	**Determines immunity?**	**Upholds legal immunity?**	**Examines IO dispute mechanism and extent of remedy provided to IO employee against ICCPR, Art. 14 (1) standards?**	**Meets standards of judicial review of dispute mechanism and extent of remedy provided to IO employee?**	**Acquires jurisdiction over IO?**	**Protects Art. 14 (1)?**	**Fulfills legal obligation to IO?**	**Fulfills legal obligation to EE?**
SCENARIO	1.a	Yes	No	-	-	-	Yes	No	No	No
	1.b	Yes	No	-	-	-	Yes	Yes	No	Yes
	2.a	Yes	Yes	No	-	-	Yes	No	No	No
	2.b	Yes	Yes	No	-	-	Yes	Yes	No	Yes
	3.a	Yes	Yes	Yes	No	-	No	-	Yes	No
	3.b	Yes	Yes	Yes (Preliminary)	Yes	No	Yes	No	Yes	No
	3.c	Yes	Yes	Yes (Preliminary)	Yes	No	Yes	Yes	Yes	Yes
	3.d	Yes	Yes	Yes (Preliminary)	Yes	Yes	No	-	Yes	Yes
	4	No, reasons other than legal immunity without grave injustice (e.g., jurisdictional or procedural defect; not on the merits)							Yes	Yes

**Assumes a valid and binding treaty obligation granting IO immunity*

V. IMPLICATIONS

Considering that this Note aims to fill a legal void by proposing a framework of legal analysis for the use of courts in actions of similar nature under their consideration and of practitioners in actions involving the parties herein described, the implications of taking this new path should then be discussed. As argued and as apparent, such analysis moves the metes and bounds of a doctrine that seems to have been firmly established in the country's legal system as a canon. It is therefore understandable that there would be both intended and unintended consequences that would flow from the decision to adopt this analysis, and which would make courts hesitate from doing so.

A. Legal Considerations

1. Functional Necessity Doctrine

The well-established doctrine of functional necessity in international and domestic jurisprudence and research has long been used to shield IOs from various forms of liability, placing them beyond the reach of domestic courts of law. It is never too useful to repeat how the Philippine courts consider the functional necessity of IOs. As held in *ICMC*:

> It is not concerned with the status, dignity or privileges of individuals, but with the elements of functional independence necessary to free international institutions from national control and to enable them to discharge their responsibilities impartially on behalf of all their members. The *raison d'etre* for these immunities is the assurance of unimpeded performance of their functions by the agencies concerned.[209]

Recent academic research on the topic of IOs, which earned the nod of some domestic and regional courts, argues that the justification of functional necessity is not anymore applicable in this day and age, because the facts and circumstances that led to the birth and maturity of said doctrine are now absent.[210] In the past, it may be said that the IOs can be threatened or influenced by the country where they are headquartered. However, experience has shown that IOs have transformed into nearly untouchable institutions that, on the contrary, now have the potential of influencing States.

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[209] *ICMC*, 190 SCRA 130, 142–43. (Citations omitted.)

[210] *Supra* note 35.

This Note is aligned with this trend of academic research in arguing that the mere invocation of functional necessity is not anymore sufficient to justify an application of immunity, *when there are correlative obligations that would be negated.* Through subsequent research, like this, and acknowledgment from different courts and tribunals globally, it is believed that the functional necessity doctrine will have to take the center stage of international law-making, particularly in altering such doctrine, to finally keep it in line with the times.

2. Judicial Review and Treaty Obligations

The Philippine legal system has seen the continuous expansion of the power of judicial review exercised by the courts. As discussed above, it has transformed from the power of "settl[-ing] actual controversies involving rights which are legally demandable and enforceable"[211] to the more expansive power of "determin[-ing] whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."[212]

The framework and analysis proposed by this Note is also hinged on the exercise of the expanded power of judicial review—in this case, even covering cases that have been expressly reserved by jurisprudence to the executive branch as a political question.[213] What is proposed here, however, is not another expansion of said power. Instead, this Note merely explores the application of judicial review to treaty obligations, particularly when there is apparent conflict with one another.

