



Primary Reference:
Lectures of ATTY. ANDRE PALACIOS

Secondary References:
Public International Law by Bernas, Cruz;
Supplementary Internet Sources

Generally entails individual responsibility	Usually collective in the sense that it attached directly to the state, not on its nationals
---	--

As to sources and application:

**Part I
BASIC CONCEPTS IN INTERNATIONAL LAW**

Concepts

Q: Does "International Law" qualify as law? Is it binding?

Yes. It consists of binding rules accepted as such by the community.

There are however, two views to reflect:

<i>Not a Law</i>	<i>Qualified as Law</i>
<ul style="list-style-type: none"> • There can be no law binding sovereign states • There is no international executive, legislature and judiciary • No assured position identifying violations • Commonly disregarded 	<ul style="list-style-type: none"> • States are usually bound by many rules not promulgated • Social interdependence • Predominance of general interest • General respect for law because of possible consequence of defiance
Not binding but merely persuasive. There are international organizations such as UN, ICJ, etc. but cannot bind states unless states give their consent.	Binding based on (positivist theory) belief that order and not chaos is the governing principle of the world where we live.

<i>Philippine Law</i>	<i>International Law</i>
Primary (mandatory) source <ul style="list-style-type: none"> • Constitution and Statutes • Jurisprudence • EOs, AOs, IRRs, Ordinances • <i>Treaties (PH is signatory)</i> 	Primary/formal source <ul style="list-style-type: none"> • Treaties or Conventions • Custom • General principles of law
Secondary (persuasive) source <ul style="list-style-type: none"> • Law books and journals • <i>Treaties (PH not a signatory)</i> • Restatements of the Law • US Supreme Court decisions 	Secondary source <ul style="list-style-type: none"> • Decisions of ICJ • Writings of highly qualified publicists
<i>Res judicata</i> is observed	<i>Res judicata</i> is binding only to parties and specific case (Sec.59 of ICJ Statute)
<i>Stare decisis</i> is applicable	There is no <i>stare decisis</i> being followed

Q: Are there similarities (or differences) between Philippine law and International Law?

<i>Philippine Law</i>	<i>International Law</i>
Issued by political superior for observance of those who are under its authority	Not imposed but simply adopted by states as a common rule of action among themselves
Enactment is from a lawmaking authority	Derived from sources of international law
Regulates the relations of persons with the state and its citizens elsewhere	Applies to the relations <i>inter se</i> of states and other international persons
Violations are redressed through local administrative or judicial process	Violations are resolved through state to state transactions

Q: Is Philippine law part of the international legal system?

Yes, Philippine law is part of international law especially if it contains provisions giving greater or less validity to the legislation of other states, for it has circumstantially the elements of international law.

Definition of International Law

International law consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical. (*Restatement of the Law*)

Theories of International Law

1. **Command theory** – (John Austin) law consists of commands originating from a sovereign backed up by threats of sanction if disobeyed. (already discredited)



2. **Consensual theory** – international law derives its binding force from the consent of states. (however, many binding rules are not derived from consent) → **dominant**
3. **Natural law theory** – posits that law is derived by reason from nature of man.

Monism and Dualism

Monism – international law and domestic law belong to only one system of law with international law considered as superior to domestic law.

Dualism – (pluralist theory, based on positivism) domestic and international law are two different spheres of law. They would favor state law.

Status of national law in the international legal system

National law provides for evidence of (international) customs and general principles which are authoritative sources of international law.

Sources of International Law

Q: How are rules of International Law created?

Rules of international law are created by general practice of states.

Q: How does one know what a particular rule of international law allows (or prohibits)?

Look into subsidiary means and judicial decisions from highly qualified publicists.

Normally, sources of international law, to be enforceable, must be accepted by the majority of the family of nations. Treaties, whether bilateral or multilateral, only takes effect *inter se* the parties thereto. If the treaty is a stipulation of generally accepted practice of nations, it forms part of customary law. If treaty is in conflict with customary law based on peremptory norms (*jus cogens*), the latter will prevail.

Q: Is a treaty superior to customary law?

Generally, NO, because they are equal in the hierarchy of international law. Treaties

and customary law are usually taken as complementary with each other. A treaty is generally entered upon into for reasons of establishing a customary law. But a later treaty may be taken as superior in repealing a prior customary law.

Q: Are there rules of customary law that are superior to treaties?

Yes. When customary law has the status of *jus cogens* or peremptory norms, they are considered superior than any treaty and custom.

Source of Law

Historical (material) sense

- Refers to a causal or historical influence explaining the factual existence of a given rule of law at a given place and time.

Legal (formal) sense

- Means the criteria under which a rule is accepted as valid in the given legal system at issue.

Classification of Sources

- **Formal Sources** – various processes by which rules come into existence.
 - Legislation
 - Treaty-Making
 - Judicial Decision-Making
 - Practice of States
- **Material Sources** – identify what the obligations are.
 - Treaties
 - State Practice
 - Judicial Decisions
 - Writings of Jurists

Section 38(1), Statute of the ICJ

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b) International custom, as evidence of a general practice accepted as law;
- c) The general principles of law recognized by civilized nations;
- d)... Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."



§ 102 ALI Restatement of the Law (Third)

(1) A rule of international law is one that has been accepted as such by the international community of states.

- a) in the form of customary law;
- b) by international agreement; or
- c) by derivation from general principles common to the major legal systems of the world.

(2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.

(3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.

(4) General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate.

Evidence of existence and content:

1. **principal means** (text of treaty and state practice)
2. **subsidiary means** (judicial decisions and teachings of highly qualified publicists)

Treaty

An international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. (Art. 2(1)(a), 1969 Vienna Convention on the Law of Treaties)

- Only the subjects of international law – States, international organizations, and the other traditionally recognized entities – can conclude treaties under international law.
- Excludes agreements between States which are governed by municipal law and agreements between States which are not intended to create legal relations at all.

“Soft Law”

- Guidelines of conduct which are neither strictly binding norms of law, nor completely irrelevant political maxims, and operate in a grey zone between law and politics.

- e.g. Treaties not yet in force; or Resolutions of international organizations or conferences which lack legally binding quality.
- Norms which are vague with respect to their content or weak with respect to the requirements of the obligation.

Custom

As confirmed by the ICJ in *Nicaragua v. USA*, custom is constituted by two elements:

- (1) general practice (objective element); and
- (2) *opinio juris* (subjective element).

In the Continental Shelf case (*Libya v. Malta*), the Court stated that the substance of customary international law must be looked for primarily in the actual practice and ***opinio juris*** of States.

“Consistency” & “Uniformity”

In the **Asylum case** (*Colombia v. Peru*), the ICJ suggested that a customary rule must be based on “a constant and uniform usage.” The ICJ, however, held:

“The facts... Disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions... that it is not possible to discern... any constant and uniform usage, accepted as law.”

In other words, what prevented the formation of a customary rule in the **Asylum case** was not the absence of repetition, but the presence of major inconsistencies in the practice.

Major inconsistencies in the practice (i.e. a large amount of practice which goes against the rule in question) prevent the creation of a customary rule.

The ICJ also emphasized that a claimant State which seeks to rely on a customary rule must prove that the rule has become binding on the defendant State.

“The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct



inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule." (*Nicaragua v. USA*)

In the *Fisheries case (U.K. v. Norway)*, the ICJ noted that minor inconsistencies (i.e. a small amount of practice which goes against the rule in question) do not prevent the creation of a customary rule, although in such cases the rule in question probably needs to be supported by a large amount of practice in order to outweigh the conflicting practice in question.

"Specially Affected States"

"A practice can be general even if it is not universally accepted; there is no precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the States particularly involved in the relevant activity." [The Restatement (Third)]

"An indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and uniform." (*North Sea Continental Shelf case*)

In other words, customary law may emerge even within a relatively short passage of time!

"Persistent Objector"

A State can be bound by the general practice of other States even against its wishes if it does not protest against the emergence of the rule and continues persistently to do so.

The State must be sufficiently aware of the emergence of the new practice and law.

"In any event, the... rule would appear to be inapplicable against Norway, inasmuch as she has always opposed any attempt to apply it to the Norwegian coast." (*Fisheries case*)

Opinio juris sive necessitatis

A conviction felt by States that a certain form of conduct is required by international law.

- Motivated by a sense of legal duty, and not simply by courtesy or comity.
- Can be proved by pointing to an express acknowledgement of the obligation by the States concerned, or by showing that failure to act in the manner required by the alleged rule has been condemned as illegal by other States whose interests were affected.

Examples of procedural & substantive Rules from domestic law principles:

- Right to a Fair Hearing
- Dubio Pro Reo
- Denial of Justice
- Exhaustion of Local Remedies
- Estoppel
- Prescription
- Liability for Fault

Decision ex aequo et bono – a decision in which equity overrides all other rules.

While a judge may not give a decision ex aequo et bono, he/she can use equity to interpret or fill gaps in the law, even when there is no express authorization to do so. The principle of equity is a general principle common to national legal systems [See *River Meuse case (Netherlands v. Belgium)*]

Treaty vs. Custom

A treaty, when it comes into force, overrides customary law as between the parties to the treaty; one of the main reasons why States make treaties is because they regard relevant rules of customary international law as inadequate.

On the other hand, treaties can come to an end when the treaty is consistently ignored by one or more parties, with the acquiescence of the other parties ("**Desuetude**"). This takes the form of the emergence of a new rule of customary law, conflicting with the treaty.

Hierarchy of Sources

PHILIPPINE LAW	INTERNATIONAL LAW	
CONSTITUTION	JUS COGENS	
STATUTE	TREATY EXECUTIVE AGREEMENT	CUSTOMS
EXECUTIVE ISSUANCES	GENERAL PRINCIPLES OF INTERNATIONAL LAW	

HIERARCHY OF LAWS (DUALIST VIEW)

Treaties and Custom are of equal authority

- *Lex posterior derogat legi priori*
(a later law repeals an earlier law)
- *Lex posterior generalis non derogat priori speciali*
(a later general law does not repeal an earlier special law)
- *Lex specialis derogat legi generali*
(a special law repeals a general law)

General principles of law are subordinate to treaties and custom as their main function is to fill gaps in treaty law and customary law.



Judicial decisions and learned writings, as mere subsidiary means, are subordinate to the three (3) primary sources.

“Jus Cogens”

Art. 53 of the Vienna Convention on the Law of Treaties provides:

“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

“Obligations Erga Omnes”

Under the international law of reprisals, the general rule is that only the directly injured State is entitled to act against the violation of an international obligation by another State.

Obligations *erga omnes* are concerned with the enforceability of norms of international law, the violation of which is deemed to be an offense not only against the State directly affected by the breach, but also against all members of the international community.

- In the **Barcelona Traction case**, the ICJ recognized the existence of norms which are “the concern of all States.”
- In the **East Timor case**, the ICJ held: “In the Court’s view, Portugal’s assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court...”

Subjects of International Law

Q: Do non-state entities (e.g., natural persons) have rights under the “law of nations”?

Yes. Other subjects of international law are:

- 1) International organizations
- 2) Insurgents

- 3) National Liberation Movements
- 4) Individuals

Q: How does an entity become a state?

In the Montevideo Convention of 1933 on Rights and Duties of States, the State as a person of international law should possess the following qualifications:

- (a) A permanent population
- (b) A defined territory
- (c) Government
- (d) Capacity to enter into relations with other states

Entity must claim self determination to complete the process.

Q: What are the fundamental rights of a state?

Rights of states

1. Self-defense
2. Independence
3. Equality in law
4. Jurisdiction over its territory and persons and things therein

Q: What are the basic obligations of a state?

Duties of states

1. Non-intervention
2. Non-use of force
3. Pacific settlement of disputes
4. Respect for human rights
5. Other duties

Recognition of states

It’s act of acknowledging the capacity of an entity to exercise rights belonging to statehood. The question of recognition of states had become less predictable and more a matter of political discretion as a result of recent practice.

