PUBLIC INTERNATIONAL LAW

NOTES AND QUESTIONS

"Nam omnia praeclara tam difficilia quam rara sunt"
For all that is excellent and eminent is as difficult as it is rare
-Spinoza on *Ethics*

CSU – LLB 3
SUMMER CLASS

MYRA C. DE GUZMAN

INTRODUCTION

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Public v Private International Law
Basis of Public International Law

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2. Positivists
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DEFINITION OF Public International Law
It is the body of rules and principles that are recognized as legally binding and which govern the relations of states and other entities invested with international legal personality. Formerly known as "**law of nations**" coined by Jeremy Bentham in 1789.

Public International Law Distinguished From Private International Law/Conflict of Laws
It is that part of the law of each State which determines whether, in dealing with a factual situation, an event or transaction between private individuals or entities involving a foreign element, the law of some other State will be recognized.

	Public	Private
1. *Nature*	Public is international in nature. It is a law of a sovereign over those subjected to his sway [Openheim – Lauterpacht, 38.]	As a rule, Private is national or municipal in character. Except when embodied in a treaty or convention, becomes international in character. It is a law, not above, but between, sovereign states and is, therefore, a weaker law. [Openheim – Lauterpacht, 38.]
2. *Settlement of Dispute*	Disputes are resolved through international modes of settlement – like negotiations and arbitration, reprisals and even war	Recourse is with municipal tribunals through local administrative and judicial processes.
3. *Source*	Derived from such sources as international customs, international conventions and the general principles of law.	Consists mainly from the lawmaking authority of each state.
4. Subject	Applies to relations states *inter se* and other international persons.	Regulates the relations of individuals whether of the same nationality or not.

5. Responsibility for violation	Infractions are usually collective in the sense that it attaches directly to the state and not to its nationals.	Generally, entails only individual responsibility.

BASIS OF PIL – 3 SCHOOLS OF THOUGHT [Why are rules of international law binding?**]**

1. *Naturalist* –
   - ★ PIL is a branch of the great law of nature – the sum of those principles which ought to control human conduct, being founded on the very nature of man as a rational and social being. [Hugo Grotius]
   - ★ PIL is <u>binding</u> upon States

2. *Positivist* –
   - ★ Basis is to be found in the <u>consent</u> and conduct of States.
   - ★ <u>*Tacit*</u> consent in the case of customary international law.
   - ★ <u>*Express*</u> in conventional law.
   - ★ <u>*Presumed*</u> in the general law of nations. [Cornelius van Bynkershoek]

3. *Groatians or Eclectics* –
   - ★ Accepts the doctrine of natural law, but maintained that States were accountable only to their own conscience for the observance of the duties imposed by natural law, unless they had agreed to be bound to treat those duties as part of positive law. [Emerich von Vattel]
   - ★ Middle ground

3 GRAND DIVISIONS

1. ***Laws of Peace*** – normal relations between states in the absence of war.

2. ***Laws of War*** – relations between hostile or belligerent states during wartime.

3. ***Laws of Neutrality*** – relations between a non-participant state and a participant state during wartime. This also refers to the relations among non-participating states.

RELATIONS BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

From the Viewpoint of Doctrine

1. Dualists –
   - ★ International Law and Municipal Law are two completely separate realms.
   - ★ *See distinctions Nos. 1,3 &4.*

2. Monists –
   - ★ Denies that PIL and Municipal Law are essential different.
   - ★ In both laws, it is the individual persons who in the ultimate analysis are regulated by the law. That both laws are far from being essentially different and must be regarded as parts of the same juristic conception. For them there is oneness or unity of all laws.
   - ★ PIL is superior to municipal law—international law, being the one which determines the jurisdictional limits of the personal and territorial competence of States.

From the Viewpoint of Practice

1. International Tribunals
   - ★ PIL superior to Municipal Law

- ★ Art. 27, Vienna Convention in the law of Treaties – A state "may not invoke the provisions of its internal law as justification for its failure to perform a treaty"
- ★ State legally bound to observe its treaty obligations, once signed and ratified

2. Municipal Sphere – depends on what doctrine is followed:

Doctrine of Incorporation -
Rules of international law form part of the law of the land and no further legislative action is needed to make such rules applicable in the domestic sphere. [Sec. of Justice v. Lantion GRN 139465, Jan. 18, 2000]

This is followed in the Philippines:
Art. II, Sec. 2 – "The Philippines…adopts the generally accepted principles of international law as part of the law of the land…" However, no primacy is implied.

Q: What are these generally accepted principles?
A: Pacta sunt servanda, sovereign equality among states, principle of state immunity; right of states to self-defense

Secretary Of Justice *v*. Judge Lantion and Jimenez [GR 139465, 18 Jan. 2000]

FACTS: A possible conflict between the US-RP Extradition Treaty and Philippine law

ISSUE: WON, under the Doctrine of Incorporation, International Law prevails over Municipal Law

HELD: NO.

Under the doctrine of incorporation, rules of international law form part of the law of the land and no further

legislative action is needed to make such rules applicable in the domestic sphere.

The doctrine of incorporation is applied whenever local courts are confronted with situations in which there appears to be a conflict between a rule of international law and the provisions of the local state's constitution/statute.

First, efforts should first be exerted to harmonize them, so as to give effect to both. This is because it is presumed that municipal law was enacted with proper regard for the generally accepted principles of international law in observance of the incorporation clause.

However, if the conflict is irreconcilable and a choice has to be made between a rule of international law and municipal law, jurisprudence dictates that the municipal courts should uphold municipal law.

This is because such courts are organs of municipal law and are accordingly bound by it in all circumstances. The fact that international law was made part of the law of the land does not pertain to or imply the primacy of international law over national/municipal law in the municipal sphere.

The doctrine of incorporation, as applied in most countries, decrees that rules of international law are given equal standing with, but are not superior to, national legislative enactments.

In case of conflict, the courts should harmonize both laws first and if there exists an unavoidable contradiction between them, the principle of ***lex posterior derogat priori*** - a treaty may repeal a statute and a statute may repeal a treaty - will apply. But if these laws are found in conflict with the Constitution, these laws must be stricken out as invalid.

In states where the constitution is the highest law of the land, such as in ours, both statutes and treaties may be invalidated if they are in conflict with the constitution.

Supreme Court has the power to invalidate a treaty – Sec. 5(2)(a), Art. VIII, 1987 Constitution

Q: What is the doctrine of incorporation? How is it applied by local courts?

Held: Under the doctrine of incorporation, rules of international law form part of the law of the land and no further legislative action is needed to make such rules applicable in the domestic sphere.

The doctrine of incorporation is applied whenever municipal tribunals (or local courts) are confronted with situations in which there appears to be a conflict between a rule of international law and the provisions of the Constitution or statute of the local state. Efforts should first be exerted to harmonize them, so as to give effect to both since it is to be presumed that municipal law was enacted with proper regard for the generally accepted principles of international law in observance of the Incorporation Clause in Section 2, Article II of the Constitution. In a situation however, where the conflict is irreconcilable and a choice has to be made between a rule of international law and municipal law, jurisprudence dictates that municipal law should be upheld by the municipal courts for the reason that such courts are organs of municipal law and are accordingly bound by it in all circumstances. The fact that international law has been made part of the law of the land does not pertain to or imply the primacy of international law over national or municipal law in the municipal sphere. The doctrine of incorporation, as applied in most countries, decrees that rules of international law are given equal standing with, but are not superior to, national legislative enactments.

Accordingly, the principle of lex posterior derogat priori takes effect – a treaty may repeal a statute and a statute may repeal a treaty. In states where the Constitution is the highest law of the land, such as the Republic of the Philippines, both statutes and treaties may be invalidated if they are in conflict with the Constitution. (Secretary of Justice v. Hon. Ralph C. Lantion, G.R. No. 139465, Jan. 18, 2000, En Banc [Melo])

Q: Is sovereignty really absolute and all-encompassing? If not, what are its restrictions and limitations?

Held: 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. 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 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.

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. (Tanada v. Angara, 272 SCRA 18, May 2, 1997 [Panganiban])

Doctrine of Transformation –
Legislative action is required to make the treaty enforceable in the municipal sphere.

Generally accepted rules of international law are not *per se* binding upon the state but must first be embodied in legislation enacted by the lawmaking body and so transformed into municipal law. This doctrine runs counter Art. II, Sec. 2, of the 1987 Constitution.
A reading of the case of Kuroda v Jalandoni, [GRN L-2662 March 26, 1949], one may say that Supreme Court expressly ruled out the Doctrine of Transformation when they declared that generally accepted principles of international law form a part of the law of our nation even if the Philippines was not a signatory to the convention embodying them, for our Constitution has been deliberately general and extensive in its scope and is not cofined to the recognition of rules and principles of international law as contained in treaties to which our government may have been or shall be a signatory.

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 [arties. A

state which has contracted a valid international obligation is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken.

Tañada vs. Angara
GRN 118295 May 2, 1997

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. The Constitution does not envision a hermit type isolation of the country from the rest of the world.

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.

The constitutional policy of a "self-reliant and independent national economy" does not necessarily rule out the entry of foreign investments, goods and services. It contemplates neither “economic seclusion" nor "mendicancy in the international community."

Concept of Sovereignty as Autolimitation
When the Philippines joined the United Nations as one of its 51 charter members, it consented to restrict its sovereign rights under the "concept of sovereignty as autolimitation.

Q: A treaty was concurred between RP and China. Later, a law was passed which has conflicting provisions with the treaty. Rule.

A: A treaty is part of the law of the land. But as internal law, it would not be superior to a legislative act, rather it would be in the same class as the latter. Thus, the latter law would be considered as amendatory of the treaty, being a subsequent law under the principle *lex posterior derogat priori.* (Abbas vs. COMELEC)

SOURCES

Article 38 of the Statute of International Court of Justice (SICJ) directs that the following be considered before deciding a case:

A. Primary

I. Treaties or International Conventions
II. International Custom
III. General Principles of Law Recognized by Civilized Nations

B. Secondary

IV. Judicial Decisions
V. Teachings of authoritative publicists

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A. Primary

I. Treaties or International Conventions – 2 KINDS:

1. Contract Treaties [*Traite-Contrat*] –

★ Bilateral arrangements concerning matters of particular or special interest to the contracting parties
★ Source of "Particular International Law"
★ BUT: May become primary sources of international law when different contract treaties are of the same nature, containing practically uniform provisions, and are concluded by a substantial number of States
EX.: Extradition Treaties

2. Law-Making Treaty [*Traite-Loi*] –
★ Concluded by a large number of States for purposes of:
1. Declaring, confirming, or defining their understanding of what the law is on a particular subject;

2. Stipulating or laying down new general rules for future international conduct;
3. Creating new international institutions

★ Source of "General International Law"

II. International Custom –
Matters of international concern are not usually covered by international agreements and many States are not parties to most treaties; international custom remains a significant source of international law, supplementing treaty rules.

Custom is the practice that has grown up between States and has come to be accepted as binding by the mere fact of persistent usage over a long period of time

It exists when a clear and continuous habit of doing certain things develops under the CONVICTION that it is obligatory and right.

This conviction is called "**Opinio Juris**"

When there's no conviction that it is obligatory and right, there's only a **Usage**.

Usage is also a usual course of conduct, a long-established way of doing things by States.

To elevate a mere usage into one of a customary rule of international law, there must be a degree of constant and uniform repetition over a period of time coupled with *opinio juris*.

III. General Principles of Law Recognized by Civilized Nations

Salonga opines that resort is taken from general principles of law whenever no custom or treaty provision is applicable. The idea of "civilized nations" was intended to

restrict the scope of the provision to European States, however, at present the term no longer have such connotation, thus the term should include all nations.

Examples of general principles are: *estoppel, pacta sunt servanda, consent, res judicata and prescription;* including the principles of justice, equity and peace.

B. Secondary

IV. Judicial decisions

The doctrine of *stare decisis* is not applicable in international law per Art.59 of the ICJ which states that "The decision of the Court has no binding force except between the parties and in respect to that particular case." This means that these decisions are not a direct source, but they do exercise considerable influence as an impartial and well-considered statement of the law by jurists made in the light of actual problems which arise before them, and thus, accorded with great respect.

This includes decisions of national courts, although they are not a source of law, the cumulative effect of uniform decisions of the courts of the most important States is to afford evidence of international custom.

V. Teachings of authoritative publicists – including learned writers

Such works are resorted to by judicial tribunals not for the speculation of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. [Mr. Justice Gray in Paquete Habana case, 175 U.S. 677.]

Q: State your general understanding of the primary sources and subsidiary sources of international law, giving an illustration of each. (2003 Bar)

A: Under Article 38 of the Statute of International Court of Justice, the primary sources of international law are the following:

1. International conventions, e.g. Vienna Convention on the Law of Treaties.
2. International customs, e.g. cabotage, the prohibition against slavery, and the prohibition against torture.
3. General principles of law recognized by civilized nations, e.g. prescription, *res judicata*, and due process.

The subsidiary sources of international law are judicial decisions, subject to the provisions of Article 59, e.g., the decision in the Anglo-Norwegian Fisheries Case and Nicaragua v. US, and teachings of the most highly qualified publicists of various nations, e.g., Human Rights in International Law by Lauterpacht and International Law by Oppenheim-Lauterpacht.