What this means for the Philippine legal system is that there is a recognition that there are indeed treaty obligations assumed by the Philippines as a State party in various international conventions that must be complied with and made effective. As stated in one case, the agreements granting immunities are covenants and commitments voluntarily assumed by the Philippine government and which must be respected.[214] However, this statement plainly neglects the fact that these agreements granting immunities are not agreements existing in a vacuum. There are other agreements of equal efficacy that must be also upheld, such as the IPPCR.

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[211] CONST. art. VIII, § 1, ¶ 2.
[212] Art. VIII, § 1, ¶ 2.
[213] *WHO*, 48 SCRA 242, 248.
[214] *Id.* at 249.

It must be noted, however, that the Philippine courts must not be blamed for this gap, because this interpretation was initially sourced from treatises and jurisprudence from other jurisdictions. In addition, the party claiming for relief, the IO employee in particular, may not have raised the particular grounds for piercing the immunity invoked by the IO and determined by the DFA. While I argue that treaty obligations of the State are supposed to be within the judicial notice of the courts,[215] they will only begin to exist on record as such when raised by the appropriate party. The only benefit of taking judicial notice of the State's treaty obligations is the absence of the need to prove its existence and validity through evidence.[216] However, these factors do not justify the continued existence of this void. Thus, this framework is a proposal to move forward leaving the then valid but now antiquated doctrine.

B. Policy Considerations

1. IO Headquarters

The headquarters of IOs are often made part of the constituent agreements among States creating such IOs. While the headquarters may be dictated by the nature, purpose, and scope of the IOs, it is at the same time a strategic decision both on the part of the IO and on the part of the State parties. Legal considerations, such as immunity from legal processes and immunity from taxation, among others, are definitely the top factors in deciding where to establish the headquarters. However, there is also a wide range of practical factors that influence the State parties, like accessibility to foreign travel, safety, standard of living, mobility, political stability, and others.

Undeniably, the proposal that this Note offers may be considered as a limitation on the rights and privileges enjoyed by the IOs, which could outweigh whatever alternative benefit the Philippines can provide as the host country to the IOs. Previously, they enjoyed unhampered protection from legal processes but on the basis of this proposal, there is now a chance that they can be sued in domestic courts. This is a serious matter in the dynamics of IOs and country headquarters that could possibly redefine the manner by which IO headquarters agreements are concluded. Moreover, any form of limitation to the rights and privileges granted to an IO, like the one proposed by this Note, could disincentivize the international community of States in choosing a particular country as the IO's headquarters.

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[215] RULES OF COURT, Rule 129, § 1.

[216] Rule 129, § 1.

Although an amendment to an international convention or constituent agreement to the effect that the headquarters be changed in light of this advancement in international law is not practical and might not be immediately feasible, it is not impossible.

2. Philippines as a State party

The Philippine Constitution unequivocally declares that "[t]he Philippines [...] adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations."[217] Further, it provides that "[t]he State shall pursue an independent foreign policy. In its relations with other states, the paramount consideration shall be national sovereignty, territorial integrity, national interest, and the right to self-determination."[218]

While the aforementioned principles of policy are to be actively pursued by the executive branch led by the President as the head of State, the judiciary's decisions also have consequences to the foreign policy and foreign relations, especially to those cases involving another State, or its agents. It may be argued, however, that this Note merely focuses on IOs—legal entities distinct from States—and that foreign policy is not at issue. However, despite the clear difference between IOs and States, the acknowledged power and influence of IOs has turned issues concerning these entities as an important matter of foreign policy. IOs have clearly become players in international law.

An unfavorable decision on IOs' privileges in the Philippines might be seen as an act diminishing the roles exclusively held and protected by IOs. To some extent, it may even be seen as an affront on the capacity of States to conclude constituent agreements of whatever nature the States may prefer. This notwithstanding, it is a common reality for all States, regardless of the source of international law, to perform all treaty obligations in good faith under the principle of *pacta sunt servanda*.[219] In deciding issues such as the one presented by this Note, the Philippine domestic courts are nonetheless enjoined to apply the highest form of judicial restraint and to exercise the power of judicial review only when the specific circumstances calling for it concur.

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[217] CONST. art. II, § 2.

[218] Art. II, § 7.

[219] VCLT, art. 26. "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."