Recognition of governments

It’s the act of acknowledging the capacity of an entity to exercise powers of government of a state.

Constitutive Theory of Statehood

The constitutive theory of statehood defines a state as a person of international law if, and only if, it is recognized as sovereign by other states. This theory of recognition was developed in the 19th century. Under it, a state was sovereign if another sovereign state recognized it as such. Because of this, new states could not



immediately become part of the international community or be bound by international law, and recognized nations did not have to respect international law in their dealings with them. (Wikipedia)

Declarative Theory of Statehood

By contrast, the "declarative" theory defines a state as a person in international law if it meets the following criteria: 1) a defined territory; 2) a permanent population; 3) a government and 4) a capacity to enter into relations with other states. According to declarative theory, an entity's statehood is independent of its recognition by other states. The declarative model was most famously expressed in the 1933 [Montevideo Convention](#). (Wikipedia)

Estrada Doctrine

The doctrine that recognition of a government should be based on its *de facto* existence, rather than on its legitimacy. It is named after Don Genero Estrada, the Mexican Secretary of Foreign Affairs who in 1930 ordered that Mexican diplomats should issue no declarations that amounted to a grant of recognition: he felt that this was an insulting practice and offended against the sovereignty of other nations. In 1980 the UK, USA, and many other states adopted the Estrada doctrine. (Oxford Reference)

In other words, the Estrada Doctrine claims that Mexico should not judge, positively or negatively, the governments or changes in government of other nations, in that such action would imply a breach to their sovereignty. In addition, this doctrine is based on the universally recognized principles of self-determination and non-intervention, which are considered essential for mutual respect and cooperation amongst nations. (Wikipedia)

Montevideo Convention

The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.

Some have questioned whether these criteria are sufficient, as they allow less-recognized entities like the Republic of China (Taiwan) to claim full status as states. According to the alternative constitutive theory of statehood, a state exists only insofar as it is recognized by

other states. It should not be confused with the [Estrada doctrine](#). (Wikipedia)

Q: What is the difference between an inter-governmental organization (IO) and an international non-governmental organization (NGO)?

An international organization is an organization that is set up by treaty (between and) among two or more states. NGO is set up by private persons.

Q: How are inter-governmental organizations created?

The constituent document of international organizations is a treaty. Thus, every IO is created by stipulations of parties creating it.

Q: Are ALL states bound to recognize the personality of an inter-governmental organization created by a group of states?

Generally NO. Only state members are bound to recognize the personality of an IGO. However, the United Nations is an exception. In the Advisory Opinion by ICJ (21 June 1971):

In its advisory opinion on the question put by the Security Council of the United Nations, "What are the legal consequences for States of the continued presence of South Africa in Namibia notwithstanding Security Council resolution 276 (1970)?", the Court was of opinion,

by 13 votes to 2,

(1) that, the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory;

by 11 votes to 4,

(2) that States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration;

(3) that it is incumbent upon States which are not Members of the United Nations to give assistance, within the scope of subparagraph (2) above, in the action which has been taken by the United Nations with regard to Namibia.



International Law and Philippine Law

Q: Can a corporation which is organized and existing under the domestic laws of a state have rights under international law?

Yes. Corporations organized under domestic laws may be subjects of international law. As such, rights may be claimed and enforced.

United Nations (“objective personality”)

International personality of an international organization effective *vis-à-vis* all States, and not simply Member States. **The United Nations is the only international organization with objective international personality:** ‘fifty States, representing the vast majority of the members of the international community [in 1945], had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone ...’: (*Reparation for Injuries Case 1949 I.C.J. Rep. 174 at 178*) (*Wikipedia*)

Principle of speciality

[P]rinciple of International law that is included in most extradition treaties, whereby a person who is extradited to a country to stand trial for certain criminal offenses may be tried only for those offenses and not for any other pre-extradition offenses. Once the asylum state extradites an individual to the requesting state under the terms of an extradition treaty, that person can be prosecuted only for crimes specified in the extradition request. This doctrine allows a nation to require the requesting nation to limit prosecution to declared offenses. US courts have been divided on allowing standing to assert the doctrine when the other nation has not explicitly or implicitly protested certain charges. (*Wikipedia*)

A person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offences described in that treaty, and for the offence with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings. *United States v. Rauscher*, 119 U.S. 407 (U.S. 1886)

Q: Is International Law superior to the Philippine Constitution? a Philippine statute? a Philippine executive issuance?

It depends on the case brought about and which legal system they are brought. If the question is brought in the international tribunal, international law will prevail over domestic law. If the dispute is brought before domestic courts, domestic law must prevail over international law. This is consistent with the dualist theory adopted by the Philippines.

Q: How may one invoke rules of International Law before a Philippine court?

International law may be used in the same manner as citing primary sources of Philippine laws. It may be invoked by citing treaties, customary law or general principles of international law as written by highly qualified publicists.

Q: What are the Philippine rules on treaty-making?

Philippine rules on treaty making are enunciated in the 1987 Constitution and Executive Order No. 59 (1997). Treaty agreements shall have the concurrence of 2/3 of the Senate and ratification by the President.

Cases:

Ichong v. Hernandez
101 Phil. 1155 (1957)

Another subordinate argument against the validity of the law is the supposed violation thereby of the Charter of the United Nations and of the Declaration of the Human Rights adopted by the United Nations General Assembly. We find no merit in the Nations Charter imposes no strict or legal obligations regarding the rights and freedom of their subjects (Hans Kelsen, *The Law of the United Nations*, 1951 ed. pp. 29-32), and the **Declaration of Human Rights** contains nothing more than a mere recommendation or a common standard of achievement for all peoples and all nations (Id. p. 39.) That such is the import of the **United Nations Charter** aid of the Declaration of Human Rights can be inferred the fact that members of the United Nations Organizations, such as Norway and



Denmark, prohibit foreigners from engaging in retail trade, and in most nations of the world laws against foreigners engaged in domestic trade are adopted.

The Treaty of Amity between the Republic of the Philippines and the Republic of China of April 18, 1947 is also claimed to be violated by the law in question. All that the treaty guarantees is equality of treatment to the Chinese nationals "upon the same terms as the nationals of any other country." But the nationals of China are not discriminating against because nationals of all other countries, except those of the United States, who are granted special rights by the Constitution, are all prohibited from engaging in the retail trade. But even supposing that the law infringes upon the said treaty, the treaty is always subject to qualification or amendment by a subsequent law (U. S. vs. Thompson, 258, Fed. 257, 260), and the same may never curtail or restrict the scope of the police power of the State (plaston vs. Pennsylvania, 58 L. ed. 539.)

Gonzales v. Hechanova
9 SCRA 230 (1963)

It is [lastly] contended that the Government of the Philippines has already entered into two (2) contracts for the Purchase of rice, one with the Republic of Vietnam, and another with the Government of Burma; that these contracts constitute valid executive agreements under international law; that such agreements became binding effective upon the signing thereof by representatives the parties thereto; that in case of conflict between Republic Acts Nos. 2207 and 3452 on the one hand, and aforementioned contracts, on the other, the latter should prevail, because, if a treaty and a statute are inconsistent with each other, the conflict must be resolved — under the American jurisprudence — in favor of the one which is latest in point of time; that petitioner herein assails the validity of acts of the Executive relative to foreign relations in the conduct of which the Supreme Court cannot interfere; and the aforementioned contracts have already been consummated, the Government of the Philippines having already paid the price of the rice involved therein through irrevocable letters of credit in favor of the sell of the said commodity. We find no merit in this pretense.

The Court is not satisfied that the status of said tracts as alleged executive agreements has been sufficiently established. The parties to said contracts do not pear to have regarded the same as executive agreements. But, even assuming that said contracts may properly considered as executive agreements, the same are unlawful, as well as null and void, from a constitutional viewpoint, said agreements being inconsistent with the provisions of Republic Acts Nos. 2207 and 3452. Although the President may, under the American constitutional system enter into executive

agreements without previous legislative authority, he may not, by executive agreement, enter into a transaction which is prohibited by statutes enacted prior thereto. Under the Constitution, the main function of the Executive is to enforce laws enacted by Congress. The former may not interfere in the performance of the legislative powers of the latter, except in the exercise of his veto power. He may not defeat legislative enactments that have acquired the status of law, by indirectly repealing the same through an executive agreement providing for the performance of the very act prohibited by said laws.

The American theory to the effect that, in the event of conflict between a treaty and a statute, the one which is latest in point of time shall prevail, is not applicable to the case at bar, for respondents not only admit, but, also insist that the contracts adverted to are not treaties. Said theory may be justified upon the ground that treaties to which the United States is signatory require the advice and consent of its Senate, and, hence, of a branch of the legislative department. No such justification can be given as regards executive agreements not authorized by previous legislation, without completely upsetting the principle of separation of powers and the system of checks and balances which are fundamental in our constitutional set up and that of the United States.

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

Tanada v. Angara,
G.R. No. 118295, May 2, 1997

Third issue (WTO Agreement and Legislative Power)

The Constitution has not really shown any unbalanced bias in favor of any business or enterprise, nor does it contain any specific pronouncement that Filipino companies should be pampered with a total proscription of foreign competition. On the other hand, respondents claim that WTO/GATT aims to make available to the Filipino consumer the best goods and services obtainable anywhere in the world at the most reasonable prices. Consequently, the question boils down to



whether WTO/GATT will favor the general welfare of the public at large.

This Court notes and appreciates the ferocity and passion by which petitioners stressed their arguments on this issue. However, while sovereignty has traditionally been deemed absolute and all-encompassing on the domestic level, it is however subject to restrictions and limitations voluntarily agreed to by the Philippines, expressly or impliedly, as a member of the family of nations. Unquestionably, the Constitution did not envision a hermit-type isolation of the country from the rest of the world. In its Declaration of Principles and State Policies, the Constitution "adopts the generally accepted principles of international law as part of the law of the land, and adheres to the policy of peace, equality, justice, freedom, cooperation and amity, with all nations." By the doctrine of incorporation, the country is bound by generally accepted principles of international law, which are considered to be automatically part of our own laws. One of the oldest and most fundamental rules in international law is *pacta sunt servanda* — international agreements must be performed in good faith. "A treaty engagement is not a mere moral obligation but creates a legally binding obligation on the parties . . . A state which has contracted valid international obligations is bound to make in its legislations such modifications as may be necessary to ensure the fulfillment of the obligations undertaken."

By their inherent nature, treaties really limit or restrict the absoluteness of sovereignty. By their voluntary act, nations may surrender some aspects of their state power in exchange for greater benefits granted by or derived from a convention or pact. After all, states, like individuals, live with coequals, and in pursuit of mutually covenanted objectives and benefits, they also commonly agree to limit the exercise of their otherwise absolute rights. Thus, treaties have been used to record agreements between States concerning such widely diverse matters as, for example, the lease of naval bases, the sale or cession of territory, the termination of war, the regulation of conduct of hostilities, the formation of alliances, *the regulation of commercial relations*, the settling of claims, the laying down of rules governing conduct in peace and the establishment of international organizations. The sovereignty of a state therefore cannot in fact and in reality be considered absolute. Certain restrictions enter into the picture: (1) limitations imposed by the very nature of membership in the family of nations and (2) limitations imposed by treaty stipulations. As aptly put by John F. Kennedy, "Today, no nation can build its destiny alone. The age of self-sufficient nationalism is over. The age of interdependence is here."

[In the foregoing treaties] the Philippines has effectively agreed to limit the exercise of its sovereign powers of taxation, eminent domain

and police power. The underlying consideration in this partial surrender of sovereignty is the reciprocal commitment of the other contracting states in granting the same privilege and immunities to the Philippines, its officials and its citizens. The same reciprocity characterizes the Philippine commitments under WTO-GATT.