Alternative A: Reflecting general international law, Article 38(1) of the Statute of International Court of Justice is understood as providing for international convention, international custom, and general principles of law as primary sources of international law, while indicating that judicial decisions and teachings of the most highly qualified publicists as "subsidiary means for the determination of the rules of law."

The primary sources may be considered as formal sources in that they are considered methods by which norms of international law are created and recognized. A conventional or treaty norm and a customary norm is the product of the formation of general practice accepted as law.

By way of illustrating international Convention as a source of law, we may refer to the principle embodied in Article 6 of the Vienna Convention on the Law on Treaties which reads: “Every State possesses capacity to conclude treaties.” It tells us what the law is and the process or method by which it cam into being. International Custom may be concretely illustrated by *pacta sunt servanda*, a customary or general norm which came about through extensive and consistent practice by a great number of states recognizing it as obligatory.

The subsidiary means serves as evidence of law. A decision of the International Court of Justice, for example, may serve as material evidence confirming or showing that the prohibition against the use of force is a customary norm, as the decision of the Court has demonstrated in the Nicaragua Case. The status of a principle as a norm of international law may find evidence in the works of highly qualified publicists in international law, such as McNair, Kelsen or Oppenheim.

SUBJECTS

Subject Defined

Object Defined

2 Concepts of Subjects of International Law
State as Subjects of International Law
Elements of a State
4. People
5. Territory
6. Government
   a) 2 kinds
      (1) De Jure
      (2) De Facto – 3 kinds
   b) 2 functions
      (1) Constituent
      (2) Ministrant
   c) Effects of change in government
7. Sovereignty
   a) Kinds
   b) Characteristics
   c) Effects of change in sovereignty

Principle of State Continuity
Fundamental Rights of States
1. Right to **S**overeignty and Independence;
2. Right to **P**roperty and Jurisdiction;
3. Right to **E**xistence and Self-Defense
4. Right to **E**quality
5. Right to **D**iplomatic Intercourse

Recognition
Level of Recognition
A. Recognition of State - 2 Schools of Thought
   a. Constitutive School
   b. Declaratory School
B. Recognition of Government
   a. Criteria for Recognition

1. Objective Test –
2. Subjective Test
   (a) Tobar/Wilson Doctrine
   (b) Estrada Doctrine

b. Kinds of Recognition
   1. De Jure
   2. De Facto

c. Consequences of Recognition of Government

C. Recognition of Belligerency
   a. Belligerency
   b. 2 Senses of Belligerency
   c. Requisites of Belligerency
   d. Consequences of Recognition of Belligerents
   e. Forms of Recognition

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Subject Defined

A Subject is *an entity that has an international personality*. An entity has an international personality if it can directly enforce its rights and duties under international law. Where there is no direct enforcement of accountability and an intermediate agency is needed, *the entity is merely an object not a subject of international law.*

Q: When does an entity acquire international personality?

A: When it has right and duties under international law; can directly enforce its rights; and may be held directly accountable for its obligations.

Objects Defined

An Object is a person or thing in respect of which rights are held and obligations assumed by the Subject. Thus, it is not directly governed by the rules of international law.

There is no direct enforcement and accountability. An intermediate agency—the Subject—is required for the enjoyment of its rights and for the discharge of its obligations.

SUBJECTS OF INTERNATIONAL LAW

2 Concepts:

1. **Traditional concept**
   - ★ Only States are considered subjects of international law.

2. **Contemporary concept**
   - ★ Individuals and international organizations are also subjects because they have rights and duties under international law. (Liang vs. People, GRN 125865 [26 March 2001])

The STATE as subject of International Law
State is a community of persons more or less numerous, permanently occupying a definite portion of territory, independent of external control, and possessing an organized government to which the great body of inhabitants render habitual obedience.

Q: The Japanese government confirmed that during the Second World War, Filipinas were among those conscripted as "comfort women" (prostitutes) for Japanese troops in various parts of Asia. The Japanese government has accordingly launched a goodwill campaign and offered the Philippine government substantial assistance for a program that will promote through government and non-governmental organization women's rights, child welfare, nutrition and family health care. An executive agreement is about to be signed for that purpose. The agreement includes a clause whereby the Philippine

government acknowledges that any liability to the comfort women or their descendants are deemed covered by the reparations agreements signed and implemented immediately after the Second World War. Julian Iglesias, descendant of now deceased comfort woman, seeks you advise on the validity of the agreement. Advise him. (1992 Bar)

A: The agreement is valid. The comfort woman and their descendant cannot assert individual claims against Japan. As stated in Paris Moore v. Reagan, 453 US 654, the sovereign authority of the state to settle claims of its nationals against foreign countries has repeatedly been recognized. This may be made without the consent of the nationals or even without consultation with them. Since the continued amity between the State and other countries may require a satisfactory compromise of mutual claims, the necessary power to make such compromise has been recognized. The settlement of such claims may be made by executive agreement.

Q: What must a person who feels aggrieved by the acts of a foreign sovereign do to espouse his cause?
Held: Under both Public International Law and Transnational Law, a person who feels aggrieved by the acts of a foreign sovereign can ask his own government to espouse his cause through diplomatic channels.

Private respondent can ask the Philippine government, through the Foreign Office, to espouse its claims against the Holy See. Its first task is to persuade the Philippine government to take up with the Holy See the validity of its claims. Of course, the Foreign Office shall first make a determination of the impact of its espousal on the relations between the Philippine government and the Holy See. Once the Philippine government decides to espouse the claim, the latter ceases to be a private cause.

According to the Permanent Court of International Justice, the forerunner of the International Court of Justice:

"By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law." (The Mavrommatis Palestine Concessions, 1 Hudson, World Court Reports 293, 302 [1924]) (Holy See, The v. Rosario, Jr., 238 SCRA 524, 533-534, Dec. 1, 1994, En Banc [Quiason])

Q: What is the status of an individual under public international law? (1981 Bar)
A: According to Hanks Kelson, "while as a general rule, international law has as its subjects states and obliges only immediately, it exceptionally applies to individuals because it is to man that the norms of international law apply, it is to man whom they restrain, it is to man who, international law thrusts the responsibilities of law and order."

Q: Is the Vatican City a state?
A: YES!

Holy See *v*. Rosario
[GR 101949, 01 Dec. 1994]

The Lateran Treaty established the STATEHOOD of the Vatican City "for the purpose of assuring to the Holy See absolute and visible independence and of guaranteeing to it indisputable sovereignty also in the field of international relations".

From the wordings of the Lateran Treaty, it is difficult to determine whether the statehood is vested in the Holy See or in the Vatican City.

The Vatican City fits into none of the established categories of states, and the attribution to it of "sovereignty" must be made in a sense different from that in which it is applied to other states.

The Vatican City represents an entity organized not for political but for ecclesiastical purposes and international objects.

Despite its size and object, it has an independent government of its own, with the Pope, who is also head of the Roman Catholic Church, as the Holy See or Head of State, in conformity with its traditions, and the demands of its mission. Indeed, its world-wide interests and activities are such as to make it in a sense an "international state".

It was noted that the recognition of the Vatican City as a state has significant implication – that it is possible for any entity pursuing objects essentially different from those pursued by states to be invested with international personality.

Since the Pope prefers to conduct foreign relations and enter into transactions as the Holy See and not in the name of the Vatican City, one can conclude that in the Pope's own view, it is the Holy See that is the international person.

The Philippines has accorded the Holy See the status of a foreign sovereign. The Holy See, through its Ambassador, the Papal Nuncio, has had diplomatic representations with

the Philippine government since 1957. This appears to be the universal practice in international relations.

Q: Discuss the Status of the Vatican and the Holy See in International Law.

Held: Before the annexation of the Papal States by Italy in 1870, the Pope was the monarch and he, as the Holy See, was considered a subject of International Law. With the loss of the Papal States and the limitation of the territory under the Holy See to an area of 108.7 acres, the position of the Holy See in International Law became controversial.

In 1929, Italy and the Holy See entered into the Lateran Treaty, where Italy recognized the exclusive dominion and sovereign jurisdiction of the Holy See over the Vatican City. It also recognized the right of the Holy See to receive foreign diplomats, to send its own diplomats to foreign countries, and to enter into treaties according to International Law.

The Lateran Treaty established the statehood of the Vatican City "for the purpose of assuring to the Holy See absolute and visible independence and of guaranteeing to it indisputable sovereignty also in the field of international relations."

In view of the wordings of the Lateran Treaty, it is difficult to determine whether the statehood is vested in the Holy See or in the Vatican City. Some writers even suggested that the treaty created two international persons - the Holy See and Vatican City.

The Vatican City fits into none of the established categories of states, and the attribution to it of "sovereignty" must be made in a sense different from that in which it is applied to other states. In a community of

national states, the Vatican City represents an entity organized not for political but for ecclesiastical purposes and international objects. Despite its size and object, the Vatican City has an independent government of its own, with the Pope, who is also head of the Roman Catholic Church, as the Holy See or Head of State, in conformity with its traditions, and the demands of its mission in the world. Indeed, the world-wide interests and activities of the Vatican City are such as to make it in a sense an "international state."

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ELEMENTS OF A STATE:

A. **People** –
   - ★ the inhabitants of the State
   - ★ must be numerous enough to be self-sufficing and to defend themselves and small enough to be easily administered and sustained.

- ★ the aggregate of individuals of both sexes who live together as a community despite racial or cultural differences
- ★ groups of people which cannot comprise a State:
  1. Amazons – not of both sexes; cannot perpetuate themselves
  2. Pirates – considered as outside the pale of law, treated as an enemy of all mankind; "*hostis humani generis*"

B. **Territory –**

- ★ the fixed portion of the surface of the earth inhabited by the people of the State
- ★ the size is irrelevant – San Marino v. China
- ★ BUT, practically, must not be too big as to be difficult to administer and defend; but must not be too small as to unable to provide for people's needs
- ★ **Q: Why important to determine?**
  A: Determines the area over which the State exercises jurisdiction
- ★ Nomadic tribe not a State

Q: What comprises the Philippine Archipelago?
A: §1, Article 1, 1987 Philippine Constitution.

"The national territory comprises the Philippine archipelago, with all the islands and waters embraced therein, and all other territories over which the Philippines has sovereignty or jurisdiction, consisting of its terrestrial, fluvial, and aerial domains, including its territorial sea, the seabed, the subsoil, the insular shelves, and other submarine areas. The waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the internal waters of the Philippines."

Q: The provision deleted the reference to territories claimed "by historic right or legal title." Does this mean that we have abandoned claims to Sabah?
A: NO! This is not an outright or formal abandonment of the claim. Instead, the claim was left to a judicial body capable of passing judgment over the issue

★ The definition covers the following territories:
1. Ceded to the US under the Treaty of Paris of 10 Dec. 1898
2. Defined in the 07 Nov. 1900 Treaty between US and Spain, on the following islands;
3. Cagayan;
4. Sulu;
5. Sibuto
6. Defined in the 02 Jan. 1930 Treaty between the US and the UK over the Turtle and Mangsee Islands
7. Island of Batanes
8. Contemplated in the phrase "belonging to the Philippines by historic right or legal title"

Q: What is the basis of the Philippine's claim to a part of the Spratlys Islands? (2000 Bar)

A: The basis of the Philippine claim is effective occupation of a territory not subject to the sovereignty of another state. The Japanese forces occupied the Spratly Islands Group during the Second World War. However, under the San Francisco Peace Treaty of 1951, Japan formally renounced all right and claim to the Spratlys. The San Francisco Treaty or any other international agreement, however, did not designate any beneficiary state following the Japanese renunciation of right. Subsequently, the Spratlys became *terra nullius* and was occupied by the Philippines in the title of sovereignty. Philippine sovereignty was displayed by open and public occupation of a number of islands by stationing military forces, by organizing a local government unit, and by awarding

petroleum drilling rights, among other political and administrative acts. In 1978, it confirmed its sovereign title by the promulgation of Presidential Decree No. 1596, which declared the Kalayaan Island Group part of Philippine territory.

c. **Government** –

★ the agency or instrumentality through which the will of the State is formulated, expressed and realized

★ **2 KINDS:**

1. De Jure
   - One with rightful title but not power or control, because:
     - ☀ Power was withdrawn;
     - ☀ Has not yet entered into the exercise of power

2. De Facto
   - A government of fact
   - Actually exercises power or control, but has NO legal title
   - **3 Kinds:**
     a) *By revolution* – that which is established by the inhabitants who rise in revolt against and depose the legitimate regime;

        EX. the Commonwealth established by Oliver Cromwell which supplanted the monarchy under Charles I of England

     b) *By government of paramount force* – that which is established in the course of war by the invading forces of one belligerent in the territory of the other belligerent, the government of which is also displaced

EX. the Japanese occupation government in the Philippines which replaced the Commonwealth government during WWII

c) *By secession* – that which is established by the inhabitants of a state who cedes therefrom without overthrowing its government

EX. the confederate government during the American Civil War which, however, did not seek to depose the union government

Q: Is the Cory Aquino Government a de facto or de jure government?

A: De Jure! While initially the Aquino Government was a de facto government because it was established thru extra-constitutional measures, it nevertheless assumed a de jure status when it subsequently recognized by the international community as the legitimate government of the Republic of the Philippines. Moreover, a new Constitution was drafted and overwhelmingly ratified by the Filipino people and national elections were held for that purpose.[Lawyers League for a Better Philippines v. Aquino, G.R. No. 73748 (1986)]

★ The Cory government won! All de facto governments lost in the end!

★ **2 Functions:**

1. **Constituent** – constitutes the very bonds of society – COMPULSORY.

Examples:

(a) Keeping of order and providing for the protection of persons and property from violence and robber;

(b) Fixing of legal relations between spouses and between parents and children;
(c) Regulation of the holding, transmission, and interchange of property, and the determination of liabilities for debt and crime;
(d) Determination of contractual relations between individuals;
(e) Definition and punishment of crimes
(f) Administration of justice in civil cases;
(g) Administration of political duties, privileges, and relations of citizens;
(h) Dealings of the States with foreign powers

2. **Ministrant** – undertaken to advance the general interests of society – merely OPTIONAL.

Examples:
(a) Public works;
(b) Public charity;
(c) Regulation of trade and industry

Q: Is the distinction still relevant?
A: No longer relevant!

ACCFA v. CUGCO [30 SCRA 649]

Constitution has repudiated the laissez faire policy
Constitution has made compulsory the performance of ministrant functions.

Examples:
Promote social justice;
Land reform
Provide adequate social services

Q: What is the mandate of the Philippine Government?
A: Art. II, Sec. 4 – "The prime duty of the Government is to serve and protect the people…" Thus, whatever good is

done by government – attributed to the State; whatever harm is done by the government – attributed to the government alone, not the State

Harm justifies the replacement of the government by revolution – "**Direct State Action**"

EFFECTS OF A CHANGE IN GOVERNMENT:

It is well settled that as far as the rights of the predecessor government are concerned, they are inherited in toto by the successor government. Regarding obligations, distinction is made according to the manner of the establishment of the new government.

The rule is that where the new government was organized by virtue of a constitutional reform duly ratified in a plebiscite, the obligations of the replaced government are also completely assumed by the former. Conversely, where the new government was established through violence, as by a revolution, it may lawfully reject the purely personal or political obligations of the predecessor government but not those contracted by it in the ordinary course of official business.

Summary:

A. Change of Government by Constitutional Reform
   - ★ The new government inherits all the rights and obligations of the former government

B. Change by Extra-Constitutional Means
   - ★ Rights – all are inherited;
   - ★ Obligations – distinguish:
     - ★ Contracted in the regular course of business – Inherited;

       EX.: Payment of postal money orders bought by an individual

★ Purely Personal/Political Obligations – Not bound! May reject!

EX.: Payment for arms bought by old government to fight the rebels

Q: The Federation of Islamabad concluded an agreement with the republic of Baleria when the leaders of Islamabad made a state visit to the latter. The agreement concerns the facilitation of entry of Balerian contract workers in Islamabad. Thereafter, a revolution broke out in Islamabad which is now governed by a revolutionary junta. Most of Balerian contract workers were arrested by Islamabad Immigration officers for not having with them the necessary papers and proper documents. Upon learning of the incident, the government of Baleria lodged a formal protest with the Islamabad revolutionary government invoking certain provisions of the aforementioned agreement. The latter replied, however that the new government is not internationally bound by the agreement that was concluded by the former government of Islamabad and Baleria. Moreover, Islamabad further contended that the agreement was contrary to its plasmatic law. Is the Islamabad revolutionary government under obligation pursuant to international law, to comply with what was agreed upon and set forth in the agreement concluded between Baleria and its former government? Reasons. (1985 Bar)

A: Yes. A new government is exempt from obligation of treaties entered into by the previous government only with respect to those whose subject matter is political in nature. The facilitation of entry by Balerian contract workers to Islamabad is non political. Hence, the treaty embodying such agreement is binding on the new government of

Islamabad. Nor may the new government evade its international obligation on the ground that the agreement is contrary to its Plasmatic law. The rule is settled that a state cannot evade its international obligation by invoking its internal law. It is presumed that the treaty is in conformity with its internal law.

D. **Sovereignty** –

★ the supreme and uncontrollable power inherent in a State by which that State is governed. May be legal or political

★ **KINDS:**

1. Legal and Political Sovereignty

Legal -

☀ the authority which has the power to issue final commands

☀ Congress is legal sovereign

Political -

☀ the power behind the legal sovereign, or the sum of the influences that operate upon it

☀ the different sectors molding public opinion

2. Internal and External Sovereignty

Internal –

☀ the power of a State to control its internal affairs

External -

☀ the power of the State to direct its relations with other States

☀ also called “Independenc”e

Characteristics of Sovereignty

1. permanent
2. exclusivity
3. comprehensiveness

4. absoluteness
5. individuality
6. inalienability
7. imprescriptibility

Q: What happens to sovereignty if the acts of authority cannot be exercised by the legitimate authority?

A: Sovereignty not suspended.

EX.: Japanese Occupation during WWII
★ Sovereignty remained with the US
★ Japanese merely took over the exercise of acts of sovereignty

Q: In this case, what are the effects on the laws?

A: Political Laws -
GR: Suspended!
★ Subject to revival under *jus postliminium* – i.e., once the legitimate authority returns, the political laws are revived

★ *Jus Postliminium* – roman law concept. If a Roman Citizen is captured, he loses his rights as a Roman citizen, but once he returns to Rome, he recovers all those rights again

XPN:
(a) Laws of Treason – Not suspended!
★ Preservation of allegiance to sovereign does not demand positive action, but only a passive attitude or forbearance from adhering to the enemy by giving the latter aid and comfort (Laurel v. Misa)

(b) Combatants – not covered by said rule

★ Thus, AFP members still covered by National Defense Act, Articles of War, etc. (Ruffy v. Chief of Staff)
★ Rule applies only to civilians

Civil Laws:
GR: Remains in force
XPN: Amended or superseded by affirmative act of belligerent occupant

Q: What happens to judicial decisions made during the occupation?
A: Those of a Political Complexion –
★ automatically annulled upon restoration of legitimate authority
★ conviction for treason against the belligerent

Non-political
★ remains valid
★ EX.: Conviction for defamation

EFFECTS OF A CHANGE IN SOVEREIGNTY
1. Political Laws are deemed ABROGATED.
   Q: Why?
   A: They govern relations between the State and the people.

2. Non-Political Laws generally continue in operation.
   Q: Why?
   A: Regulates only private relations

   XPN:
   (a) Changed by the new sovereign
   (b) Contrary to institutions of the new sovereign

Q: What is the effect of change of sovereignty when the Spain ceded the Philippines to the U.S.?

A: The effect is that the political laws of the former sovereign are *not merely suspended but abrogated.* As they regulate the relations between the ruler and the rules, these laws fall to the ground *ipso facto* unless they are retained or re-enacted by positive act of the new sovereign. Non-political laws, by contrast, continue in operation, for the reason also that they regulate private relations only, unless they are changed by the new sovereign or are contrary to its institutions.

Q: What is the effect of Japanese occupation to the sovereignty of the U.S. over the Philippines?

A: Sovereignty is not deemed suspended although acts of sovereignty cannot be exercised by the legitimate authority. Thus, sovereignty over the Philippines remained with the U.S. although the Americans could not exercise any control over the occupied territory at the time. What the belligerent occupant took over was merely the exercise of acts of sovereignty.

Q: Distinguish between Spanish secession to the U.S. and Japanese occupation during WWII regarding the political laws of the Philippines.

A: There being no change of sovereignty during the belligerent occupation of Japan, the political laws of the occupied territory are *merely suspended*, subject to revival under *jus postliminium* upon the end of the occupation. In both cases, however, non-political laws, remains effective.

NOTES:
Members of the armed forces are still covered by the National Defense Act, the Articles of War and other laws relating to the armed forces even during the Japanese occupation.

A person convicted of treason *against* the Japanese Imperial Forces was, after the occupation, entitled to be released on the ground that the sentence imposed on him for his political offense had ceased to be valid but not on non-political offenses.

Q: May an inhabitant of a conquered State be convicted of treason against the legitimate sovereign committed during the existence of belligerency?

A: YES. Although the penal code is non-political law, it is applicable to treason committed against the national security of the legitimate government, because the inhabitants of the occupied territory were still bound by their allegiance to the latter during the enemy occupation. Since the preservation of the allegiance or the obligation of fidelity and obedience of a citizen or subject to his government or sovereign does not demand from him a positive action, but only passive attitude or forbearance from adhering to the enemy by giving the latter aid and comfort, the occupant has no power, as a corollary of the preceding consideration, to repeal or suspend the operation of the law of treason.

Q: Was there a case of suspended allegiance during the Japanese occupation?

A: None. Adoption of the petitioner's theory of suspended allegiance would lead to disastrous consequences for small and weak nations or states, and would be repugnant to the laws of humanity and requirements of public conscience, for it would allow invaders to legally recruit or enlist the quisling inhabitants of the occupied territory to fight against their own government without the latter incurring the risk of being prosecuted for treason. To allow suspension is to commit political suicide.

Q: Is sovereignty really absolute?

A: In the domestic sphere – YES! In international sphere – NO!

Tañada, et al. vs. Angara, et al.
[GR 118295, 02 May 1997]

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.

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. By their inherent nature, treaties 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.

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, a state's sovereignty cannot in fact and in reality be considered absolute. Certain restrictions enter into the picture:

Limitations imposed by the very nature of membership in the family of nations; and
Limitations imposed by treaty stipulations.

Thus, when the Philippines joined the UN as one of its 51 charter members, it consented to restrict its sovereign rights under the "concept of sovereignty as AUTO-LIMITATION."

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.

Clearly, a portion of sovereignty may be waived without violating the Constitution, based on the rationale that the Philippines "adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of . . . cooperation and amity with all nations."

Principle of State Continuity

State is not lost when one of its elements is changed; it is lost only when at least one of its elements is destroyed. State does not lose its identity but remains one and the same international person notwithstanding changes in the form of its government, territory, people, or sovereignty. See **Holy See vs. Rosario (238 SCRA 524)**

From the moment of its creation, the State continues as a juristic being, despite changes in its elements. EX.:
(1) Reduction of population due to natural calamity
(2) Changes in territory
However, the disappearance of any of the elements causes the extinction of the state.

Q: In the famous Sapphire Case, Emperor Louis Napoleon filed damage suit on behalf of France in an

American Court, but he was deposed and replaced as head of State pendent elite. Was the action abated? (Bar)

A: No, because it had in legal effect been filed by France, whose legal existence had not been affected by change in head of its government. Napoleon had sued not in his personal capacity but officially as sovereign of France. Hence, upon recognition of the duly authorized representative of the new government, the litigation could continue.

RIGHTS OF THE STATE

Fundamental Rights of States [S P E E D]

1. Right to **S**overeignty and Independence;
2. Right to **P**roperty and Jurisdiction;
3. Right to **E**xistence and Self-Defense
4. Right to **E**quality
5. Right to **D**iplomatic Intercourse

RIGHT OF EXISTENCE AND SELF-DEFENSE

★ The most elementary and important right of a State
★ All other rights flow from this right
★ Recognized in the UN Charter, Article 51:

> "Nothing in the present charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the UN, until the SC has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the SC and shall not in any way affect the authority and responsibility of the SC under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

- ★ Art. II, Sec. 2 – "The Philippines renounces war as an instrument of national policy…"
- ★ This prohibits an offensive/aggressive war
- ★ But, it allows DEFENSIVE WAR!
- ★ Thus, when attacked, the Philippines can exercise its inherent right of existence and self-defense
- ★ This right is a generally accepted principle of international law – thus, it is part of our law of the land, under the Incorporation Clause (Art. II, Sec. 2, 1987 Constitution)

Q: State the occasions when the use of force may be allowed under the UN Charter.

A: There are only two occasions when the use of force is allowed under the UN Charter. The first is when it is authorized in pursuance of the enforcement action that may be decreed by the Security Council under Art. 42. The second is when it is employed in the exercise of the inherent right of self-defense under conditions prescribed in Art. 51. (Justice Isagani A. Cruz, in an article entitled "A New World Order" written in his column "Separate Opinion" published in the March 30, 2003 issue of the Philippines Daily Inquirer)

Q: Not too long ago, "allied forces", led by Amercian and British armed forces, invaded Iraq to "liberate Iraqis and destroy suspected weapons of mass destruction." The Security Council of the United Nations failed to reach a consensus on whether to support or oppose the "war of liberation." Can the action taken by the allied forces find justification in International Law? Explain. (2003 Bar)

A: The United States and its allied forces cannot justify their invasion of Iraq on the basis of self-defense under Article 51, attack by Iraq, and there was no necessity for anticipatory self-defense which may be justified under

customary international law. Neither can they justify their invasion on the ground that Article 42 of the Charter of the United Nations permits the use of force against a State if it is sanctioned by the Security Council. Resolution 1441, which gave Iraq a final opportunity to disarm or face serious consequences, did not authorize the use of armed force.

Alternative A: In International Law, the action taken by the allied forces cannot find justification. It is covered by the prohibition against the use of force prescribed by the United Nations Charter and it does not fall under any of the exceptions to that prohibition.