Treaty-making under Philippine law

EXECUTIVE ORDER NO. 459 PROVIDING FOR THE GUIDELINES IN THE NEGOTIATION OF INTERNATIONAL AGREEMENTS AND ITS RATIFICATION

WHEREAS, the negotiations of international agreements are made in pursuance of the foreign policy of the country;

WHEREAS, Executive Order No. 292, otherwise known as the Administrative Code of 1987, provides that the Department of Foreign Affairs shall be the lead agency that shall advise and assist the President in planning, organizing, directing, coordinating and evaluating the total national effort in the field of foreign relations;

WHEREAS, Executive Order No. 292 further provides that the Department of Foreign Affairs shall negotiate treaties and other agreements pursuant to the instructions of the President, and in coordination with other government agencies;

WHEREAS, there is a need to establish guidelines to govern the negotiation and ratification of international agreements by the different agencies of the government;

NOW, THEREFORE, I, FIDEL V. RAMOS, President of the Philippines, by virtue of the powers vested in me by the Constitution, do hereby order:

SECTION 1. Declaration of Policy. — It is hereby declared the policy of the State that the negotiations of all treaties and executive agreements, or any amendment thereto, shall be coordinated with, and made only with the participation of, the Department of Foreign Affairs in accordance with Executive Order No. 292. It is also declared the policy of the State that the composition of any Philippine negotiation panel and the designation of the chairman thereof shall be made in coordination with the Department of Foreign Affairs.

SECTION 2. Definition of Terms. —

- a. International agreement — shall refer to a contract or understanding, regardless of nomenclature, entered into between the Philippines and another government in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments.
- b. Treaties — international agreements entered into by the Philippines which require legislative concurrence after executive ratification. This term may include compacts like conventions, declarations, covenants and acts.
- c. Executive Agreements — similar to treaties except that they do not require legislative concurrence.
- d. Full Powers — authority granted by a Head of State or Government to a delegation head enabling the latter to bind his country to the commitments made in the negotiations to be pursued.



- e. National Interest — advantage or enhanced prestige or benefit to the country as defined by its political and/or administrative leadership.
- f. Provisional Effect — recognition by one or both sides of the negotiation process that an agreement be considered in force pending compliance with domestic requirements for the effectivity of the agreement.

SECTION 3. Authority to Negotiate. — Prior to any international meeting or negotiation of a treaty or executive agreement, authorization must be secured by the lead agency from the President through the Secretary of Foreign Affairs. The request for authorization shall be in writing, proposing the composition of the Philippine delegation and recommending the range of positions to be taken by that delegation. In case of negotiations of agreements, changes of national policy or those involving international arrangements of a permanent character entered into in the name of the Government of the Republic of the Philippines, the authorization shall be in the form of Full Powers and formal instructions. In cases of other agreements, a written authorization from the President shall be sufficient.

SECTION 4. Full Powers. — The issuance of Full Powers shall be made by the President of the Philippines who may delegate this function to the Secretary of Foreign Affairs.

The following persons, however, shall not require Full Powers prior to negotiating or signing a treaty or an executive agreement, or any amendment thereto, by virtue of the nature of their functions:

- a. Secretary of Foreign Affairs;
- b. Heads of Philippine diplomatic missions, for the purpose of adopting the text of a treaty or an agreement between the Philippines and the State to which they are accredited;
- c. Representatives accredited by the Philippines to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

SECTION 5. Negotiations. —

- a. In cases involving negotiations of agreements, the composition of the Philippine panel or delegation shall be determined by the President upon the recommendation of the Secretary of Foreign Affairs and the lead agency if it is not the Department of Foreign Affairs.
- b. The lead agency in the negotiation of a treaty or an executive agreement, or any amendment thereto, shall convene a meeting of the panel members prior to the commencement of any negotiations for the purpose of establishing the parameters of the negotiating position of the panel. No deviation from the agreed parameters shall be made without prior consultations with the members of the negotiating panel.

SECTION 6. Entry into Force and Provisional Application of Treaties and Executive Agreements. —

- a. A treaty or an executive agreement enters into force upon compliance with the domestic requirements stated in this Order.
- b. No treaty or executive agreement shall be given provisional effect unless it is shown that a pressing national interest will be upheld thereby. The Department of Foreign Affairs, in consultation with

the concerned agencies, shall determine whether a treaty or an executive agreement, or any amendment thereto, shall be given provisional effect.

SECTION 7. Domestic Requirements for the Entry into Force of a Treaty or an Executive Agreement. — The domestic requirements for the entry into force of a treaty or an executive agreement, or any amendment thereto, shall be as follows:

A. Executive Agreements.

- i. All executive agreements shall be transmitted to the Department of Foreign Affairs after their signing for the preparation of the ratification papers. The transmittal shall include the highlights of the agreements and the benefits which will accrue to the Philippines arising from them.
- ii. The Department of Foreign Affairs, pursuant to the endorsement by the concerned agency, shall transmit the agreements to the President of the Philippines for his ratification. The original signed instrument of ratification shall then be returned to the Department of Foreign Affairs for appropriate action.

B. Treaties.

- i. All treaties, regardless of their designation, shall comply with the requirements provided in sub-paragraph 1 and 2, item A (Executive Agreements) of this Section. In addition, the Department of Foreign Affairs shall submit the treaties to the Senate of the Philippines for concurrence in the ratification by the President. A certified true copy of the treaties, in such numbers as may be required by the Senate, together with a certified true copy of the ratification instrument, shall accompany the submission of the treaties to the Senate.
- ii. Upon receipt of the concurrence by the Senate, the Department of Foreign Affairs shall comply with the provision of the treaties in effecting their entry into force.

SECTION 8. Notice to Concerned Agencies. — The Department of Foreign Affairs shall inform the concerned agencies of the entry into force of the agreement.

SECTION 9. Determination of the Nature of the Agreement. — The Department of Foreign Affairs shall determine whether an agreement is an executive agreement or a treaty.

SECTION 10. Separability Clause. — If, for any reason, any part or provision of this Order shall be held unconstitutional or invalid, other parts or provisions hereof which are not affected thereby shall continue to be in full force and effect.

SECTION 11. Repealing Clause. — All executive orders, proclamations, memorandum orders or memorandum circulars inconsistent herewith are hereby repealed or modified accordingly.

SECTION 12. Effectivity. — This Executive Order shall take effect immediately upon its approval.

DONE in the City of Manila, this 25th day of November, in the year of Our Lord, Nineteen Hundred and Ninety-Seven.



Pimentel v. Office of the Executive Secretary,
G.R. No. 158088, July 6, 2005

The case is about a petition for *mandamus* filed by Pimentel et al. to compel the Office of the Executive Secretary and the Department of Foreign Affairs to transmit the signed copy of the Rome Statute of the International Criminal Court to the Senate of the Philippines for its concurrence in accordance with Section 21, Article VII of the 1987 Constitution.

Justice Isagani Cruz, in his book on International Law, describes the treaty-making process in this wise:

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

Negotiation may be undertaken directly by the head of state but he now usually assigns this task to his authorized representatives. These representatives are provided with credentials known as full powers, which they exhibit to the other negotiators at the start of the formal discussions. It is standard practice for one of the parties to submit a draft of the proposed treaty which, together with the counter-proposals, becomes the basis of the subsequent negotiations. The negotiations may be brief or protracted, depending on the issues involved, and may even "collapse" in case the parties are unable to come to an agreement on the points under consideration.

If and when the negotiators finally decide on the terms of the treaty, the same is opened for *signature*. This step is primarily intended as a means of authenticating the instrument and for the purpose of symbolizing the good faith of the parties; but, significantly, it does not indicate the final consent of the state in cases where ratification of the treaty is required. The document is ordinarily signed in accordance with the *alternat*, that is, each of the several negotiators is allowed to sign first on the copy which he will bring home to his own state.

Ratification, which is the next step, is the formal act by which a state confirms and accepts the provisions of a treaty concluded by its representatives. The purpose of ratification is to enable the contracting states to examine the treaty more closely and to give them an opportunity to refuse to be bound by it should they find it inimical to their

interests. It is for this reason that most treaties are made subject to the scrutiny and consent of a department of the government other than that which negotiated them.

x x x

The last step in the treaty-making process is the *exchange of the instruments of ratification*, which usually also signifies the effectivity of the treaty unless a different date has been agreed upon by the parties. Where ratification is dispensed with and no effectivity clause is embodied in the treaty, the instrument is deemed effective upon its signature.

Petitioners' submission that the Philippines is bound under treaty law and international law to ratify the treaty which it has signed is without basis. The signature does not signify the final consent of the state to the treaty. It is the ratification that binds the state to the provisions thereof. In fact, the Rome Statute itself requires that the signature of the representatives of the states be subject to ratification, acceptance or approval of the signatory states. Ratification is the act by which the provisions of a treaty are formally confirmed and approved by a State. By ratifying a treaty signed in its behalf, a state expresses its willingness to be bound by the provisions of such treaty. After the treaty is signed by the state's representative, the President, being accountable to the people, is burdened with the responsibility and the duty to carefully study the contents of the treaty and ensure that they are not inimical to the interest of the state and its people. Thus, the President has the discretion even after the signing of the treaty by the Philippine representative whether or not to ratify the same. The Vienna Convention on the Law of Treaties does not contemplate to defeat or even restrain this power of the head of states. If that were so, the requirement of ratification of treaties would be pointless and futile. It has been held that a state has no legal or even moral duty to ratify a treaty which has been signed by its plenipotentiaries. There is no legal obligation to ratify a treaty, but it goes without saying that the refusal must be based on substantial grounds and not on superficial or whimsical reasons. Otherwise, the other state would be justified in taking offense.

It should be emphasized that under our Constitution, the power to ratify is vested in the President, subject to the concurrence of the Senate. The role of the Senate, however, is limited only to giving or withholding its consent, or concurrence, to the ratification. Hence, it is within the authority of the President to refuse to submit a treaty to the Senate or, having secured its consent for its ratification, refuse to ratify it. Although the refusal of a state to ratify a treaty which has been signed in its behalf is a serious step that should not be taken lightly, such decision is



within the competence of the President alone, which cannot be encroached by this Court via a writ of *mandamus*. This Court has no jurisdiction over actions seeking to enjoin the President in the performance of his official duties. The Court, therefore, cannot issue the writ of *mandamus* prayed for by the petitioners as it is beyond its jurisdiction to compel the executive branch of the government to transmit the signed text of Rome Statute to the Senate.

PETITION WAS DISMISSED.

Philippine Constitution, Art. II, Sec. 2

The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.

Philippine Constitution, Art. VII, Sec. 21

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

Philippine Constitution, Art. VIII, Sec. 5(2)(a)

- (2) Review, revise, reverse, modify, or affirm on appeal or certiorari, as the law or the Rules of Court may provide, final judgments and orders of lower courts in:
- (a) All cases in which the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question.

Part II

SUBSTANCE OF INTERNATIONAL LAW

Law of Treaties

Q: Is a state bound by a treaty to which it is a party? Or one to which it is not a party?

Generally NO, but a NON-party may take obligation by accepting/signing it.

Q: Compare the definition of "treaty" in VCLT and in Executive Order No. 459. Which definition is broader?

VCLT	EO 459
international agreement concluded between two states in written form governed by international law whether embodied in a single instrument or in two or more related instrument and whatever its particular designation	International agreements entered by the Philippines which requires legislative concurrence and executive ratification. This term may include compacts like conventions, declarations, covenants and acts.

VCLT definition is broader in scope; EO 459 requires concurrence.

Q: May an individual enter into a treaty?

NO. Only states can enter into treaties. This is clear in the definition of the Vienna Convention on the Law of Treaties.

Q: What are the stages in the treaty making process?

1. Authorization, "full powers" required [except: heads of state/ government or DFA Secretary, head of diplomatic missions / ambassadors (adopting text), representative to international organization]
2. Negotiation
3. Adoption and authentication of text
4. Expression of Consent to be bound
5. Entry into force

Q: What is the difference between a signatory to a treaty and a party to a treaty?

Signatory - means having the authority to enter into an agreement, but still subject to ratification.

Party - a state which has consented to be bound by the treaty and from which the treaty is enforced.

Q: Can a treaty be invalidated? Or terminated? Is there a difference between the two?