The UN Charter in Article 2(4) prohibits the use of force in the relations of states by providing that all members of the UN "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." This mandate does not only outlaw war; it encompasses all threats of and acts of force or violence short of war.

As thus provided, the prohibition is addressed to all UN members. However, it is now recognized as a fundamental principle in customary international law and, as such, is binding on all members of the international community.

The action taken by the allied forces cannot be justified under any of the three exceptions to the prohibition against the use of force which the UN Charter allows. These are: (1) inherent right of individual or collective self-defense under Article 51; (2) enforcement measure involving the use of armed forces by the UN Security Council under Article 42; and (3) enforcement measure by regional arrangement under Article 53, as authorized by the UN Security Council. The allied forces did not launch

military operations and did not occupy Iraq on the claim that their action was in response to an armed attacked by Iraq, of which there was none.

Moreover, the action of the alleged allied forces was taken in defiance or disregard of the Security Council Resolution No. 1441 which set up "an enhanced inspection regime with the aim of bringing to full and verified completion the disarmament process," giving Iraq "a final opportunity to comply with its disarmament obligations." This resolution was in the process of implementation; so was Iraq's compliance with such disarmament obligations.

Q: On 31 October 2001, members of Ali Baba, a political extremist organization based in and under the protection of *Country X* and espousing violence worldwide as a means of achieving its objective, planted high-powered explosives and bombs at the International Trade Tower (ITT) in Jewel City in *Country Y*, a member of the United Nations. As a result of the bombing and the collapse of the 100-story twin towers, about 2000 people, including women and children were killed or injured and billions of dollars in property were lost.

Immediately after the incident, Ali Baba, speaking through its leader Bin Derdandat, admitted and owned responsibility for the bombing of ITT, saying that it was done to pressure *Country Y* to release captured members of the terrorist group. Ali Baba threatened to repeat its terrorist acts against *Country Y* if the latter and its allies failed to accede to Ali Baba's demands. In response, *Country Y* demanded that *Country X* surrender and deliver Bin Derdandat to the government authorities of *Country Y* for the purpose of trial and "in the name of justice." *Country X* refused to accede to the demand of *Country Y*.

What action or actions can *Country Y* legally take against Ali Baba and *Country X* to stop the terrorist activities of Ali Baba and dissuade *Country X* from harboring and giving protection to the terrorist organization? Support your answer with reasons. (2002 Bar)

A: (1) *Country Y* may exercise the right of self-defense, as provided under Article 51 of the UN Charter "until the Security Council has taken measure necessary to maintain international peace and security." Self-defense enables *Country Y* to use force against *Country X* as well as against the Ali Baba organization.

(2) It may bring the matter to the Security Council which may authorize sanctions against *Country X,* including measure invoking the use of force. Under Article 4 of the UN Charter, *Country Y* may use force against *Country X* as well as against the Ali Baba organization by authority of the UN Security Council.

Alternative A: Under the Security Council Resolution No. 1368, the terrorist attack of Ali Baba may be defined as a threat to peace, as it did in defining the 11 September 2001 attacks against the United States. The resolution authorizes military and other actions to respond to terrorist attacks. However, the use of military force must be proportionate and intended for the purpose of detaining the persons allegedly responsible for the crime and to destroy military objectives used by the terrorists.

The fundamental principles of international humanitarian law should be respected. *Country Y* cannot be granted sweeping discretionary powers that include the power to decide what states are behind the terrorist organizations. It is for the Security Council to decide whether force may be used against specific states and under what conditions the force may be used.

Q: Is the United States justified in invading Iraq invoking its right to defend itself against an expected attack by Iraq with the use of its biological and chemical weapons of mass destruction?

A: The United States is invoking its right to defend itself against an expected attack by Iraq with the use of its biological and chemical weapons of mass destruction. There is no evidence of such a threat, but Bush is probably invoking the modern view that a state does not have to wait until the potential enemy fires first. The cowboy from Texas says that outdrawing the foe who is about to shoot is an act of self-defense.

Art. 51 says, however, that there must first be an "armed attack" before a state can exercise its inherent right of self-defense, and only until the Security Council, to which the aggression should be reported, shall have taken the necessary measures to maintain international peace and security. It was the United States that made the "armed attack" first, thus becoming the aggressor, not Iraq. Iraq is now not only exercising its inherent right of self-defense as recognized by the UN Charter. (Justice Isagani A. Cruz, in an article entitled "A New World Order" written in his column "Separate Opinion" published in the March 30, 2003 issue of the Philippines Daily Inquirer)

Q: Will the subsequent discovery of weapons of mass destruction in Iraq after its invasion by the US justify the attack initiated by the latter?

A: Even if Iraq's hidden arsenal is discovered – or actually used – and the United States is justified in its suspicions, that circumstance will not validate the procedure taken against Iraq. It is like searching a person without warrant and curing the irregularity with the discovery of prohibited drugs in his possession. The

process cannot be reversed. The warrant must first be issued before the search and seizure can be made.

The American invasion was made without permission from the Security Council as required by the UN Charter. Any subsequent discovery of the prohibited biological and chemical weapons will not retroactively legalize that invasion, which was, legally speaking, null and void ab initio. (Justice Isagani A. Cruz, in an article entitled "A New World Order" written in his column "Separate Opinion" published in the March 30, 2003 issue of the Philippines Daily Inquirer)

Q: State B, relying on information gathered by its intelligence community to the effect that its neighbor, State C, is planning an attack on its nuclear plan and research institute, undertook a "preventive" attack in certain bases on State C located near the border of the two states. As a result, State C presented the incident to the UN General Assembly but the latter referred it to the UN Security Council as a matter, which disturbs or threatens "international peace and security". State B argued that it was acting within the legal bounds of Article 51 of the UN Charter and that it was a permitted use of force in self-defense and against armed attack. Is State B responsible under International Law? Did State B act within the bounds set forth in the UN Charter on the use of force in self-defense? (1985 Bar)

A: An armed attack is not a requirement for the exercise of the right of self-defense. However, the attack of State B on State C cannot be justified as an act of self-defense under Art. 51 of the UN Charter considering that the danger perceived by State B was not imminent. State B ought to have exhausted peaceful and pacific methods of settlements instead of resorting to the use of force.

Q: Who can declare war?

A: No one! The Constitution has withheld this power from the government. What the Constitution allows is a declaration of a "State of War". Under Art. VI, Sec. 23(1) – "Congress, by a vote of 2/3 of both Houses, in joint session assembled, voting separately, shall have the sole power to declare the existence of a state of war. This means that we are already under attack

Q: What are the effects when Congress declares a state of war?

A: 1. Art. VI, Sec. 23 – "In times of war…the Congress may, by law, authorize the President, for a limited period and subject to such restrictions as it may prescribe, to exercise powers necessary and proper to carry out a declared national policy. Unless sooner withdrawn by resolution of the Congress, such powers shall cease upon the next adjournment thereof."

2. Art. VII, Sec. 18 – "The President shall be the Commander-in-Chief of all armed forces…and whenever it becomes necessary, he may call out such armed forces to prevent or suppress…invasion…In case, invasion…when the public safety requires it, he may, for a period not exceeding 60 days, suspend the privilege of the writ of habeas corpus or place the Philippines or any part thereof under martial law…"

- ☀ This is in line with the UN Charter, which also renounces war
- ☀ As charter-member of the UN, our Constitution also renounces war as an instrument of national policy

RIGHTS OF SOVEREIGNTY AND INDEPENDENCE
Intervention

It is “the dictatorial interference by a State in the internal affairs of another State, or in the relations between other States, which is either forcible or backed by the threat of force.”

Intervention is Different from “Intercession”

- ☀ Intercession is allowed!
- ☀ EX.: Diplomatic Protest, Tender of Advice

Generally Intervention is Prohibited (Drago Doctrine)

- ★ Prohibits intervention for the collection of contractual debts, public or private
- ★ Formulated by Foreign Minister Luis Drago (Argentina), in reaction to the Venezuelan Incident

Venezuelan Incident

In 1902, UK, Germany and Italy blockaded Venezuelan ports to compel it to pay its contractual debts leading Foreign Minister Drago to formulate a doctrine that “ a public debt cannot give rise to the right of intervention. This principle was later adopted in the Second Hague Conference, but subject to the qualification that the debtor state should not refuse or neglect to reply to an offer of arbitration or after accepting the offer, prevent any *compromis* from being agreed upon, or after the arbitration, fail to submit to the award, the qualification is known as the **Porter resolution.**

Pacific Blockade

- ★ one imposed during times of peace
- ★ were the countries at war, then a blockade is a legitimate measure
- ★ in fact, a blockade must not be violated by a neutral State
- ★ if breached, the neutral vessel is seized

WHEN INTERVENTION ALLOWED, Exceptions

1. Intervention as an Act of Individual and Collective Self-Defense
2. Intervention by Treaty Stipulation or by Invitation

"Intervention by Invitation"

★ Presupposes that the inviting State is not a mere puppet of the intervening State

★ EX.: Hungary

- In 1956, Hungary was in internal turmoil, and asked the Soviet forces to intervene
- While the intervention was upon invitation, it was still condemned because the Hungarian government was a mere Soviet puppet

3. By UN Authorization and Resolution

★ EX.: 1. Korean War

- In fact, it is UN itself that intervened

2. 1990 Iraqi Annexation of Kuwait

- There was an SC Resolution, authorizing the US-led multilateral force to intervene

4. On Humanitarian Grounds

★ This has recently evolved by international custom

★ Thus, has become a primary source of international law

★ EX.: 1. Intervention in Somalia

2. Intervention in Bosnia and Kosovo

- No UN Resolution, but NATO intervened militarily
- Ground: There was ethnic cleansing by Serbs of ethnic minorities

3. Intervention in East Timor

- Purpose: To protect the East Timorese
-

Q: At the United Nations, the Arab League, through Syria, sponsors a move to include in the agenda of the General Assembly the discussion of this matter: "The Muslim population of Mindanao, Philippines has expressed the desire to secede from the Republic of the Philippines in order to constitute a separate and independent state and has drawn attention to the probability that the continuation of the armed conflict in Mindanao constitutes a threat to peace." You are asked by the Philippine Government to draft a position paper opposing the move. Briefly outline your arguments supporting the Philippine position, specifically discussing the tenability of Arab League's action from the standpoint of International Law. (1984 Bar)

A: The Muslim secessionist movement is not an international dispute, which under Article 35(1) of the UN Charter, a member of the United Nations may bring to the attention of the Security Council or the General Assembly. Such dispute can arise only between two or more States. The attempt of the Arab League to place on the agenda of the General Assembly the Muslim problem in Mindanao can only be views as an interference with a purely domestic affair.

When Use of Force is Allowed under the UN Charter By UNSC Resolution – Arts. 41 and 42

Art. 41 – "The SC may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the UN to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

Art. 42 – “Should the SC consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the UN.”

In the exercise of right of self-defense, against armed attacks – Art. 51:

> “Nothing in the present charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the UN, until the SC has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the SC and shall not in any way affect the authority and responsibility of the SC under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

NOTE: There is a limited definition of armed attacks – Nicargua v. United States

Nicaragua v. United States

“195. In the case of individual self-defense, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defense of course does not remove the need for this. There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also 'the sending by or on behalf

of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to' *(inter alia*) an actual armed attack conducted by regular forces, 'or its substantial involvement therein'. This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the Court does not believe that the concept of 'armed attack' includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States."

RECOGNITION
3 LEVELS

A. Recognition of State
B. Recognition of Government
C. Recognition of Belligerency

RECOGNITION OF STATE
2 Schools of Thought
Constitutive School

- recognition is the act which gives to a political entity international status as a State;
- it is only through recognition that a State becomes an International Person and a subject of international law
- thus, recognition is a <u>legal</u> matter—not a matter of arbitrary will on the part of one State whether to

recognize or refuse to recognize another entity but that where certain conditions of fact exist, an entity may demand, and the State is under legal duty to accord recognition

Declaratory School

- recognition merely an act that declares as a fact something that has hitherto been uncertain
- it simply manifests the recognizing State's readiness to accept the normal consequences of the fact of Statehood
- recognition is a political act, i.e., it is entirely a matter of policy and discretion to give or refuse recognition, and that no entity possesses the power, as a matter of legal right, to demand recognition
- there is no legal right to demand recognition
- followed by most nations

★ recognition of a State has now been substituted to a large extent by the act of admission to the United Nations

★ it is the "assurance given to a new State that it will be permitted to hold its place and rank in the character of an independent political organism in the society of nations"

Q: Explain, using example, the Declaratory Theory of Recognition Principle. (1991 Bar)

A: The declaratory theory of recognition is a theory according to which recognition of a state is merely an acknowledgment of the fact of its existence. In other words, the recognized state already exists and can exist even without such recognition. For example, when other countries recognize Bangladesh, Bangladesh already existed as a state even without such recognition.

Q: Distinguish briefly but clearly between the constitutive theory and the declaratory theory concerning recognition of states. (2004 Bar)

A: The constitutive theory is the minority view which holds that recognition is the last element that converts or constitutes the entity being recognized into an international person; while the declaratory theory is the majority view that recognition affirms the pre-existing fact that the entity being recognized already possesses the status of an international person. In the former recognition is regarded as mandatory and legal and may be demanded as a matter of right by any entity that can establish its possession of the four essential elements of a state; while the latter recognition is highly political and discretionary.

RECOGNITION OF GOVERNMENT

	Recognition of Government	Recognition of State
As to Scope	Does not necessarily signify that recognition of a State – to government may not be independent	Includes recognition or government – government an essential element of a State
As to Revocability	Revocable	Generally, irrevocable

Q: Distinguish recognition of State from recognition of Government. (1975 Bar)

A: (1) Recognition of state carries with it the recognition of government since the former implies that a state

recognized has all the essential requisites of a state at he time recognition is extended.

(2) Once recognition of state is accorded, it is generally irrevocable. Recognition of government, on the other hand, may be withheld from a succeeding government brought about by violent or unconstitutional means.

Criteria for Recognition

1. **Objective Test** –
   - ★ government should be EFFECTIVE and STABLE
   - ★ government is in possession of State machinery
   - ★ there is little resistance to its authority

2. **Subjective Test** –
   - ★ WILLINGNESS and ABILITY
   - ★ the government is willing and able to discharge its international obligations
   - ★ 2 Doctrines

Tobar or Wilson Doctrine

- ☀ suggested by Foreign Minister Tobar (Ecuador); reiterated by President Woodrow Wilson (US)
- ☀ recognition is withheld from governments established by revolutionary means – revolution, civil war, coup d'etat, other forms of internal violence, UNTIL, freely elected representatives of the people have organized a constitutional government

Estrada Doctrine

- ☀ a reaction to the Tobar/Wilson Doctrine; formulated by Mexican Foreign Minister Genaro Estrada
- ☀ disclaims right of foreign states to rule upon legitimacy of a government of a foreign State
- ☀ a policy of never issuing any declaration giving recognition to governments – instead, it simply accepts whatever government is in effective control without raising the issue of recognition

Q: Distinguish briefly but clearly between the Wilson doctrine and the Estrada doctrine regarding recognition of governments. (2004 Bar)

A: In the Wilson or Tobar doctrine, a government established by means revolution, civil war, *coup d' etat* or other forms of internal violence will not be recognized until the freely elected representatives of the people have organized a constitutional government, while in the Estrada doctrine any diplomatic representatives in a country where an upheaval has taken place will deal or not deal with whatever government is in control therein at the time and either action shall not be taken as a judgment on the legitimacy of the said government.

Kinds of Recognition

	Recognition De Jure	Recognition De Facto
As to Duration	Relatively permanent	Provisional,
As to Effect on Diplomatic Relations	Brings about full diplomatic relations/intercourse	Limited to certain juridical relations; for instance, it does not bring about diplomatic immunities
As to Effect on Properties Abroad	Vests title to recognized government in properties abroad	Does not vest such title

Recognition De Jure

★ Given to a government that satisfies both the objective and subjective criteria

Recognition De Facto

★ Given to governments that have not fully satisfied objective and subjective criteria

★ EX.: While wielding effective power, it might have not yet acquired sufficient stability

Consequences of Recognition of Government

1. The recognized government or State *acquires the capacity to enter into diplomatic relations* with recognizing States and to make treaties with them
2. The recognized government or State *acquires the right of suing* in the courts of law of the recognizing State
3. It is *immune from the jurisdiction* of the courts of law of recognizing State
4. It *becomes entitled to demand and receive possession of property* situated within the jurisdiction of a recognizing State, which formerly belonged to the preceding government at the time of its supercession
5. Its effect is *to preclude the courts of recognizing State* from assign judgment on the legality of its acts, past and future. Recognition being retroactive.

 Thus, Act of State Doctrine now applies

Q: Who has the authority to recognize?

A: It is a matter to be determined according to the municipal law of each State. In the Philippines, there is no explicit provision in the Constitution which vests this power in any department. But since under the Constitution, the President is empowered to appoint and receive ambassadors and public ministers, it is conceded that by implication, it is the Executive Department that is primarily endowed with the power to recognize foreign governments and States. [Art. VII, 1987 Constitution]

The legality and wisdom of recognition accorded any foreign entity is not subject to judicial review. The courts are bound by the acts of political department of the government. The action of the Executive in recognizing or refusing to recognize a foreign State or government is properly within the scope of judicial notice.

Q: Is the recognition extended by the President to a foreign government subject to judicial review?
A: NO! It is purely a political question.

Marcos v. Manglapus
[GR 88211 15 Sept. 1989]

The Constitution limits resort to the political question doctrine and broadens the scope of judicial inquiry…But nonetheless there remain issues beyond the Court's jurisdiction the determination of which is exclusively for the President…We cannot, for example, question the President's recognition of a foreign government, no matter how premature or improvident such action may appear..."

ICMC vs. Calleja
[GR 85750, 28 Sept. 1990]

A categorical recognition by the Executive Branch that ICMC enjoy immunities…is a political question conclusive upon the Courts in order not to embarrass a political department of Government.

BELLIGERENCY

2 Senses of Belligerency

1. State of War between 2 or more States
   - ☀ Belligerency
   - ☀ the States at war are called "Belligerent States"

2. Actual Hostilities amounting to Civil War within a State

- ☀ Insurgency
- ☀ there is just 1 State
- ☀ presupposes the existence of a rebel movement

Developments in a Rebel Movement

Insurgency	Belligerency
a mere initial stage of war. It involves a rebel movement, and is usually not recognized	more serious and widespread and presupposes the existence of war between 2 or more states (1st sense) or actual civil war within a single state (2nd sense)
sanctions are governed by municipal law – Revised Penal Code, i.e. rebellion	governed by the rules on international law as the belligerents may be given international personality

Stage of Insurgency
- ★ Earlier/nascent/less-developed stage of rebellion
- ★ There is not much international complication
- ★ Matter of municipal law
- ★ EX.: Captured rebels are prosecuted for rebellion

Stage of Belligerency
- ★ A higher stage, as the stage of insurgency becomes widespread
- ★ Already a matter of international law, not of municipal law
- ★ EX.: Captures rebels – must be treated like prisoners of war; considered as combatants; hence, cannot be executed

Note: Abu Sayaff is not a rebel group it is a mere bandit group.

Requisites of Belligerency [COWS]

1. an *organized **c**ivil government* that has control and direction over the armed struggle launched by the rebels;
   - ★ a "provisional government"

2. ***o**ccupation* of a substantial portion of the state's territory;
   - ★ more or less permanent occupation
   - ★ legitimate government must use superior military force to dislodge the rebels

3. ***s**eriousness of the struggle*, which must be so widespread thereby leaving no doubt as to the outcome; and
   - ★ must be so widespread, leaving no doubt as to the outcome

   - ★ **Q: Has the CPP/NPA and MILF complied with these conditions?**

     A: NO! BUT, there are some indications they are striving to meet the conditions. They executed common criminals, after a trial. It is like saying they have a government

Note: The maintenance of peace and order, and administration of justice, are constituent functions of the government

- ★ Camp Abu-Bakr—MILF almost had control of a substantial portion of territory

- ★ government had to use all its military might and divert its budget
- ★ CPP/NPA sends message that they are observing the Laws of War
- ★ Captured soliders are announced as POWs; had Red Cross representatives

4. ***willingness*** on the part of the rebels to observe the rules and customs of war.

Q: Explain, using example, recognition of belligerency. (1991 Bar)

A: Recognition of belligerency is the formal acknowledgment by a third party of the existence of a state of war between the central government and a portion of that state. Belligerency exists when a sizable portion of the territory of a state is under the effective control of an insurgent community which is seeking to establish a separate government and the insurgents are in de facto control of a portion of the territory and population, have a political organization, and are able to maintain such control and conduct themselves according to the laws of war. For example, Great Britain recognized a state of belligerency in the United States during the Civil War.

Consequences of Recognition of Belligerents

1. Before recognition as such, it is the legitimate government that is responsible for the acts of the rebels affecting foreign nationals and their properties. Rebel government is responsible for the acts of the rebels affecting foreign nationals and properties;
2. Laws and customs of war in conducting the hostilities must be observed;
   - ★ EX.: cannot execute captured rebels, considered as POWs
3. From the point of view of 3rd States, the effect of recognition of belligerency is to put them under

obligation to observe strict neutrality and abide by the consequences arising from that position.

★ must observe Laws of Neutrality

★ EX.:

1. must abstain from taking part in the hostilities;
2. most acquiesce to restrictions imposed by the rebels, such as visit and search of its merchant ships

4. Rebels are enemy combatants and accorded the rights of prisoners of war. *and*

★ essentially, this means that there are 2 competing governments in 1 country

5. On the side of the rebels, the recognition of belligerency puts them under responsibility to 3rd States and to the legitimate government for all their acts which do not conform to the laws and customs of war.

FORMS OF RECOGNITION

1. Express
2. Implied

EX.; Proclamation by the legitimate government of a blockade of ports held by the rebels

★ Done by Lincoln during the American Civil War

★ **Q: What about peace talks?**

A: NOT implied recognition. But, circumstances may be such as to become an implied recognition

EX.: Holding peach talks in a foreign country. Rebels call the foreign country a “neutral state”. If a mere insurgency, it is a purely internal matter – no need for talks abroad

TERRITORY OF STATES

Territory Defined

Characteristics of Territory

Modes of Acquisition of Territory

(1) Dereliction/Abandonment

(2) Cession
(3) Conquest/Subjugation
(4) Prescription
(5) Erosion
(6) Revolution
(7) Natural Causes

COMPONENTS OF TERRITORY

(1) Territorial Domain
(2) Maritime and Fluvial Domain
   a. Territorial Sea
   b. Contiguous Zone
   c. Exclusive Economic Zone (EEZ)
   d. Continental Shelf
   e. High Seas
(3) Aerial Domain
   a. Air Space
   b. Outer Space

b.

Territory

- the fixed and permanent portion on the earth's surface inhabited by the people of the state and over which it has supreme authority
- consists of the portion of the surface of the globe on which that State settles and over which it has supreme authority
- an exercise of sovereignty, covering not only land, but also the atmosphere as well

CHARACTERISTICS OF TERRITORY

1. Permanent
2. Definite/Indicated with Precision
   ★ Generally, the territory's limits define the State's jurisdiction
3. Big enough to sustain the population
4. Not so extensive as to be difficult to:
   (1) Administer; and
   (2) Defend from external aggression

Modes of Acquisition of Territory

(1) By Original Title
   a. Discovery and Occupation
   b. Accretion
   c. "Sector Principle"
(2) By Derivative Title
   a. Prescription
   b. Cession
   c. Conquest/Subjugation

Other Modes

(a) Dereliction/Abandonment
(b) Erosion
(c) Revolution
(d) Natural Causes

Discovery and Occupation

★ An original mode of acquisition of territory belonging to no one – "*terra nullius*"
★ land to be acquired must be *terra nullius*

★ **Q: Today, few, if any places are terra nullius. Why is this mode then important?**
A: Past occupations are source of modern boundary disputes
★ **Q: When is a territory "terra nullius?"**
A: Under the Old Concept a territory is not necessarily uninhabited! A territory is terra nullius, if, even if occupied, the people occupying it has a civilization that falls below the European standard. This was the justification for the Spanish colonization of the Philippines, and the European colonization of Africa. However, this old concept is no longer valid under contemporary international law!

★ **2 REQUISITES**
(1) <u>Discovery/Possession</u>

- ☀ Mere discovery gives only an Inchoate Right of Discovery
- ☀ **Q: What is the effect of this right?**
  A: It bars other states, within a reasonable time, from entering the territory, so that the discovering state may establish a settlement therein an commence administration and occupation. Once the discovering state begins exercising sovereign rights over the territory, the inchoate right ripens and is perfected into a full title

- ☀ **Q: What if the discovering state fails to exercise sovereign rights?**
  A: The inchoate title is extinguished, and the territory becomes terra nullius again.

- ☀ **Q: How is this done and effected?**
  A: Possession must be claimed on behalf of the State represented by the discoverer. It may then be effected through a formal proclamation and the symbolic act of raising the state's national flag.