Yes. Yes. Yes. The main difference is that in invalidity, the grounds are present before perfection of treaty, while termination may be accomplished by subsequent action of the parties.



Pacta sunt servanda - (obligation of) treaties must be complied with in good faith; based on consensual theory

VCLT definition of "treaty"

International agreement concluded between two states in written form governed by international law whether embodied in a single instrument or in two or more related instrument and whatever its particular designation. (see also the comparison table on p.12)

Interpretation of Treaties

Good faith in accordance with the **O**rdinary meaning given to the terms of the treaty in their **C**ontext and in light of its **O**bject and purpose. (**G-O-C-O**)

VCLT (1969)

Article 31

General rule of interpretation

1. 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**.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Article 33

Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

Invalidity of treaties

- (a) error of fact
- (b) corruption
- (c) duress/coercion
- (d) violation of *ius cogens*

Termination of treaties

- (a) material breach
- (b) supervening impossibility of performance
- (c) fundamental change of circumstances (*rebus sic stantibus*)

Cases:

BAYAN v. Zamora,

G.R. No. 138570, October 10, 2000

(VFA as a treaty in international law)

This Court is of the firm view that the phrase "**recognized as a treaty**" means that the other contracting party **accepts or acknowledges** the agreement as a treaty. To require the other contracting state, the United States of America in this case, to submit the VFA to the United States Senate for concurrence pursuant to its Constitution, is to accord strict meaning to the phrase.

Well-entrenched is the principle that the words used in the Constitution are to be given their ordinary meaning except where technical terms are employed, in which case the significance thus attached to them prevails. Its language should be understood in the sense they have in common use.

Moreover, it is inconsequential whether the United States treats the VFA only as an executive agreement because, under international law, an executive agreement is as binding as a treaty. To be sure, as long as the



VFA possesses the elements of an agreement under international law, the said agreement is to be taken equally as a treaty.

A treaty, as defined by the Vienna Convention on the Law of Treaties, is “an international instrument concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation.” There are many other terms used for a treaty or international agreement, some of which are: act, protocol, agreement, *compromis d’arbitrage*, concordat, convention, declaration, exchange of notes, pact, statute, charter and *modus vivendi*. All writers, from Hugo Grotius onward, have pointed out that the names or titles of international agreements included under the general term treaty have little or no legal significance. Certain terms are useful, but they furnish little more than mere description.

Article 2(2) of the Vienna Convention provides that “the provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms, or to the meanings which may be given to them in the internal law of the State.”

Thus, in international law, there is no difference between treaties and executive agreements in their binding effect upon states concerned, as long as the negotiating functionaries have remained within their powers. International law continues to make no distinction between treaties and executive agreements: they are equally binding obligations upon nations.

Nicolas v. Romulo,
G.R. No. 175888, February 11, 2009

[These are petitions for certiorari, etc. as special civil actions and/or for review of the Decision of the Court of Appeals in **Lance Corporal Daniel J. Smith v. Hon. Benjamin T. Pozon, et al.**, in CA-G.R. SP No. 97212, dated January 2, 2007]

The rule in international law is that a foreign armed forces allowed to enter one’s territory is immune from local jurisdiction, except to the extent agreed upon. The Status of Forces Agreements involving foreign military units around the world vary in terms and conditions, according to the situation of the parties involved, and reflect their bargaining power. But the principle remains, *i.e.*, the receiving State can exercise jurisdiction over the forces of the sending State only to the extent agreed upon by the parties.

As a result, the situation involved is not one in which the power of this Court to adopt rules of procedure is curtailed or violated, but rather one in which, as is normally encountered around the world, the laws (including rules of procedure) of one State do not extend or apply – except to the extent agreed upon – to

subjects of another State due to the recognition of extraterritorial immunity given to such bodies as visiting foreign armed forces.

Nothing in the Constitution prohibits such agreements recognizing immunity from jurisdiction or some aspects of jurisdiction (such as custody), in relation to long-recognized subjects of such immunity like Heads of State, diplomats and members of the armed forces contingents of a foreign State allowed to enter another State’s territory. On the contrary, the Constitution states that the Philippines adopts the generally accepted principles of international law as part of the law of the land. (Art. II, Sec. 2).

x x x

It is clear that the parties to the VFA recognized the difference between custody during the trial and detention after conviction, because they provided for a specific arrangement to cover detention. And this specific arrangement clearly states not only that the detention shall be carried out in facilities agreed on by authorities of both parties, but also that the detention shall be “by Philippine authorities.” Therefore, the Romulo-Kenney Agreements of December 19 and 22, 2006, which are agreements on the detention of the accused in the United States Embassy, are not in accord with the VFA itself because such detention is not “by Philippine authorities.”

Respondents should therefore comply with the VFA and negotiate with representatives of the United States towards an agreement on detention facilities under Philippine authorities as mandated by Art. V, Sec. 10 of the VFA.

End of Topic for Midterm Purposes

Law of the Sea

Q: How are international rules of the sea created?

They are created by treaties and customs. The latest was the Convention of the Law of the Sea (LOS) of 1982 whose provisions are a repetition of earlier convention law (Geneva Conventions 1958, 1960) or a codification of customary law, with matters not regulated is governed by the principles of international law.

Q: Who are bound by international rules of the sea?



State parties to the convention or those states which have consented to be bound by international rules of the sea shall be bound as such. All other states are deemed party to the Convention after failing an expression of different intention [Article 316(4), UNCLOS]

Q: What rights can a state exercise over: waters that are near its land territory? fish that are in waters near its land territory? other natural resources (e.g., oil) that are in waters near its land territory? submerged land underneath waters that are near its land territory?

Article 2

Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil

1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.
3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

Q: Do other states have rights over said resources?

NO. Article 1 of the Geneva Convention specifically excludes from the six freedoms (navigation, overflight, fishing, lay submarine cables and pipelines, construct artificial islands and structures and of scientific research) "all parts of the sea that are not included in the territorial sea or in the internal waters of a State".

Q: How will legal disputes involving state rights under UNCLOS be resolved?

Under Article 188 of UNCLOS, disputes may be submitted to the:

- (a) International Tribunal of the Law of the Sea (ITLOS),
- (b) an *ad hoc* chamber of the Seabed Disputes Chamber, or
- (c) to a binding commercial arbitration

Q: What has the Philippines done to define which waters are near its land territory?

The Philippines already enacted several statutes defining the baselines of Philippine territory:

- (a) Republic Act No. 3046 (1961) baselines
- (b) Republic Act No. 5446 (1968) baselines
- (c) Presidential Decree No. 1599 (1978) on Exclusive Economic Zones (EEZ)
- (d) Republic Act No. 9522 (2009) baselines

Wikipedia on:

(1) United Nations Convention on the Law of the Sea

The United Nations Convention on the Law of the Sea (UNCLOS), also called the Law of the Sea Convention or the Law of the Sea treaty, is the international agreement that resulted from the third United Nations Conference on the Law of the Sea (UNCLOS III), which took place between 1973 and 1982. The Law of the Sea Convention defines the rights and responsibilities of nations in their use of the world's oceans, establishing guidelines for businesses, the environment, and the management of marine natural resources. The Convention, concluded in 1982, replaced four 1958 treaties. UNCLOS came into force in 1994, a year after Guyana became the 60th nation to sign the treaty. As of October 2012, 164 countries and the European Union have joined in the Convention. However, it is uncertain as to what extent the Convention codifies customary international law.

While the Secretary General of the United Nations receives instruments of ratification and accession and the UN provides support for meetings of states party to the Convention, the UN has no direct operational role in the implementation of the Convention. There is, however, a role played by organizations such as the International Maritime Organization, the International Whaling Commission, and the International Seabed Authority (the latter being established by the UN Convention).

(2) Fisheries Case (UK v. Norway)

The Fisheries Case (United Kingdom v. Norway) was the culmination of a dispute, originating in 1933, over how large an area of water surrounding Norway was Norwegian waters (that Norway thus had exclusive fishing rights to) and how much was 'high seas' (that the UK could thus fish).

On 24 September 1949, the UK requested that the International Court of Justice determine how far Norway's territorial claim extended to sea, and to award the UK damages in compensation for Norwegian interference with UK fishing vessels in the disputed waters, claiming that Norway's claim to such an extent of waters was against international law.



On 18 December 1951, the ICJ decided that Norway's claims to the waters were not inconsistent with international laws concerning the ownership of local sea-space.

(3) Corfu Channel Incident

The Corfu Channel Incident refers to three separate events involving Royal Navy ships in the Channel of Corfu which took place in 1946, and it is considered an early episode of the Cold War. During the first incident, Royal Navy ships came under fire from Albanian fortifications. The second incident involved Royal Navy ships striking mines and the third incident occurred when the Royal Navy conducted mine-clearing operations in the Corfu Channel, but in Albanian territorial waters, and Albania complained about them to the United Nations. This series of incidents led to the Corfu Channel Case, where the United Kingdom brought a case against the People's Socialist Republic of Albania to the International Court of Justice. The Court rendered a decision under which Albania was to pay £844,000 to Great Britain, the equivalent of £20 million in 2006. Because of the incidents, Britain, in 1946, broke off talks with Albania aimed at establishing diplomatic relations between the two countries. Diplomatic relations were only restored in 1991.

(4) Exclusive Economic Zones

An exclusive economic zone (EEZ) is a seazone prescribed by the United Nations Convention on the Law of the Sea over which a state has special rights over the exploration and use of marine resources, including energy production from water and wind. It stretches from the baseline out to 200 nautical miles from its coast. In colloquial usage, the term may include the territorial sea and even the continental shelf beyond the 200-mile limit.

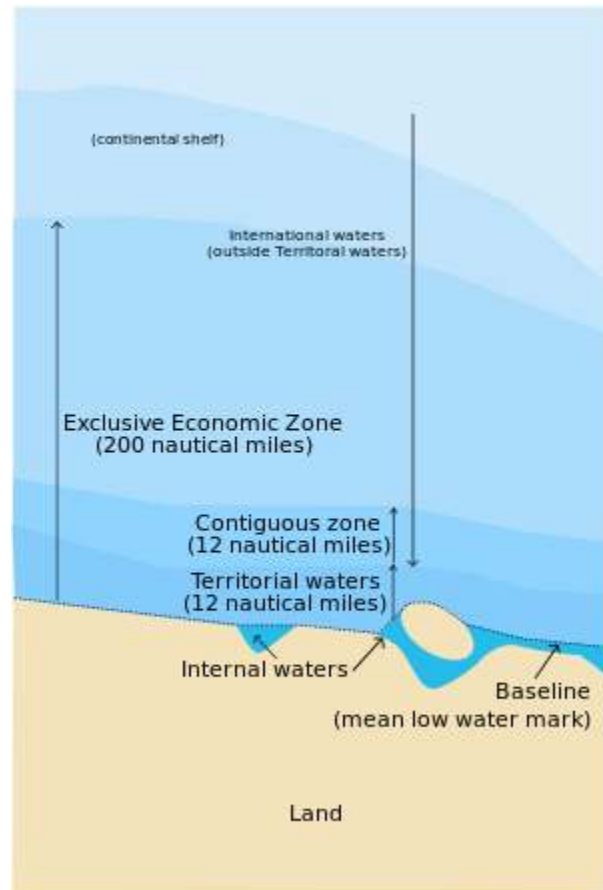
(5) Continental Shelf

The continental shelf is the extended perimeter of each continent and associated coastal plain. Much of the shelf was exposed during glacial periods, but it is now submerged under relatively shallow seas (known as shelf seas) and gulfs and was similarly submerged during other interglacial periods.

The continental margin, between the continental shelf and the abyssal plain, comprises a steep continental slope followed by the flatter continental rise. Sediment from the continent above cascades down the slope and accumulates as a pile of sediment at the base of the slope, called the continental rise. Extending as far as 500 km from the slope, it consists of thick sediments deposited by turbidity currents from the shelf and slope.

Under the United Nations Convention on the Law of the Sea, the name continental shelf was given a legal

definition as ***the stretch of the seabed adjacent to the shores of a particular country to which it belongs.***



International Human Rights Law

Q: Are the following binding under international law:

- ***Universal Declaration of Human Rights?*** Yes.
- ***International Covenant on Civil and Political Rights?*** Yes.
- ***International Covenant on Economic, Social and Cultural Rights?*** Yes.

Q: If yes, why are these instruments binding under international law?

Human rights, in general terms, are those inalienable and fundamental rights which are essential for life as human beings.



Civil and political rights are substantive rights which are binding to all states who did not express dissent with the convention.

Economic, social and cultural rights are specific social welfare rights assuring the right to self-determination of people and are substantial overlapping of other subjects of covenants.

In general, the Western tradition has developed from the Natural Law that certain rights exist as a result of a law higher than the nature of man which demands certain immunities or liberties.

Q: Who are bound by said rules?

All states are bound by said rules as long as they are declared by the UN which has an objective personality.

What are human rights?

Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.

Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.

Universal and inalienable

The principle of universality of human rights is the cornerstone of international human rights law. This principle, as first emphasized in the Universal Declaration on Human Rights in 1948, has been reiterated in numerous international human rights conventions, declarations, and resolutions. The 1993 Vienna World Conference on Human Rights, for example, noted that it is the duty of States to promote and protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems.

All States have ratified at least one, and 80% of States have ratified four or more, of the core human rights treaties, reflecting consent of States which creates legal obligations for them and giving concrete expression to universality. Some fundamental human rights norms enjoy universal protection by customary international law across all boundaries and civilizations.

Human rights are inalienable. They should not be taken away, except in specific situations and according to due process. For example, the right to liberty may be restricted if a person is found guilty of a crime by a court of law.

Interdependent and indivisible

All human rights are indivisible, whether they are civil and political rights, such as the right to life, equality before the law and freedom of expression; economic, social and cultural rights, such as the rights to work, social security and education, or collective rights, such as the rights to development and self-determination, are indivisible, interrelated and interdependent. The improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others.

Equal and non-discriminatory

Non-discrimination is a cross-cutting principle in international human rights law. The principle is present in all the major human rights treaties and provides the central theme of some of international human rights conventions such as the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.

The principle applies to everyone in relation to all human rights and freedoms and it prohibits discrimination on the basis of a list of non-exhaustive categories such as sex, race, colour and so on. The principle of non-discrimination is complemented by the principle of equality, as stated in Article 1 of the Universal Declaration of Human Rights: "All human beings are born free and equal in dignity and rights."

Both Rights and Obligations

Human rights entail both rights and obligations. States assume obligations and duties under international law to respect, to protect and to fulfill human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfill means that States must take positive action to facilitate the enjoyment of basic human rights. At the individual level, while we are entitled our human rights, we should also respect the human rights of others.

International Human Rights Law

The international human rights movement was strengthened when the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR) on 10 December 1948. Drafted as 'a common standard of achievement for all peoples and nations', the Declaration for the first time in human history spell out basic civil, political, economic, social and cultural rights that all human beings should enjoy. It has over time been widely accepted as the fundamental norms of human rights that everyone should respect and protect. The UDHR, together with the International Covenant on Civil and Political Rights and its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights, form the so-called International Bill of Human Rights.

A series of international human rights treaties and other instruments adopted since 1945 have conferred legal form on inherent human rights and developed the body of international human rights. Other instruments have been adopted at the regional level reflecting the particular human rights concerns of the region and providing for specific mechanisms of protection. Most States have also adopted constitutions and other laws which formally protect basic human rights. While international treaties and customary law form the backbone of international human rights law other



instruments, such as declarations, guidelines and principles adopted at the international level contribute to its understanding, implementation and development. Respect for human rights requires the establishment of the rule of law at the national and international levels.

International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.

Through ratification of international human rights treaties, Governments undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties. Where domestic legal proceedings fail to address human rights abuses, mechanisms and procedures for individual complaints or communications are available at the regional and international levels to help ensure that international human rights standards are indeed respected, implemented, and enforced at the local level.

Universal Declaration of Human Rights 1948 (UDHR) PREAMBLE

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1.

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2.

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3.

Everyone has the right to life, liberty and security of person.

Article 4.

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5.

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6.

Everyone has the right to recognition everywhere as a person before the law.

Article 7.

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8.

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9.

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10.

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11.

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12.

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13.

(1) Everyone has the right to freedom of movement and residence within the borders of each state.

(2) Everyone has the right to leave any country, including his own, and to return to his country.

Article 14.

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15.

(1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16.

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17.

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

Article 18.

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19.

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20.

(1) Everyone has the right to freedom of peaceful assembly and association.

(2) No one may be compelled to belong to an association.

**Article 21.**

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
 (2) Everyone has the right of equal access to public service in his country.
 (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22.

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23.

(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 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.

Article 24.

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25.

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
 (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.
 (3) Parents have a prior right to choose the kind of education that shall be given to their children.

Article 26.

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
 (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
 (3) Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27.

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
 (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28.

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29.

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.
 (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
 (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30.

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights

International Humanitarian Law

NOT all is fair in war.
 “Armed conflict” is broader than “war”.

Q: What is international humanitarian law (IHL)?

It is the law that governs armed conflict short of war, when a state may use force (*jus ad bello*) and how combatants should behave (*jus in bello*).

Armed Conflict	War
Use of arms by two or more groups	Use of arms by armed forces of two or more states

Q: What are the fundamental IHL principles?

- ➔ **Distinction**
Distinguish between civilian population and combatants.
- ➔ **Proportionality**
Action must be focused on attainment of military objective. No unlimited choice of means and methods.

- (1) Persons hors de combat and those not taking part in hostilities shall be protected and treated humanely.
- (2) It is forbidden to kill or injure an enemy who surrenders or is hors de combat.
- (3) The wounded and the sick shall be cared for and protected by the party to the conflict which has them in its power.
- (4) Captured combatants and civilians must be protected against acts of violence and reprisals.
- (5) No one shall be subjected to torture, corporal punishment or cruel or degrading treatment.

Q: How were IHL rules created?

- (1) Custom: *laws and customs of war*
- (2) Treaty: *Geneva Conventions and Additional Protocols*
 - ▶ 1st (1864): Wounded and Sick in Armed Forces in the Field
 - ▶ 2nd (1906): Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
 - ▶ 3rd (1929): Prisoners of War



- ▶ 4th (1949): Civilian Persons
- ▶ Additional Protocol I: national liberation movements
- ▶ Additional Protocol II: dissident armed forces under responsible command, exercising control of territory, able to carry out sustained and concerted military operations, and able to implement the protocol).

unlawful combatants

- ▶ soldiers and civilians who fight in a manner not in accordance with the laws of war
- ▶ manner: uniform, emblem (distinction)
- ▶ treatment: (old) execution upon capture, (now) prosecution under domestic law

Q: Who are bound by IHL rules?

- (1) State parties
- (2) third States
- (3) “armed groups”
- (4) natural persons
- (5) international organizations, juridical persons

Q: How are IHL rules enforced?

Generally, IHL rules are matter of adherence to customs (rules of engagement). Rules are enforced by conflicting parties themselves in applying distinction of combatant from non-combatants and assessing the proportionality of force used. The International Criminal Court may acquire jurisdiction in case of violations of IHL.

Q: What are the Geneva Conventions and their Additional Protocols?

They are the **Geneva Conventions** on (1) wounded and sick in the field (2) wounded, sick and shipwrecked at sea (3) prisoners of war (4) civilians. The essence of conventions is that the persons not actively engaged in warfare should be treated humanely.

Q: Does IHL apply to the Mindanao situation?

Yes. Considering the existence of armed conflict based on the identities of opposing parties, the intensity of the conflict, and by enactment of domestic law (**R.A. No. 9851**), IHL applies.

Additional protocol 1: national liberation movements.

In effect, the IHL as a customary law is deemed adopted by PH by state practice and *opinio juris* by enactment of R.A. 9851.

Additional protocol 2: dissident armed forces under responsible command, over a controlled territory.

The Mindanao conflict per se does not concern IHL but the aid to rebels is, according to 1970 Declaration on Principles of International Law.

N.B. Individuals are covered by IHL.

ICRC Flyer “What is IHL?”*
International humanitarian law forms a major part of public international law and comprises *the rules which, in times of armed conflict, seek to protect people who are not or are no longer taking part in the hostilities, and to restrict the methods and means of warfare employed.*

Q: Do the same IHL rules apply to international situations and internal situations?

Yes. IHL applies whether there is international armed conflict (IAC) or non-international armed conflict (NIAC).

International Armed Conflict (IAC)	Non-International Armed Conflict (NIAC)
means fighting between the armed forces of at least two States (it should be noted that wars of national liberation have been classified as international armed conflicts).	means fighting on the territory of a State between the regular armed forces and identifiable armed groups, or between armed groups fighting one another.

Q: Do terrorists have rights under IHL?

Yes. Terrorists, as human beings also have human rights. They have the universal right to life and liberty, due process and the equal protection of laws. However, there are no clear rules under the IHL. Terrorists may be considered as **unlawful combatants**.



To be considered an armed conflict, fighting must reach a certain level of intensity and extend over a certain period of time.

An **unlawful combatant**, illegal combatant or unprivileged combatant/ belligerent is a civilian or military personnel who directly engages in armed conflict in violation of the laws of war. An unlawful combatant may be detained or prosecuted under the domestic law of the detaining state for such action; subject of course to international treaties on justice and human rights such as everyone's right to a fair trial. (Wikipedia)

Nationality and Statelessness

Q: Is "nationality" different from "citizenship"?

Yes. Nationality refers to membership in a nation (ethnic, cultural) while citizenship refers to membership in a state (political).

Q: Who determines whether an individual is a national (or citizen) of a certain state?

It is usually the state who determines their nationals or citizen. This was affirmed in PCIJ Advisory Opinion on Tunis and Morocco Nationality Decrees (1923).

Birth determines personality (Art.40, NCC)

Q: Are there international rules on nationality?

→ **Rule 1:** Each state determines who its nationals are.

Limitation 1: custom, Art.15 of UDHR

- (1) Everyone has a right a right to a nationality.
- (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Limitation 2: treaty, Convention on the Reduction of Statelessness (NOTE: PH not a party)

Nationality is a **LEGAL BOND** having as its basis a **SOCIAL FACT** of attachment. *Nottebohm Case (Lechtenstein v. Guatemala) 1955*

- **Rule No.2:** a State may exercise diplomatic relation over its nationals.
- Natural persons
 - Juridical persons

Nationality of juridical persons shall be in the place of registration. *Barcelona Traction Case (Belgium v. Spain) 1970*

Bases for determining membership in political entity

- ▶ Accident of birth
- ▶ Free choice

Membership in political entity determines

- ▶ Status
- ▶ Legal rights

Importance of membership in political entity

- ▶ Individual may ask for protection
- ▶ State may claim "right" to protect

"diplomatic protection" theory:
injury to national is injury to the state

Wikipedia on:
(1) Nationality

Nationality is the legal relationship between a person and a nation state. Nationality normally confers some protection of the person by the state, and some obligations on the person towards the state. What these rights and duties are vary from country to country.

Nationality affords the state jurisdiction over the person and affords the person the protection of the state. The most common distinguishing feature of citizenship is that citizens have the right to participate in the political life of the state, such as by voting or standing for election. Therefore, in modern democracies, the terms are synonymous, while in an absolute monarchy, there may be a legal or technical distinction between them.

The noun *national* can include both citizens and non-citizens. By custom, it is the right of each state to determine who its nationals are. Such determinations are part of nationality law. In some cases, determinations of nationality are also governed by public international law—for example, by treaties on statelessness and the European Convention on Nationality.

In English, the same word is used in the sense of an ethnic group (a group of people who share a common ethnic identity, language, culture, descent, history, and so forth). This meaning of nationality is not defined by political borders or passport ownership and includes nations that lack an independent state (*such as the Scots, Welsh, English, Basques, Kurds, Tamils, Hmong, Inuit and Māori*).