2. <u>Effective Occupation</u>
   - ☀ Does not necessarily require continuous display of authority in every part of the territory claimed
   - ☀ Authority must be exercised as and when occasion demands
   - ☀ Thus, when the territory is thinly populated and uninhabited, very little actual exercise of sovereign rights is needed in the absence of competition

Doctrine of Effective Occupation

- ☀ discovery alone gives only an inchoate title; it must be followed within a reasonable time by effective occupation
- ☀ effective occupation does not necessarily require continuous display of authority in every part of the territory claimed

- ☀ an occupation made is valid only with respect to and extends only to the area effectively occupied.
- ☀ under the "**Principle of Effective Occupation**," the following doctrines/principles are no longer applicable today:

a) **Hinterland Doctrine**
Occupation of coasts results to claim on the unexplored interior

b) **Right of Contiguity**
Effective occupation of a territory makes the possessor's sovereignty extend over neighboring territories as far as is necessary for the integrity, security and defense of the land actually occupied

Prescription

- ★ acquisition of territory by an averse holding continued through a long term of years
- ★ derivative mode of acquisition by which territory belonging to 1 State is transferred to the sovereignty of another State by reason of the adverse and uninterrupted possession thereof by the latter for a sufficiently long period of time

★ **2 REQUISITES**

★

a) <u>continuous and undisturbed possession</u>

- ☀ **Q: What if there are claims or protests to the State's possession?**
  A: NOT undisturbed!

b) <u>lapse of a period of time</u>

- ☀ No rule as to length of time required

☀ Question of fact

★ **Q: What is the source of this right?**
A: Roman principle of "*usucapio*" (long continued use of real property ripened into ownership)

Cession

★ a derivative mode of acquisition by which territory belonging to 1 State is transferred to the sovereignty of another State in accordance with an agreement between them

★ a bilateral agreement whereby one State transfers sovereignty over a definite portion of territory to another State
E.g. Treaty of cession (maybe an outcome of peaceful negotiations [voluntary] or the result of war[forced])

★ **2 KINDS:**

1. <u>Total Cession</u>
- comprises the entirety of 1 State's domain
- the ceding State is absorbed by the acquiring State and ceases to exist
- EX.: Cession of Korea to Japan under the 22 Aug. 1910 Treaty

2. <u>Partial Cession</u>
- comprises only a fractional portion of the ceding State's territory
- cession of the Philippine Islands by Spain to the US in the Treaty of Paris of 10 Dec. 1988
- Forms:
  a) Treaty of Sale
     EX.: (1) Sale by Russia of Alaska to US
     (2) Sale by Spain of Caroline Islands to Germany
  b) Free Gifts
     EX: (1) Cession of a portion of the Horse-Shoe Reef in Lake Erie

by UK to US

Conquest

★ derivative mode of acquisition whereby the territory of 1 State is conquered in the course of war and thereafter annexed to and placed under the sovereignty of the conquering State
★ the taking possession of hostile territory through military force in time of war and by which the victorious belligerent compels the enemy to surrender sovereignty of that territory thus occupied
★ acquisition of territory by force of arms
★ however, conquest alone merely gives an inchoate right; acquisition must be completed by formal act of annexation
★ no longer regarded as lawful
★ UN Charter prohibits resort to threat or use of force against a State's territorial integrity or political independence

Conquest is Different from "Military or Belligerent Occupation"

☀ Act whereby a military commander in the course of war gains effective possession of an enemy territory
☀ By itself, does not effect an acquisition of territory

Accretion

★ the increase in the land area of a State caused by the operation of the forces of nature, or artificially, through human labor
★ **Accessio cedat principali** (accessory follows the principal) is the rule which, in general, governs all the forms of accretion.
★ EX.: (1) Reclamation projects in Manila Bay
(2) Polders of the Netherlands

COMPONENTS OF TERRITORY

TERRITORIAL DOMAIN

★ The landmass where the people live

Internal Waters

★ These are bodies of water within the land boundaries of a State, or are closely linked to its land domain, such that they are considered as legally equivalent to national land

★ includes: **rivers, lakes and land-locked seas, canals, and polar regions**.

Rivers

☀ **Kinds of Rivers**

(1) National Rivers

- Lie wholly within 1 State's territorial domain – from source to mouth
- Belongs exclusively to that State
- EX.: Pasig River

(2) Boundary Rivers

- Separates 2 Different States
- Belongs to both States:
  - If river is navigable – the boundary line is the middle of the navigable channel "thalweg"
  - If the river is not navigable – the boundary line is the midchannel
- EX.: St. Lawrence River between US and Canada

(3) Multinational Rivers

- Runs through several States
- Forms part of the territory of the States through which it passes
- EX.: Congo River, Mekong River

(4) International Rivers

- navigable from the open sea, and which separate or pass through several States between their sources and mouths
- In peacetime, freedom of navigation is allowed or recognized by conventional international law

Lakes and Land-locked Seas

☀ If entirely enclosed by territory of 1 state: Part of that State's territory

☀ If surrounded by territories of several States: Part of the surrounding States

Canals

☀ Artificially constructed waterways

☀ **GR**: Belongs to the State's territory

☀ **XPN**: Important Inter-Oceanic Canals governed by Special Regime

(1) Suez Canal

(2) Panama Canal

Historic Waters

☀ Waters considered internal only because of existence of a historic title, otherwise, should not have that charater

☀ EX.: Bay of Cancale in France

MARITIME AND FLUVIAL DOMAIN

Zones of the Sea

– Waters adjacent to the coasts of a State to a specified limit

1. <u>Territorial Sea</u>

★ comprises in the marginal belt adjacent to the land area or the coast and includes generally the bays, gulfs and straights which do not have the character of *historic waters* (waters that are legally part of the internal waters of the State)

★ portion of the open sea adjacent to the State's shores, over which that State exercises jurisdictional control

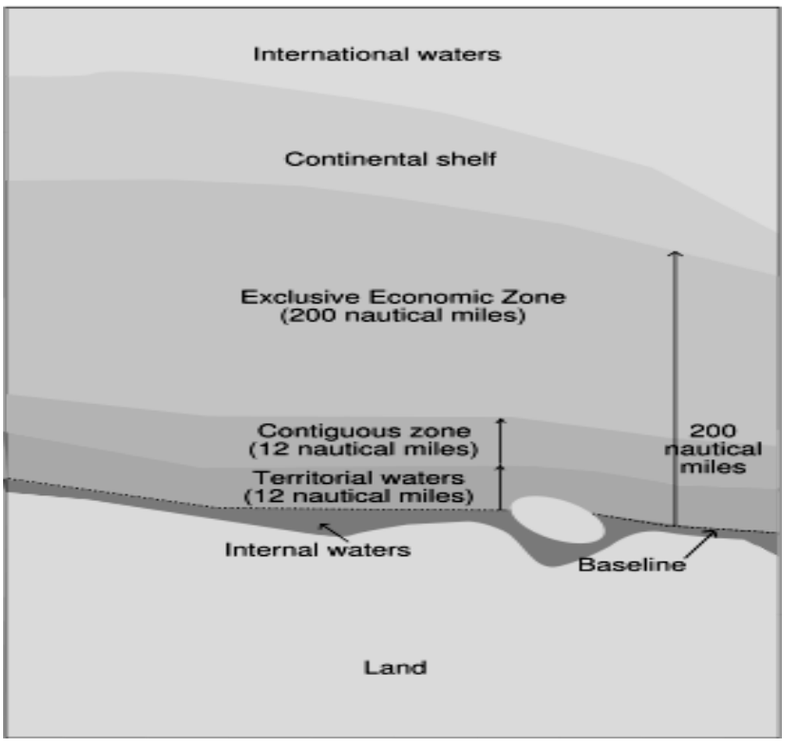
★ Basis – necessity of self-defense
★ Effect – territorial supremacy over the territorial sea, exclusive enjoyment of fishing rights and other coastal rights
★ BUT: Subject to the RIGHT OF INNOCENT PASSAGE (a foreign State may exercise its *right of innocent passage*)
★ **Q: When is passage innocent?**
A: When it is not prejudicial to the peace, good order, or security of the coastal State

Right of Innocent Passage
The right of continuous and expeditious navigation of a foreign shop through a State's territorial sea for the purpose of traversing that sea without entering the internal waters or calling at a roadstead or port facility outside the internal waters, or proceeding to or from internal waters or a call at such roadstead or port facility

Q: Explain Innocent Passage. (1991 Bar)
A: Innocent passage means the right of continuous and expeditious navigation of a foreign ship through the territorial sea of a State for the purpose of traversing that sea without entering the internal waters or calling at a roadstead or port facility outside internal water or proceeding to or from internal waters or a call at such roadstead or port facility. The passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State.

Extent and Limitations of Right of Innocent Passage
☀ Extends to ALL ships – merchant and warships
☀ Submarines must navigate on the surface and show their flag

- Nuclear-powered ships, ships carrying nuclear and dangerous substances must carry documents and observe special safety measures



Q: En route to the tuna fishing grounds in the Pacific Ocean, a vessel registered in Country TW entered the Balintang Channel north of Babuyan Island and with special hooks and nets dragged up red corrals found near Batanes. By International Convention certain corals are protected species. Just before the vessel reached the high seas, the Coast Guard patrol intercepted the vessel and seized its cargo including tuna. The master of the vessel and the owner of the cargo protested, claiming the rights of transit passage and innocent passage, and sought recovery of the cargo and the release of the ship. Is the claim meritorious or not? Reason briefly. (2004 Bar)

A: The claim of the master of the vessel and the owner of the cargo is not meritorious. Although their claim of transit passage and innocent passage through the Balintang Channel is tenable under the 1982 Convention on the Law of the Sea, the fact that they attached special hooks and nets to their vessel which dragged up red corrals is reprehensible. The Balintang Channel is considered part of our internal waters and thus is within the absolute jurisdiction of the Philippine government. Being so, no foreign vessel, merchant or otherwise, could exploit or explore any of our natural resources in any manner of doing so without the consent of our government.

Q: What is the extent of the territorial sea?
A: 1. Formerly, 3 nautical miles from the low water mark based on the theory that this is all that a State could defend. This has been practically abandoned.

2. 1982 Convention of the Law of the Sea provides the maximum limit of 12 nautical miles from the baseline.

Q: What is the baseline?

A: Depends on the method:
1. Normal Baseline Method
   - ☀ Territorial sea is drawn from the low-water mark.
   - ☀ **Q: What is the low-water mark?**
     A: The line on the shore reached by the sea at low tide. Otherwise known as the "baseline."

2. Straight Baseline Method
   - ☀ A straight line is drawn across the sea, from headland to headland, or from island to island. That straight line then becomes the baseline from which the territorial sea is measured.
   - ☀ **Q: What happens to the waters inside the line?**

A: Considered internal waters. However, the baseline must not depart to any appreciable extent from the general direction of the coast

☀ **Q: When is this used?**

A: When the coastline is deeply indented, or when there is a fringe of islands along the coast in its immediate vicinity.

Distinguish briefly but clearly between the territorial sea and the internal waters of the Philippines. (2004 Bar)

Territorial water is defined by historic right or treaty limits while internal water is defined by the archipelago doctrine. The territorial waters, as defined in the Convention on the Law of the Sea, has a uniform breadth of 12 miles measured from the lower water mark of the coast; while the outermost points of our archipelago which are connected with baselines and all waters comprised therein are regarded as internal waters.

2. Contiguous Zone

★ zone adjacent to the territorial sea, over which the coastal State may exercise such control as is necessary to:

- Prevent infringement of its customs, fiscal, immigration or sanitary laws within its territory or territorial sea;
- Punish such infringement

☀ extends to a maximum of 24 nautical miles from the baseline from which the territorial sea is measured.

3. Exclusive Economic Zone

☀ a maximum zone of 200 nautical miles from the baseline from which the territorial sea is measured, over which, the coastal State exercises sovereign rights over all the economic resources of the sea, sea-bed and subsoil

Rights of other States in the EEZ

(a) Freedom of navigation and overflight
(b) Freedom to lay submarine cables and pipelines
(c) Freedom to engage in other internationally lawful uses of the sea related to said functions

Rights of Land-locked States

Right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the EEZ of the coastal States of the same sub-region or region

Distinguish briefly but clearly between the contiguous zone and exclusive economic zone. (2004 Bar)

The contiguous zone is the area which is known as the protective jurisdiction and starts from 12th nautical mile from low water mark (baseline), while the EEZ is the area which ends at the 200th nautical mile from the baseline. In the latter, no state really has exclusive ownership of it but the state which has a valid claim on it according to the UN Convention on the Law of the Seas agreement has the right to explore and exploit its natural resources; while in the former the coastal state may exercise the control necessary to a) prevent infringement of its customs, fiscal immigration or sanitary regulations within its territory b) punish infringement of the above regulations within its territory or territorial sea.

Q: Enumerate the rights of the coastal state in the exclusive economic zone. (2005, 2000 Bar)

A: The following are the rights of the coastal state in the exclusive economic zone:

1. sovereign rights for the purpose of exploring and exploiting, conserving and managing the living and non-living resources in the superjacent waters of the sea-bed and the resources of the sea-bed and subsoil;
2. sovereign rights with respect to the other activities for the economic exploitation and exploration of the zone or

EEZ, such as production of energy from water, currents and winds;
3. jurisdictional right with respect to establishment and use of artificial islands;
4. jurisdictional right as to protection and preservation of the marine environment; and
5. jurisdictional right over marine scientific research
6. other rights and duties provided for in the Law of the Sea Convention. (Article 56, Law of the Sea Convention)

These treaty provisions form part of the Philippine Law, the Philippines being a signatory to the UNCLOS.

4. Continental Shelf

Q: Explain the meaning of continental shelf. (1991 Bar)
A: The continental shelf comprises the seabed and subsoil of the submarine areas that extend beyond the territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin; or to a distance of more than 200 nautical miles from the baselines form which the breadth of the territorial sea is measured where the outer edge of the continental shelf does not extend up to that distance.