Individuals may also be considered nationals of groups with autonomous status which have ceded some power to a larger government, such as the federally recognized tribes of Native Americans in the United States. Article 15 of



the Universal Declaration of Human Rights states that "Everyone has the right to a nationality," and "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

(2) Statelessness

Statelessness is a legal concept describing the lack of any nationality. It denotes the absence of a recognized link between an individual and any state.

A **de jure stateless person** is someone who is "not considered as a national by any state under the operation of its law".

A **de facto stateless person** is someone who is outside the country of his or her nationality and is unable or, for valid reasons, unwilling to avail himself or herself of the protection of that country. This can be a result of persecution or a consequence of lack of diplomatic relations between the state of nationality and the state of residence.

Some *de jure* stateless persons are also refugees, although not all asylum seekers are *de jure* stateless and not all *de jure* stateless persons are refugees. Many stateless persons have never crossed an international border.

Causes of statelessness:

- (a) birth
- (b) choice
- (c) political events

(3) Statelessness – Status Convention

The United Nations Charter and Universal Declaration of Human Rights were approved on 10 December 1948. Of significance, the Declaration at Article 15 affirms that:

- **Everyone has the right to a nationality.**
- **No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.**

The Convention relating to the Status of Refugees was promulgated on 28 July 1951. Despite an original intention, it did not include any content about the status of stateless persons and there was no protocol regarding measures to effect the reduction of statelessness.

On 26 April 1954, ECOSOC adopted a Resolution to convene a Conference of Plenipotentiaries to "regulate and improve the status of stateless persons by an international agreement".

The ensuing Conference adopted the Convention on 28 September 1954.

The Convention entered into force on 6 June 1960.

(4) Statelessness – Reduction Convention

The **Convention on the Reduction of Statelessness** is a 1961 United Nations multilateral treaty whereby states agree to reduce the incidence of statelessness. The Convention was originally intended as a Protocol to the Convention Relating to the Status of Refugees, while the 1954 Convention Relating to the Status of Stateless Persons was adopted to cover stateless persons who are not refugees

and therefore not within the scope of the Convention Relating to the Status of Refugees.

(5) Nottebohm (Liechtenstein v. Guatemala)

Background of the ICJ case

The Government of Liechtenstein granted Nottebohm protection against unjust treatment by the government of Guatemala and petitioned the International Court of Justice. However, the government of Guatemala argued that Nottebohm did not gain Liechtenstein citizenship for the purposes of international law. The court agreed and thus stopped the case from continuing.

Decision

Although the Court stated that it is the sovereign right of all states to determine its own citizens and criteria for becoming one in municipal law, such a process would have to be scrutinized on the international plane where the question is of diplomatic protection. The Court upheld the principle of **effective nationality**, (the **Nottebohm principle**) where the national must prove a meaningful connection to the state in question. This principle was previously applied only in cases of dual nationality to determine which nationality should be used in a given case. However Nottebohm had forfeited his German nationality and thus only had the nationality of Liechtenstein. The question arises, who then had the power to grant Nottebohm diplomatic protection?

The Nottebohm case was subsequently cited in many definitions of nationality.

Jurisdiction of States and Immunities, including Diplomatic and Consular law

Q: What is meant by "jurisdiction"?

It means the authority to affect legal interests.

Q: What are the three forms of a state's jurisdiction?

- (1) Jurisdiction to prescribe norms (legislative jurisdiction)
- (2) Jurisdiction to enforce the norms prescribed (executive jurisdiction)
- (3) Jurisdiction to adjudicate (judicial jurisdiction)

Q: What principles can be used to justify a state's exercise of jurisdiction (i) within its territorial borders? (ii) beyond its territorial borders?

Territoriality Principle – the fundamental source of jurisdiction is sovereignty over territory. For this reason, it is necessary that the boundaries be determined.



Effects Doctrine – consists to two principles: (1) the **subjective territorial principle** which says that a state has jurisdiction to prosecute and punish for crime committed within the state but completed and consummated abroad, and (2) the **objective territorial principle** which says that a state has jurisdiction to prosecute and punish for crime commenced without the state but consummated within its territory. (*Lotus case*)

Nationality Principle – says that every state has jurisdiction over its nationals even those nationals are outside the state.

Effective Nationality Link – doctrine is used to determine which of two states of which a person is a national will be recognized as having the right to give diplomatic protection to the holder of dual nationality. (*Nottebohm case*)

Protective Principle – says that a state may exercise jurisdiction over conduct outside its territory that threatens its security, as long as that conduct is generally recognized as criminal by states in international community. (*Restatement 402(3)*). This conditional clause excludes acts committed in exercise of the liberty guaranteed an alien by the law of the place where the act is committed.

Universality Principle – recognizes that certain activities, universally dangerous to states and their subjects, require authority in all community members to punish such acts wherever they may occur, even absent a link between the state and the parties or the acts in question.

Ex. *piracy, genocide, crimes against humanity, war crimes and terrorism*

Passive Personality Principle – a state may apply law, particularly criminal law, to an act committed outside its territory by a person not its national where the victim of the act was its national.

Principle of	Within territory	Beyond territory
Territoriality	Absolute but not exclusive	"Effects doctrine"; as long as it has some effects to the state
Nationality	Territoriality applies	Applicable (<i>Blackmer v. US, 248 US 421</i>)

[Protective Principle]	Territoriality applies	Applicable, as long as security threat is generally recognized as criminal by states internationally
Universality	Territoriality applies	Not applicable, but certain crimes may be prosecuted by any other state
Passive Personality	Territoriality applies	Applicable as long as its nationals are victims of certain organized crimes

Q: If State A claims that State B acted without or in excess of its jurisdiction, who has the burden of proving that State B indeed acted without or in excess of its jurisdiction?

There is no issue of having a burden of proving jurisdiction as both states A and B are considered equal in international law and both may prosecute crimes committed within their own jurisdiction.

Q: The President of State A is in the territory of State B. Can the President of State A claim that State B cannot exercise jurisdiction over his person?

Yes. While jurisdiction of State B is complete and absolute on its territory, it admits two exceptions: (1) sovereign immunity, and (2) immunity of the representative of states (diplomatic and consular immunities). President A is the sitting foreign sovereign and therefore immune from any claim of jurisdiction over his person.

Resolving Conflicts of Jurisdiction

- (1) The balancing test
- (2) International comity
- (3) *Forum non conveniens*

Foreign State:

United States of America, et al. v. Hon. V. M. Ruiz, G.R. No. L-35645, May 22, 1985

The traditional rule of State immunity exempts a State from being sued in the courts of another State without its consent or waiver. This rule is a necessary consequence of the principles of independence and equality of States. However, the rules of International Law are not petrified; they are constantly developing and evolving. And because the activities of states have multiplied, it has been necessary to distinguish them-between sovereign and governmental acts (*jure*



imperii) and private, commercial and proprietary acts (*jure gestionis*). The result is that State immunity now extends only to acts *jure imperii*. The restrictive application of State immunity is now the rule in the United States, the United Kingdom and other states in Western Europe.

Relevant Articles of:

Vienna Convention on Consular Relations (1963)

Article 3

1. The functions of a diplomatic mission consist, inter alia, in:
 (a) Representing the sending State in the receiving State;
 (b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
 (c) Negotiating with the Government of the receiving State;
 (d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
 (e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.
 2. Nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission.

Article 4

1. The sending State must make certain that the *agrément* of the receiving State has been given for the person it proposes to accredit as head of the mission to that State.
 2. The receiving State is not obliged to give reasons to the sending State for a refusal of *agrément*.

Article 22

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
 2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
 3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Article 24

The archives and documents of the mission shall be inviolable at any time and wherever they may be.

Article 27

x x x
 2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.
 x x x

Article 29

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Article 30

1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.
 2. His papers, correspondence and, except as provided in paragraph 3 of article 31, his property, shall likewise enjoy inviolability.

Article 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
 (a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (a), (b) and (c) of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

Article 32

1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under article 37 may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgement, for which a separate waiver shall be necessary.

Article 5

Consular functions

Consular functions consist in:

(a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;

(b) furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention;

(c) ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested;

(d) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State;

(e) helping and assisting nationals, both individuals and bodies corporate, of the sending State;

Article 12

The *exequatur*

1. The head of a consular post is admitted to the exercise of his functions by an authorization from the receiving State termed an *exequatur*, whatever the form of this authorization.

2. A State which refused to grant an *exequatur* is not obliged to give to the sending State reasons for such refusal.

3. Subject to the provisions of articles 13 and 15, the head of a consular post shall not enter upon his duties until he has received an *exequatur*.

Article 29

Use of national flag and coat-of-arms

x x x

2. The national flag of the sending State may be flown and its coat-of-arms displayed on the building occupied by the consular post and at the entrance door thereof, on the residence of the head of the consular post and on his means of transport when used on official business..

Article 31

Inviolability of the consular premises

1. Consular premises shall be inviolable to the extent provided in this article.

2. The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic



mission of the sending State. The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.

3. Subject to the provisions of paragraph 2 of this article, the receiving State is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity.

4. The consular premises, their furnishings, the property of the consular post and its means of transport shall be immune from any form of requisition for purposes of national defence or public utility.

If expropriation is necessary for such purposes, all possible steps shall be taken to avoid impeding the performance of consular functions, and prompt, adequate and effective compensation shall be paid to the sending State.

Article 33

Inviolability of the consular archives and documents

The consular archives and documents shall be inviolable at all times and wherever they may be.

Article 35

Freedom of communication

x x x

2. The official correspondence of the consular post shall be inviolable. Official correspondence means all correspondence relating to the consular post and its functions.

x x x

Article 40

Protection of consular officers

The receiving State shall treat consular officers with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity.

Article 41

Personal inviolability of consular officers

1. Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority.

2. Except in the case specified in paragraph 1 of this article, consular officers shall not be committed to prison or be liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect.

3. If criminal proceedings are instituted against a consular officer, he must appear before the competent authorities. Nevertheless, the proceedings shall be conducted with the respect due to him by reason of his official position and, except in the case specified in paragraph 1 of this article, in a manner which will hamper the exercise of consular functions as little as possible. When, in the circumstances mentioned in paragraph 1 of this article, it has become necessary to detain a consular officer, the proceedings against him shall be instituted with the minimum of delay.

Article 43

Immunity from jurisdiction

1. Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.

2. The provisions of paragraph 1 of this article shall not, however, apply in respect of a civil action either:

(a) arising out of a contract concluded by a consular officer or a consular employee in which he did not contract expressly or impliedly as an agent of the sending State; or

(b) by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft.

Article 45

Waiver of privileges and immunities

1. The sending State may waive, with regard to a member of the consular post, any of the privileges and immunities provided for in articles 41, 43 and 44.

2. The waiver shall in all cases be express, except as provided in paragraph 3 of this article, and shall be communicated to the receiving State in writing.

3. The initiation of proceedings by a consular officer or a consular employee in a matter where he might enjoy immunity from jurisdiction under article 43 shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim.

4. The waiver of immunity from jurisdiction for the purposes of civil or administrative proceedings shall not be deemed to imply the waiver of immunity from the measures of execution resulting from the judicial decision; in respect of such measures, a separate waiver shall be necessary.

Wikipedia on:

Diplomatic immunity

It is a form of legal immunity and a policy held between governments that ensures that diplomats are given safe passage and are considered not susceptible to lawsuit or prosecution under the host country's laws, although they can still be extradited. It was agreed as international law in the Vienna Convention on Diplomatic Relations (1961), though the concept and custom have a much longer history. Many principles of diplomatic immunity are now considered to be customary law. Diplomatic immunity as an institution developed to allow for the maintenance of government relations, including during periods of difficulties and even armed conflict. When receiving diplomats—who formally represent the sovereign—the receiving head of state grants certain privileges and immunities to ensure they may effectively carry out their duties, on the understanding that these are provided on a reciprocal basis.