Rights of the Coastal State

- ☀ sovereign rights for the purpose of exploring and exploiting its natural resources
- ☀ rights are exclusive – if the State does not explore or exploit the continental shelf, no one may do so without its express consent

Archipelagic Doctrine

✎ **2 Kinds of Archipelagos:**

1. Coastal Archipelago

- ☀ situated close to a mainland, and may be considered part of such mainland

2. Mid-Ocean Archipelago
   - ☀ groups of islands situated in the ocean at such distance from the coasts of firm land (mainland)
   - ☀ EX.: Philippines
- ✎ emphasizes the unity of land and waters by defining an archipelago either as:
  - A group of island surrounded by waters; or
  - A body of water studded with islands
- ✎ thus, baselines are drawn by connecting the appropriate points of the outermost islands to encircle the islands within the archipelago.

Rules Governing the Baselines

(a) Such baselines should not depart radically from the general direction of the coast, or from the general configuration of the archipelago

(b) Within the baselines are included the main islands an area with a maximum water area to land area ratio of 9:1

(c) Length of baselines shall not exceed 1—nautical miles
- ☛ XPN: Up to 3% of the total number of baselines may have a maximum length of 125 nautical miles

Effect of the Baselines

(a) The waters inside the baselines are considered internal waters;

(b) The territorial sea, etc. are measured from such baselines;

(c) Archipelagic State exercises sovereign rights over all the waters enclosed by the baselines

Limitation – Archipelagic Sealanes

☀ Archipelagic State must designate sea lands an air route for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters and adjacent territorial sea
  - Passage only for continuous, expeditious, and unobstructed transit between 1 part of the high seas or an EEX to another part of the high seas or an EEZ
  - **Q: What if none are designated?**
    A: Right of archipelagic sealane passage may still be exercised through the routes normally used for international navigation

✎ The Philippines adheres to the Archipelagic Doctrine – Art. I, 1987 Constitution:
"The waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the internal waters of the Philippines."

✎ Also embodied in the 1982 Convention of the Law of the Sea, Art. 47

✎ UNCLOS became effective on 16 Nov. 1994, after its ratification by more than the required 60 of the signatory States

Q: What do you understand by the archipelagic doctrine? Is this reflected in the 1987 Constitution? (1989, 1979, 1975 Bar)

A: The archipelagic doctrine emphasizes the unity of land and waters by defining an archipelago either as a group of islands surrounded by waters or a body of water with studded with islands. For this purpose, it requires that baselines be drawn by connecting the appropriate points of the outermost islands to encircle the islands within the archipelago. The waters on the landward side of the

baselines regardless of breadth, or dimensions are merely internal waters.

Article I, Sec. 1 of the Constitution provides that the national territory of the Philippines includes the Philippine archipelago, with all the islands and waters embraced therein; and the waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions form part of the internal waters of the Philippines.

5. The regime of the High Seas

★ belongs to everyone and to no one – both *res commones* and *res nullius*

★ everyone may enjoy the following rights over the high seas:

(a) Navigation
(b) Fishing
(c) Scientific research
(d) Mining
(e) Laying of submarine cables or pipelines; *and*
(f) other human activities in the open sea and the ocean floor

★ the freedoms extend to the air space above the high seas

Doctrine of Hot Pursuit

☀ The pursuit of a foreign vessel undertaken by the coastal State which has "good reason to believe that the ship has violated the laws and regulations of that State."

☀ The pursuit must:

1. Be commenced when the ship is within the pursuing State's:
   a. Internal Waters;
   b. Territorial Sea; or
   c. Contiguous Zone

2. May be continued outside such waters if the pursuit has not been interrupted
3. Continuous and unabated
4. Ceases as soon as the foreign ship enters the territorial sea of:
   a. Its own State; or
   b. That of a 3rd State
5. Be undertaken by:
   a. Warships; or
   b. Military aircraft; or
   c. Other ships/aircraft cleared and identifiable as being in the government service and authorized to that effect

☀ Also applies to violations of laws and regulations of the coastal State applicable to the EEZ and to the continental shelf.

Deep Sea Bed

☀ The sea-bed beyond the continental shelf

☀ Under the UNCLOS – resources of the deep sea-bed are reserved as the "common heritage of mankind"

Q: In the Pacific Ocean, while on its way to Northern Samar to load copra, a Norweigian freighter collides with Philippine Luxury Liner resulting in the death of ten (10) Filipino passengers. Upon the Norweigian vessel's arrival in Catarman, Northern Samar, the Norweigian captain and the helmsman assisting were arrested and charged with multiple homicide through reckless imprudence. Apart from filing a protest with the Ministry of Foreign Affairs, the Norweigian Embassy, through a local counsel helps the accused in filing a motion to quash. It is pointed out that the incident happened on the high seas, the accused were on board a Norweigian vessel and only a Norweigian court can try the case even if the death occurred on a Philippine ship. Resolve the motion stating the reason for your decision. (1986 Bar)

A: The motion to quash should be sustained. In the Lotus case [PCIJ Pub 198i2 Series A No 10 p.25], a French mail steamer, Lotus, collided with a Turkish collier, Boz Kourt. As a result, eight (8) Turkish subjects died. The collision took place in the Aegean Sea, outside of Turkish territorial waters. The Lotus proceeded to Constantinople where its officers were tried and convicted for manslaughter. The French government protested on the ground that Turkey had no jurisdiction over an act committed on the high seas by foreigners on board foreign vessels whose flag state has exclusive jurisdiction as regards such acts. The dispute was referred by agreement to the Permanent Court of International Justice which held in a split decision that Turkey had "not acted in conflict with the principles of International Law," because the act committed produced affects on board the Boz Kourt under Turkish flag, and thus on Turkish territory. The principle that vessels on the high seas are subject to no authority except that the flag State whose flag they fly was thus affirmed.

NOTE: Justice Jorge Coquia, in his book however, opined that the ruling in the Lotus case is no longer controlling in view of Art. 97 of the UN Convention on the Law of the Sea which provides that in the event of collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or any other person in the service of the ship, the penal or disciplinary proceedings may be instituted only before State of which such person is a national. For this purpose, no arrest or detention of the ship, even as a measure of navigation shall be ordered by the authorities other than those of the flag state.

Freedom of Navigation
the right to sail ships on the seas which is open to all States and land-locked countries

General Rule: vessels sailing on the high seas are subject only to international law and the laws of the flag state

Exceptions: a) *foreign merchant ships* violating the laws of the coastal State; b) pirate ships; c) slave trade ships; d) any ship engaged in unauthorized broadcasting; and e) ships without nationality, or flying a false flag or refusing to show its flag.

Flag State
the State whose nationality (ship's registration) the ship possesses**,** for it is nationality which gives the right to fly a country's flag

Flags of Convenience –
registration of any ship in return for a payment fee

Q: Distinguish briefly but clearly between the flag state and the flag of convenience. (2004 Bar)
A: Flag state means a ship has the nationality of the flag state it flies, but there must be a genuine link between the state and the ship. *(Article 91 of the Convention of the Law of the Sea.)* Flag of convenience refers to a state with which a vessel is registered for various reasons such as low or non-existent taxation or low operating costs although the ship has no genuine link with that state. *(Harris, Cases and Materilas on International Law, 5th ed., 1998, p. 425.)*

AERIAL DOMAIN
★ the airspace above the territorial and maritime domains of the State, to the limits of the atmosphere
★ does not include the outer space

1. Air Space
★ the air space above the State's terrestrial and maritime territory

★"…Every State has complete and exclusive sovereignty over the air space above its territory"
★Convention on International Civil Aviation –"Territory" – includes terrestrial and maritime territory
★thus, includes air space above territorial sea
★NOTE: NO right of innocent passage!
★the air space above the high seas is open to all aircraft, just as the high seas is accessible to ships of all States
- the State whose aerial space is violated can take measures to protect itself, but it does not mean that States have an unlimited right to attack the intruding aircraft (intruding aircraft can be ordered either to leave the State's air space or to land)

Q: What are the 5 air freedoms?
A:

(a) overflight without landing;
(b) landing for non-traffic purposes;
(c) put down traffic from state to airline;
(d) embark traffic destined for state of aircraft; and
(e) embark traffic or put down traffic to or from a third state

2. **Outer Space (***res commones*)

★the space beyond the airspace surrounding the earth or beyond the national airspace, which is completely beyond the sovereignty of any State
★the moon and the other celestial bodies form part of the outer space (Moon Treaty of 1979)
★thus, it is not subject to national appropriation
★free for all exploration and use by all States and cannot be annexed by any State
★governed by a regime similar to that of the high seas

Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space (Outer Space Treaty)

☀Outer Space is free for exploration and use by States

- ☀ Cannot be annexed by any State
- ☀ Its use and exploration must be carried out for the benefit of all countries and in accordance with international law
- ☀ Celestial bodies shall be used exclusively for peaceful purposes
- ☀ Nuclear weapons and weapons of mass destruction shall not be placed in orbit around the earth

Q: What is the boundary between the air space and the outer space?

A: No accepted answer yet! There are different opinions:

1. That it should be near the lowest altitude (perigee) at which artificial earth satellites can remain in orbit without being destroyed by friction with the air around 190 km from earth's surface

2. Theoretical limit of air flights is 90 km above the earth

3. Functional Approach
   - The legal regime governing space activities are based, not on a boundary line, but on the nature of the activities

Q: What is outer space? Who or which can exercise jurisdiction over astronauts while in outer space? (2003 Bar)

A: There are several schools of thought regarding the determination of outer space, such as the limit of air flight, the height of atmospheric space, infinity, the lowest altitude of an artificial satellite, and an altitude approximating aerodynamic lift. Another school of thought proceeds by analogy to the law of the sea. It proposes that a State should exercise full sovereignty up to the height to which an aircraft can ascend. Non-militant flight instrumentalities should be allowed over a second area, a contiguous zone of 300 miles. Over that should be outer space. The boundary between airspace and outer space

has not yet been defined. (Harris, Cases and Materials on International Law, 5th Ed., pp. 251-253) Under Article 8 of the Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, a State on whose registry an object launched into outer space retains jurisdiction over the astronauts while they are in outer space.

Alternative A: Outer space is the space beyond the airspace surrounding the Earth or beyond the national airspace. In law, the boundary between outer space and airspace has remained undetermined. But in theory, this has been estimated to be between 80 to 90 kilometers. Outer space in this estimate begins from the lowest altitude an artificial satellite can remain in orbit. Under the **Moon Treaty of 1979**, the moon and the other celestial bodies form part of outer space.

In outer space, the space satellites or objects are under the jurisdiction of States of registry which covers astronauts and cosmonauts. This matter is covered by the Registration of Objects in Space Convention of 1974 and the Liability for Damage Caused by Spaced Objects Convention of 1972.

Q: May the USA lay exclusive claim over the moon, having explored it and having planted her flag therein to the exclusion of other states? Explain. (1979 Bar)
A: No, because the outer space and celestial bodies found therein including the moon are not susceptible to the national appropriation but legally regarded as *res communes*.

THE UNITED NATIONS

The United Nations
Formation of the United Nations
Purpose of United Nations
Principles of United Nations
Membership
Principal Organs
Privileges and Immunities of the United Nations

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THE UNITED NATIONS

It is an international organization created at the San Francisco Conference which was held in the United States from April 25 to June 26, 1945. The U.N., as it is commonly called, succeeded the League of Nations and is governed by a Charter which came into force on October 24, 1945. composed originally of only 51 members, the UN has grown rapidly to include most of the states in the world.

Who was the advocate of forming the UN?

In his famous Fourteen Points for the peace settlement, **Woodrow Wilson** called for the establishment of a "general association of nations for world peace under specific covenants for mutual guarantees of political independence and territorial integrity to large and small States alike." And so, the *League of Nations* was formed.

Who coined the name UN?

It was President Roosevelt who suggested early in 1942 the name UN for the group of countries which were fighting the Axis powers.

What are the principal purposes of the UN?

1. To maintain international peace and security
2. To develop friendly relations among nations

3. To achieve international cooperation in solving international economic, social, cultural and humanitarian problems
4. To promote respect for human rights
5. To be a center of harmonizing the actions of nations towards those common goals.

What are the principles of the UN?

1. All its members are equal and all are committed to fulfill in good faith their obligations under the Charter
2. To settle their disputes with each other by peaceful means
3. To refrain form the threat or use of force in their international relations
4. To refrain from assisting any State against which the UN is taking preventive or enforcement action.

2 Kinds of Membership

a. Original
b. Elective – those subsequently admitted upon the recommendation of the UN Security Council.

Qualifications for Membership

1. Must be State
2. Must be Peace-loving ☺
3. Must accept the obligations as member
4. In the judgment of the Organization, be able and willing to carry out such obligation.

How is Admission conducted?

1. Recommendation of a qualified majority in the Security Council
   - The affirmative vote of at least 9 members including the Big 5.
2. Approval of the General Assembly (GA) by a vote of at least 2/3 of those *present and voting.*

Note: Both SC and GA votes must be complied with.

Suspension of Membership
Suspension may occur when a preventive or enforcement action has been taken by the SC. The SC may, by a qualified majority, recommend suspension to the GA who shall in turn concur with a 2/3 vote of those present and voting.

Discipline does not suspend the member's obligations but only the exercise of its rights and privileges as a member. Only the SC may lift the suspension by a qualified majority.

Expulsion of a Member
The penalty of expulsion may be imposed upon a member which has *persistently* violated the principles in the UN Charter. Same voting requirement as to suspension.