Originally, these privileges and immunities were granted on a bilateral, ad hoc basis, which led to misunderstandings and conflict, pressure on weaker states, and an inability for other states to judge which party was at fault. An international agreement known as the Vienna Conventions codified the rules and agreements, providing standards and privileges to all states.

It is possible for the official's home country to waive immunity; this tends to happen only when the individual has committed a serious crime, unconnected with their diplomatic role (as opposed to, say, allegations of spying), or has witnessed such a crime. However, many countries refuse to waive immunity as a matter of course; individuals have no authority to waive their own immunity (except perhaps in cases of defection). Alternatively, the home country may prosecute the individual. If immunity is waived by a government so that a diplomat (or their family members) can be prosecuted, it must be because there is a case to answer and it is in the public interest to prosecute them. A 2002 example of a Colombian diplomat in London being prosecuted for the manslaughter of a man who mugged his son was deemed in the public interest once diplomatic immunity was waived by the Colombian government.

Consular Immunity

Privileges are described in the Vienna Convention on Consular Relations of 1963 (VCCR). Consular



immunity offers protections similar to diplomatic immunity, but these protections are not as extensive, given the functional differences between consular and diplomatic officers. For example, consular officers are not accorded absolute immunity from a host country's criminal jurisdiction, they may be tried for certain local crimes upon action by a local court, and are immune from local jurisdiction only in cases directly relating to consular functions

Republic of Indonesia v. Vinzon, G.R. No. 154705, June 26, 2003

International law is founded largely upon the principles of reciprocity, comity, independence, and equality of States which were adopted as part of the law of our land under Article II, Section 2 of the 1987 Constitution. The rule that a State may not be sued without its consent is a necessary consequence of the principles of independence and equality of States. As enunciated in *Sanders v. Veridiano II*, the practical justification for the doctrine of sovereign immunity is that there can be no legal right against the authority that makes the law on which the right depends. In the case of foreign States, the rule is derived from the principle of the sovereign equality of States, as expressed in the maxim *par in parem non habet imperium*. All states are sovereign equals and cannot assert jurisdiction over one another. A contrary attitude would "unduly vex the peace of nations."

The rules of International Law, however, are neither unyielding nor impervious to change. The increasing need of sovereign States to enter into purely commercial activities remotely connected with the discharge of their governmental functions brought about a new concept of sovereign immunity. This concept, the restrictive theory, holds that the immunity of the sovereign is recognized only with regard to public acts or acts *jure imperii*, but not with regard to private acts or acts *jure gestionis*.

x x x

Apropos the present case, the mere entering into a contract by a foreign State with a private party cannot be construed as the ultimate test of whether or not it is an act *jure imperii* or *jure gestionis*. Such act is only the start of the inquiry. Is the foreign State engaged in the regular conduct of a business? If the foreign State is not engaged regularly in a business or commercial activity, and in this case it has not been shown to be so engaged, the particular act or transaction must then be tested by its nature. If the act is in pursuit of a sovereign activity, or an incident thereof, then it is an act *jure imperii*.

Hence, the existence alone of a paragraph in a contract stating that any legal action arising out of the agreement shall be settled according to the laws of the Philippines and by a specified court of the Philippines is not necessarily a waiver of sovereign immunity from suit. The aforesaid provision contains language not necessarily inconsistent with sovereign immunity. On the other hand, such provision may also be meant to apply where the sovereign party elects to sue in the local courts, or otherwise waives its immunity by any subsequent act. The applicability of Philippine laws

must be deemed to include Philippine laws in its totality, including the principle recognizing sovereign immunity. Hence, the proper court may have no proper action, by way of settling the case, except to dismiss it.

International organizations and staff

Liang v. People of the Philippines, G.R. No. 125856, March 26, 2001

[T]he slander of a person, by any stretch, cannot be considered as falling within the purview of the immunity granted to ADB officers and personnel. Petitioner argues that the Decision had the effect of prejudging the criminal case for oral defamation against him. We wish to stress that it did not. What we merely stated therein is that slander, in general, cannot be considered as an act performed in an official capacity. The issue of whether or not petitioner's utterances constituted oral defamation is still for the trial court to determine.

International Catholic Migration Commission v. Calleja, G.R. No. 85750, September 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 tigger 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*."

DFA v. NLRC, G.R. No. 113191, September 18, 1996

The DFA's function includes, among its other mandates, the determination of persons and institutions covered by diplomatic immunities, a determination which, when challenge, 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. When international agreements are concluded, the parties thereto are deemed to have likewise accepted the responsibility of seeing to it that their agreements are duly regarded. In our country, this task falls principally of the DFA as being the highest executive department with the competence and authority to so act in this aspect of the international arena.



**Treatment of Aliens, including Deportation
(compared with Extradition)**

Q: A group of foreigners reside in the territory of State A.

Is State A free to treat such foreigners in any manner that it so pleases?

No.

Or is State A required to treat them as it treats its own citizens?

No.

Or is State A required to treat them according to certain international rules even if such rules prescribe that they be treated better than the citizens of State A?

It depends. The traditional concept was to a state to treat foreigner/aliens as they treat their nationals. But modern concept provides states to exercise certain "minimum standards" of treatment. The standards are quoted in the *Neer claim*, US v. Mexico, 4RIAA (1926):

"[T]reatment of alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of government action so far short of international standards that every reasonable and impartial man would readily recognize the insufficiency."

Q: What is the difference between extradition and deportation?

Deportation	Extradition
Expulsion of an individual from a state where he is alleged to have committed a crime or has been convicted of a crime within its territory back to his state of origin.	Surrender of an individual by the state within whose territory he is found to the state whose laws he is alleged to have committed a crime or to have been convicted of a crime.

Principles Governing Extradition:

1. No state is obliged to extradite unless there is a treaty;
2. Differences in legal system can be an obstacle to interpretation of what the crime is;

3. Religious and political offenses are non-extraditeable

Wikipedia on:

Extradition

It is the official process whereby one country transfers a suspected or convicted criminal to another country. Between country, extradition is normally regulated by **treaties**. Where extradition is compelled by laws, such as among sub-national jurisdictions, the concept may be known more generally as **rendition**. It is an ancient mechanism, dating back to at least the 13th century BC, when an Egyptian Pharaoh negotiated an extradition treaty with a Hittite King. Through the extradition process, a sovereign (the requesting state) typically makes a formal request to another sovereign (the requested state). If the fugitive is found within the territory of the requested state, then the requested state may arrest the fugitive and subject him or her to its extradition process. The extradition procedures to which the fugitive will be subjected are dependent on the law and practice of the requested state.

Deportation

It is the expulsion of a person or group of people from a place or **country**. Today the expulsion of foreign nationals is usually called deportation, whereas the expulsion of nationals is called banishment, **exile**, or **penal transportation**. Deportation is an ancient practice: **Khosrau I**, Sassanid King of **Persia**, deported 292,000 citizens, slaves, and conquered people to the new city of **Ctesiphon** in 542 C.E. **Britain** deported religious objectors and criminals to America in large numbers before 1776, and transported them to Australia between 1788 and 1868.

Also check Philippine Law:

Presidential Decree No. 1069

Prescribing the Procedure for the Extradition of Persons who have committed Crimes in a Foreign Country

Secretary of Justice v. Lantion, G.R. No. 139465, Resolution on MR dated October 17, 2000 [not the Decision dated January 18, 2000]

In tilting the balance in favor of the interests of the State, the Court stresses that it is not ruling that the private respondent has no right to due process at all throughout the length and breadth of the extrajudicial proceedings. Procedural due process requires a determination of what process is due, when it is due, and the degree of what is due. Stated otherwise, a **prior determination should be made as to whether procedural protections are at all due and when they are due, which in turn depends on the extent to which an individual will be "condemned to suffer grievous loss."** We have explained why an extraditee has no right to notice and hearing during the evaluation stage of the extradition



process. As aforesaid, P.D. No. 1069 which implements the RP-US Extradition Treaty affords an extraditee **sufficient opportunity** to meet the evidence against him **once the petition is filed in court**. The time for the extraditee to know the basis of the request for his extradition is **merely moved** to the filing in court of the formal petition for extradition. The extraditee's right to know is **momentarily withheld during the evaluation stage** of the extradition process to accommodate the more compelling interest of the State to prevent escape of potential extraditees which can be precipitated by premature information of the basis of the request for his extradition. No less compelling **at that stage** of the extradition proceedings is the need to be more deferential to the judgment of a co-equal branch of the government, the Executive, which has been endowed by our Constitution with greater power over matters involving our foreign relations. Needless to state, this balance of interests is **not a static but a moving balance** which can be adjusted as the extradition process moves from the administrative stage to the judicial stage and to the execution stage depending on factors that will come into play. In sum, we rule that the **temporary hold** on private respondent's privilege of notice and hearing is a **soft restraint** on his right to due process which will not deprive him of **fundamental fairness** should he decide to resist the request for his extradition to the United States. **There is no denial of due process as long as fundamental fairness is assured a party.**

We end where we began. A myopic interpretation of the due process clause would not suffice to resolve the conflicting rights in the case at bar. With the global village shrinking at a rapid pace, propelled as it is by technological leaps in transportation and communication, we need to push further back our horizons and work with the rest of the civilized nations and move closer to the universal goals of "peace, equality, justice, freedom, cooperation and amity with all nations." In the end, it is the individual who will reap the harvest of peace and prosperity from these efforts.

Government of the USA v. Purganan, G.R. No. 148571, Decision dated September 24, 2002

In extradition proceedings, are prospective extraditees entitled to notice and hearing *before* warrants for their arrest can be issued? Equally important, are they entitled to the right to bail and provisional liberty while the extradition proceedings are pending? In general, the answer to these two novel questions is "No."

[T]o summarize and stress these ten points:

1. The ultimate purpose of extradition proceedings is to determine whether the request expressed in the petition, supported by its annexes and the evidence that may be adduced during the hearing of the petition, complies with the Extradition Treaty and Law; and whether the person sought is extraditable. The proceedings are intended merely to assist the requesting state in bringing the accused -- or the fugitive who has illegally escaped -- back to its territory, so that the criminal process may proceed therein.
2. By entering into an extradition treaty, the Philippines is deemed to have reposed its trust in the reliability or soundness of the legal and judicial system of its treaty partner, as well as in the ability and the willingness of the latter to grant basic rights to the accused in the pending criminal case therein.
3. By nature then, extradition proceedings are not equivalent to a criminal case in which guilt or innocence is determined. Consequently, an extradition case is not one in which the constitutional rights of the accused are necessarily available. It is more akin, if at all, to a court's request to police authorities for the arrest of the accused who is at large or has escaped detention or jumped bail. Having once escaped the jurisdiction of the requesting state, the reasonable prima facie presumption is that the person would escape again if given the opportunity.
4. Immediately upon receipt of the petition for extradition and its supporting documents, the judge shall make a prima facie finding whether the petition is sufficient in form and substance, whether it complies with the Extradition Treaty and Law, and whether the person sought is extraditable. The magistrate has discretion to require the petitioner to submit further documentation, or to personally examine the affiants or witnesses. If convinced that a prima facie case exists, the judge immediately issues a warrant for the arrest of the potential extraditee and summons him or her to answer and to appear at scheduled hearings on the petition.
5. After being taken into custody, potential extraditees may apply for bail. Since the applicants have a history of absconding, they have the burden of showing that (a) there is no flight risk and no danger to the community; and (b) there exist special, humanitarian or compelling circumstances. The grounds used by the highest court in the requesting state for the grant of bail therein may be considered, under the principle of reciprocity as a special circumstance. In extradition cases, bail is not a matter of right; it is subject to judicial discretion in the context of the peculiar facts of each case.
6. Potential extraditees are entitled to the rights to due process and to fundamental fairness. Due process does not always call for a *prior* opportunity to be heard. A *subsequent* opportunity is sufficient due to the flight risk involved. Indeed, available during the hearings on the petition and the answer is the full chance to be heard and to enjoy fundamental fairness that is *compatible with the summary nature* of extradition.
7. This Court will always remain a protector of human rights, a bastion of liberty, a bulwark of democracy and the conscience of society. But it is also well aware of the limitations of its authority and of the need for respect for the prerogatives of the other co-equal and co-independent organs of government.
8. We realize that extradition is essentially an executive, not a judicial, responsibility arising out of the presidential power to conduct foreign relations and to implement treaties. Thus, the Executive Department of government has broad discretion in its duty and power of implementation.
9. On the other hand, courts merely perform oversight functions and exercise review authority to prevent or excise grave abuse and tyranny. They should not allow contortions, delays and "over-due process" every little step of the way, lest these *summary* extradition proceedings become not only inutile but also sources of international embarrassment due to our inability to comply in good faith with a treaty partner's simple request to return a fugitive. Worse, our country should not be converted into a dubious haven where fugitives and escapees can unreasonably delay, mummify, mock, frustrate, checkmate and defeat the quest for bilateral justice and international cooperation.
10. **At bottom, extradition proceedings should be conducted with all deliberate speed to determine compliance with the Extradition Treaty and Law; and, while safeguarding basic individual rights, to avoid the legalistic**



contortions, delays and technicalities that may negate that purpose.

Dissenting Opinion of Justice Vitug to the Resolution on MR dated December 17, 2002

The proposal to curtail the right of an individual to seek bail from the courts of law, acting in extradition cases, as well as his right to notice and hearing before being arrested, brings to mind the not so distant past of the Spanish Inquisition and an uneasy realization that we have yet to totally free ourselves from the grip of a dark page in history.

My reservation on the draft *ponencia* is premised on the following theses – *first*, it would ignore constitutional safeguards to which all government action is defined, and *second*, it would overstep constitutional restraints on judicial power.

Treaty laws, particularly those which are self-executing, have equal stature as national statutes and, like all other municipal laws, are subject to the parameters set forth in the Constitution. The Constitution, being both a grant and a circumscription of government authority by the sovereign people, presents the ultimate yardstick of power and its limitation upon which an act of government is justly measured. This instrument contains a rule for all agencies of the government and any act in opposition thereto can only be struck down as being invalid and without effect. When the great Charter gives a mandate, the government can do no less than to accept it; its rejection would be an act of betrayal. The edict in its Bill of Rights granting to all persons, without distinction, the fundamental right to bail, is clear. No statute or treaty can abrogate or discard its language and its intent.

Nowhere in the Extradition Treaty with the United States is the grant of bail mentioned but so also it is not prohibited. This obscurity must not be held to negate the right to bail; on the contrary, it should be viewed as allowing, at the very least, the evident intent and spirit of the fundamental law to prevail.

A Constitution does not deal with details, but only enunciates general tenets that are intended to apply to all facts that may come about and be brought within its directions. Behind its conciseness is its encompassing inclusiveness. It is not skin-deep; beneath that surface is what gives it real life and meaning. It can truly be said that the real essence of justice does not emanate from quibbling over patchwork but proceeds from its gut consciousness and dynamic role as a brick in the ultimate development of the edifice.

Resort to overly rigid procedures is being justified as a need to keep in line with our treaty obligations. Verily, comity in our relations with sovereign states is important, but there are innate rights of individuals which no government can negotiate or, let alone, bargain away.

Environmental Law

Environmental law is a collective term describing international **treaties** (conventions), **statutes, regulations,** and **common law** or national legislation (where applicable) that operates to regulate the interaction of humanity

and the **natural environment**, toward the purpose of reducing the impacts of human activity.

1972 Stockholm Declaration of the United Nations Conference on the Human Environment

Principle 21

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

2002 Johannesburg Declaration on Sustainable Development

The Johannesburg Declaration on Sustainable Development was adopted at the **World Summit on Sustainable Development** (WSSD), sometimes referred to as Earth Summit 2002, at which the Plan of Implementation of the World Summit on Sustainable Development was also agreed upon.

The Johannesburg Declaration builds on earlier declarations made at the **United Nations Conference on the Human Environment** at **Stockholm** in 1972, and the **Earth Summit** in **Rio de Janeiro** in 1992. While committing the nations of the world to **sustainable development**, it also includes substantial mention of multilateralism as the path forward.

In terms of the political commitment of parties, the Declaration is a more general statement than the Rio Declaration. It is an agreement to focus particularly on "the worldwide conditions that pose severe threats to the sustainable development of our people, which include: chronic hunger; malnutrition; foreign occupation; armed conflict; illicit drug problems; organized crime; corruption; natural disasters; illicit arms trafficking; trafficking in persons; terrorism; intolerance and incitement to racial, ethnic, religious and other hatreds; xenophobia; and endemic, communicable and chronic diseases, in particular HIV/AIDS, malaria and tuberculosis."



Jessup Problem



55. Alfurna requests the Court to adjudge and declare that:

- (a) Alfurna is still a state, and accordingly, the Court may exercise jurisdiction over its claims;
- (b) Alfurna is entitled to make claims in relation to the migrants now in Rutasia, and Rutasia has failed to process those migrants and accord them status consistent with international law;
- (c) Rutasia's treatment of the detained Alfurnan migrants held in the Woeroma Centre, and the proposed transfer to Saydee, violate international law; and
- (d) Rutasia's conduct disentitles it to any relief from this Court in respect of its claims over Alfurna's assets, and in any event Rutasia's actions regarding those assets are in violation of international law.

55 (a)

Alfurna is still a state. The definition and requirements under the Convention on the Rights and Duties of States does not apply as Alfurna never consented for its ratification.

But even if the convention is made applicable to Alfurna, Article 3 is clear:

"The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law."

There is also no showing that the Convention had become a customary international law. To be a custom applicable in the case, state practice and *opinio juris* must concur. There is none to show that these two ever existed at least in Alfurna.

Lastly, the Convention defines how a state is constituted but does not set criteria how a state is extinguished or

succeeded. The principle of state continuity must be applied. But in any case, the elements of a state still exist upon Alfurna.

Permanent population – no specific definition under international law. It is enough that the population is capable of multiplying themselves for existence.

Defined territory – is found in the leased Nasatima Island. It is not required that the territory is owned. It is enough that possession and control is exercised.

Effective government – although only 3 out of 11 administrative agencies have transferred to Nasatima Island, the remaining is scheduled to transfer thereafter.

Capacity to enter into agreements with other states – is also evident after Prime Minister Fatu was able to obtain sympathy, compassion and support among 67 other states, aside from Finutafu, to condemn Rutasia's conduct.

55 (b)

It is fundamental to every state to recognize human rights as they are inherent to all human beings, on whatever nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. All are equally entitled to human rights without discrimination. These rights are all interrelated, interdependent and indivisible. Violations of these rights are actionable and entitled for claims in any jurisdiction.

55 (c)

Rutasia clearly violated its obligations under international law with the kind of treatment to Alfurnan migrants. Human rights entail both rights and obligations. Rutasia as a state assumes obligations and duties under international law to respect, to protect and to fulfill human rights. The obligation to respect means that Rutasia must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires Rutasia to protect individuals and groups against human rights abuses. The obligation to fulfill means that Rutasia must take positive action to facilitate the enjoyment of basic human rights.

Rutasia's act of transferring Alfurnan migrants to Saydee violates the non-refoulement obligation under Articles 6 and 7 of ICCPR. Rutasia may only transfer Alfurnan migrants to safe (third party) countries.

55 (d)

Under international law, an inconsistent conduct disentitles a state from claiming any relief from this Court. 'Good faith' cannot be invoked if it results to an estoppel. The doctrine of estoppel precludes Rutasia from denying or asserting anything to the contrary of that which has been established as truth or fact by its own implied or express deeds. Tolerance to Alfurna's situation by Rutasia cannot be followed by subsequent sequestering of the former's assets.

In any event, the Rutasia violated Alfurna's sovereign immunity from enforcement of its assets as the latter did neither gave its consent nor it had earmarked said assets in satisfaction of its claims. Alfurna's assets were actually



in use for an *acta iure imperii* as opposed to *acta iure gestionis*. The former is immuned from any enforcement.

56. Rutasia requests the Court to adjudge and declare that:

(a) Alfurna is no longer a state, and accordingly the Court lacks jurisdiction over Alfurna's claims;

and in any event:

(b) Rutasia has not violated international law in its treatment of the migrants from (former) Alfurna and, in any event, Alfurna is foreclosed from making claims with respect to those individuals because of its failure to take available affirmative steps to protect them;

(c) the Alfurnan migrants held in the Woeroma Centre are being treated in accordance with Rutasia's obligations under international law, and their proposed transfer to Saydee is legal; and

(d) Rutasia's conduct in respect of Alfurna's assets is also consistent with international law.

56 (a)

Alfurna is no longer a state applying the Convention on the Rights and Duties of States. Article 1 of the said convention requires that the state as a person of international law should possess a permanent population, defined territory, government and capacity to enter into relations with other states.

In the case of Alfurna, its inhabitants are scattered on the states of Finutafu, Rutasia and Saydee. Their territory is no longer defined and habitable after the inundation. Their government has lost its seat of power and remained as a fiction under the voice of its Prime Minister. The only seemingly left is the capacity to enter into relations with other states, which is also in its verge of extinguishment after the United Nations Secretary-General refused to comment on Alfurna's unpaid UN membership dues.

The situation is more real than apparent, that Alfurna ceased to become a state. Article 34(1) of the ICJ statute provides that "Only states may be parties in cases before the Court." The case must be dismissed in favour of Rutasia.

56 (b)

Alfurna cannot claim any relief under the "doctrine of clean hands" considering it had violated obligation under customary international law by failing to provide adequate evacuation plans for its nationals.

The matter raised by Alfurnan migrants is under the sphere of domestic law, thusre of domestic law, thus it is not violative of the Refugee Convention. In fact, Rutasia adequately provided migrants with temporary refuge and

protection in administrative detention for reasons of their illegal, if not irregular entry to Rutasian territory. This cannot be construed as a violation under Article 31 of said convention.

56 (c)

Rutasia have not violated international law in its manner of receiving mass-influx of migrants from Alfurna. Firstly, the migration was illegal absent any form of prior communication from Alfurna. Secondly, it is an established state practice to place migrants with irregular entry to prison-converted-refuge-camp in absence of accommodating infrastructure. Lastly, the adverse condition of such detentions is a necessary consequence of overcrowding, thus unavoidable.

In order to reduce the burden of overcrowding, transfer to Saydee, the next accessible and feasible option, is logical and legal. The apprehensions that Saydee is notoriously known to be a human rights violator are more apparent than real at this point. Rutasia has given sufficient guarantee that Alfurnan migrants will be extended protection under the "Protection Elsewhere Doctrine" considering that the former financed Saydee's operations.

56 (d)

Rutasia may have not fully complied with its obligations to reduce its carbon foot-print but there is no conclusion that it is the sole contributor for climate change that caused inundation to Alfurna. Besides, Rutasia has yet to ratify *Kyoto Protocol*. In any event, Rutasia took reasonable efforts to minimize the risk to Alfurna under the ACCR Project.

The liability of MCL as contractor does not extend as a sovereign act of Rutasia absent its consent. Rutasia also lacks territorial and jurisdictional control over MCL to prove due diligence obligation. In any event, Rutasia maintained "good faith" considering it has restructured Alfurna's debt twice on separate occasions.

Alfurna cannot invoke *rebus sic stantibus* as a matter of defense as it requires that the change must not be anticipated. Also, the imposition of moratorium does not bind Rutasia under the constructive notice theory. Being an action *in personam*, notice must be express and personal.

Finally, Alfurna cannot invoke immunity of its assets from enforcement by way of a waiver when it entered the CCL agreement. Even if such waiver is not considered, the purpose of the assets in ARB is for *acta iure gestionis* or a commercial/proprietary act as opposed to a sovereign/governmental act. In any event, Rutasia's act in seizing Alfurna's assets is a valid countermeasure considering Alfurna's moratorium is constructively a repudiation of debts which is a wrongful act.

END OF SEMESTER – GOOD LUCK TO US!