Withdrawal of Membership – Indonesia Case
The Charter is silent regarding withdrawal of membership. In 1985, Indonesia withdrew its membership from the UN and it was not compelled to remain. Subsequently, upon President Sukarno's overthrow, Indonesia resumed its membership, which was accepted by the UN.

The Principal Organs
1. *General Assembly (GA)*
2. *Security Council (SC)*
3. *Economic and Social Council (ESC)*
4. *Trusteeship Council (TC)*
5. *International Court of Justice (ICJ)*
6. *Secretariat*

Subsidiary Organs – those which was created by the Charter itself or which it allows to be created whenever necessary by the SC or GA.
1. *Little Assembly* – Interim Committee, created in 1947 for a term of one eyar and re-established in 1949 for an

indefinite term. Composed of one delegate for each member-state, it meets when the General Assembly is in recess and assists this body in the performance of its functions.

2. *Military Staff Committee*
3. *Human Rights Commission*

Specialized Agencies – not part of the UN, but have been brought into close contact with it because of their purposes and functions, such as:

1. *World Health Organization*
2. *International Monetary Fund*
3. *Technical Assistance Board*

Proposals for Amendments to the UN Charter and Ratification

2 ways of adopting proposals:

a. *directly*, by 2/3 votes of all GA members

b. by 2/3 of a *general conference* called for this purpose by 2/3 of the GA and any 9 members of the SC.

Any amendment thus proposed shall be subject to ratification by at least 2/3 of the GA, including the permanent members of the SC.

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UN General Assembly

This is the *central organ* of the UN. The principal deliberative body of the organization and is vested with jurisdiction over matters concerning the internal machinery and operations of the UN.

GA Composition

Consists of all the members of the UN. Each member is entitled to send no more than 5 delegates and 5 alternates

and as many technical and other personnel as it may need.
The reason for this system of multiple delegates is to enable the members to attend of several meetings that may be taking place at the same time in the different organs or committees of the Organization.

However, each delegation is entitled only to one vote in the decisions to be made by the GA.

GA Sessions

1. *Regular sessions* – every year beginning the third Tuesday of September.
2. *Special sessions* – may be called at the request of the SC, a majority of the member states, or one member with the concurrence of the majority.
3. *Emergency special session* – may be called within 24 hours at the request of the SC by vote of any 9 members or by a majority of the members of the UN.

Some Important Functions of the GA

1. Deliberative – discuss principles regarding maintenance of international peace and security and may take appropriate measures toward this end.
2. Supervisory – receives and considers reports from the other organs of the UN.
3. Elective – important voting functions are also vested in the GA, such as the election of the non-permanent members of the SC, some members of the TC and all the members of the ESC, and with the SC selects the judges of the ICJ; also participates in the amendment of the Charter.
4. Budgetary – controls the finances of the UN
5. Constituent – amendment of the charter.

GA Voting Rules

Each member or delegation has 1 vote in the GA. *Important Questions* are decided by 2/3 majority of those present and voting. All other matters, including the determination of whether a question is important or not, are decided by simple majority.

Important Questions include:

a) peace and security
b) membership
c) election
d) trusteeship system
e) budget

GA Main Committees

Most questions are then discussed in its six main committees:

- 1st Committee - Disarmament & International Security
- 2nd - Economic & Financial
- 3rd - Social, Humanitarian & Cultural
- 4th - Special Political & Decolonization
- 5th - Administrative & Budgetary
- 6th - Legal

Some issues are considered only in plenary meetings, while others are allocated to one of the six main committees. All issues are voted on through resolutions passed in plenary meetings, usually towards the end of the regular session, after the committees have completed their consideration of them and submitted draft resolutions to the plenary Assembly.

Voting in Committees is by a simple majority. In plenary meetings, resolutions may be adopted by acclamation, without objection or without a vote, or the vote may be recorded or taken by roll-call.
While the decisions of the Assembly have no legally

binding force for governments, they carry the weight of world opinion, as well as the moral authority of the world community.

The work of the UN year-round derives largely from the decisions of the General Assembly - that is to say, the will of the majority of the members as expressed in resolutions adopted by the Assembly. That work is carried out:

a. by committees and other bodies established by the Assembly to study and report on specific issues, such as disarmament, peacekeeping, development and human rights;
b. in international conferences called for by the Assembly; and
c. by the Secretariat of the UN - the Secretary-General and his staff of international civil servants.

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UN Security Council

An organ of the UN primarily responsible for the maintenance of international peace and security. Their responsibility makes the SC a key influence in the direction of the affairs not only of the Organization but of the entire international community as well.

SC Functions and Powers:

1. to maintain international peace and security in accordance with the principles and purposes of the UN;
2. to investigate any dispute or situation which mightlead to international friction;
3. to recommend methods of adjusting such disputes or the terms of settlement;
4. to formulate plans for the establishment of a system to regulate armaments;

5. to determine the existence of a threat to the peace or act of aggression and to recommend what action should be taken;
6. to call on Members to apply economic sanctions and other measures not involving the use of force to prevent or stop aggression;
7. to take military action against an aggressor;
8. to recommend the admission of new Members;
9. to exercise the trusteeship functions of the UN in "strategic areas"; and
10. to recommend to the General Assembly the appointment of the Secretary-General and, together with the Assembly, to elect the Judges of the International Court of Justice.

SC Composition

Composed of 15 members, 5 of which are permanent. The so-called Big Five are China, France, the European Union, the United Kingdom, and the United States.

The other ten members are elected for 2-year terms by the GA, 5 from the African and Asian states, 1 from Eastern European states, 2 from Latin American states, and 2 from Western European and other states. Their terms have been so staggered as to provide for the retirement of ½ of them every year.

These members are not eligible for immediate re-election.

Chairmanship of the SC is rotated monthly on the basis of the English alphabetical order of the names of the members.

SC Sessions

The SC is required to function *continuously* and to hold itself in readiness in case of threat to or actual breach of international peace. For this purpose, all members should be represented at all times at the seat of the Organization.

SC Voting Rules
Each member of the SC has 1 vote, but distinction is made between the permanent and the non-permanent members in the decision of substantive questions.

Yalta Voting Formula
a. *Procedural matters* – 9 votes of *any* of SC members
b. *Substantive matters* – 9 votes including 5 permanent votes.

No member, permanent or not, is allowed to vote on questions concerning the pacific settlement of a dispute to which it is a party.

Rule of Great-Power Unanimity: a negative vote by any permanent member on a non-procedural matter, often referred to as "veto", means rejection of the draft resolution or proposal, even if it has received 9 affirmative votes.
- *Abstention* or *absence of a member* is not regarded as veto

Procedural and Substantive Matters Distinguished
Procedural matters include:
a. questions relating to the organization and meetings of the Council;
b. the establishment of subsidiary organs; and
c. the participation of states parties to a dispute in the discussion of the SC.

Substantial matters include those that may require the SC under its responsibility of maintaining or restoring world peace to invoke measures of enforcement.

What is the role of a Member of the UN but not a member of the Security Council?

Although not a member of the SC, it may participate (without vote) in the discussion of any question before the Council *whenever the latter feels that the interests of that member are specially affected.* Such member is likewise to be invited by the Council to participate (without vote)in the discussion of any dispute to which the Member is a party.

Q: Loolapalooza conducted illegal invasion and conquest against Moooxaxa. The UN Security Council called for enforcement action against Loolapalooza. Does enforcement action include sending of fighting troops?

A: NO. Compliance with the resolution calling for enforcement action does not necessarily call for the sending of fighting troops. There must be a special agreement with the SC before sending of fighting troops may be had and such agreement shall govern the numbers and types of forces, their degree of readiness and general locations, and the nature of the facilities and assistance to be supplied by UN members.

International Court of Justice

International Court of Justice
Composition
Qualifications
Jurisdiction
Functions of International Court of Justice
Procedure

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International Court of Justice

The International Court of Justice is the principal judicial organ of the United Nations. Its seat is at the Peace Palace in The Hague (Netherlands). It began work in 1946, when it replaced the Permanent Court of International Justice which had functioned in the Peace Palace since 1922. It operates under a Statute largely similar to that of its predecessor, which is an integral part of the Charter of the United Nations.

ICJ Composition and Qualifications

The Court is composed of 15 judges elected to nine-year terms of office by the United Nations General Assembly and Security Council sitting independently of each other. It may not include more than one judge of any nationality. Elections are held every three years for one-third of the seats, and retiring judges may be re-elected. The Members of the Court do not represent their governments but are independent magistrates.

QUALIFICIATIONS OF JUDGES

1. They must be of high moral character;
2. Possess the qualifications required in their respective countries for appointment to the highest judicial office or are *jurists* of recognized competence in international law; *and*

3. As much as possible, they must represent the main forms of civilization and the principal legal systems of the world.

When the Court does not include a judge possessing the nationality of a State party to a case, that State may appoint a person to sit as a judge ad hoc for the purpose of the case.

ICJ Jurisdiction

The Court is competent to entertain a dispute only if the States concerned have accepted its jurisdiction in one or more of the following ways:

a. by the conclusion between them of a special agreement to submit the dispute to the Court;
b. by virtue of a jurisdictional clause, i.e., typically, when they are parties to a treaty containing a provision whereby, in the event of a disagreement over its interpretation or application, one of them may refer the dispute to the Court. Several hundred treaties or conventions contain a clause to such effect; *or*
c. through the reciprocal effect of declarations made by them under the Statute whereby each has accepted the jurisdiction of the Court as compulsory in the event of a dispute with another State having made a similar declaration. The declarations of 65 States are at present in force, a number of them having been made subject to the exclusion of certain categories of dispute.

In cases of doubt as to whether the Court has jurisdiction, it is the Court itself which decides.

Term of Office

Term of 9 years, staggered at three year year intervals by dividing the judges first elected into three equal groups and assigning them by lottery terms of three, six and nine years respectively. Immediate re-election is allowed. The President and the Vice President elected by the Court for

three years, may also be re-elected. Terms of office of 5 of the 15 members shall expire at the end of every 3 years.

How members of ICJ are chosen

1. Nomination made by national groups in accordance with the Hague Conventions of 1907. No group shall nominate more than four persons and not more than two of whom shall be of their own nationality.
2. Candidates obtaining an absolute majority in the GA and SC are considered elected. In the event that more than 1 national of the same state obtain the requisite majorities in both bodies, only the eldest is chosen.
3. In cases when membership is not completed by the regular elections, a joint conference shall be convened. If this still fails, the judges elected shall fill the remaining vacancies.

ICJ Sessions

The Court shall remain permanently in session at the Hague or elsewhere as it may decide, except during the judicial vacations the dates and duration of which it shall fix.

Procedure in the ICJ

The procedure followed by the Court in contentious cases is defined in its Statute, and in the Rules of Court adopted by it under the Statute. The latest version of the Rules dates from 5 December 2000. The proceedings include a written phase, in which the parties file and exchange pleadings, and an oral phase consisting of public hearings at which agents and counsel address the Court. As the Court has two official languages (English and French) everything written or said in one language is translated into the other.

After the oral proceedings the Court deliberates in camera and then delivers its judgment at a public sitting. The judgment is final and without appeal. Should one of the

States involved fail to comply with it, the other party may have recourse to the Security Council.

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The Court discharges its duties as a full court but, at the request of the parties, it may also establish a special chamber. A Chamber of Summary Procedure is elected every year by the Court in accordance with its Statute. In July 1993 the Court also established a seven-member Chamber to deal with any environmental cases falling within its jurisdiction

ICJ Voting Rules

All questions before the Court are decided by a majority of the judges present, the quorum being nine when it is sitting *en banc*. In case of tie, the President or his substitute shall have a casting vote.

Rule for Inhibition of Judges

No judge may participate in the decision of a case in which he has previously taken part as agent, counsel or advocate for one of the parties, or as a member of a national or international court, or of a commission of injury, or in any other capacity.

Functions of ICJ

The principal functions of the Court are:

2. to decide contentious case; and
3. to render advisory opinions.

Who may file contentious cases?

Only states can file contentious cases and both must agree to the court's jurisdiction. Only States may apply to and appear before the Court. The Member States of the United Nations (at present numbering 191) are so entitled.

- Article 34(1): Only states may be parties in cases before the Court.

- 2. Article 36(1): The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the UN or in treaties and conventions in force.

Advisory Opinions

The advisory procedure of the Court is open solely to international organizations. The only bodies at present authorized to request advisory opinions of the Court are five organs of the United Nations and 16 specialized agencies of the United Nations family.

On receiving a request, the Court decides which States and organizations might provide useful information and gives them an opportunity of presenting written or oral statements. The Court's advisory procedure is otherwise modelled on that for contentious proceedings, and the sources of applicable law are the same. In principle the Court's advisory opinions are consultative in character and are therefore not binding as such on the requesting bodies. Certain instruments or regulations can, however, provide in advance that the advisory opinion shall be binding.

- ***Only organizations can request advisory opinions*** [Article 65(1)]: The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the UN to make such a request.

- ***There is no rule of stare decisis.***

Q: A, a citizen of State X, was arrested and detained for several years without charges or trial. He brings his case to the courts of State X, but to no avail. He desires to seek redress from any international forum. He goes to you as counsel to file his case with the

International Court of Justice. Will the action prosper? (1978 Bar)

A: No! Only States may be parties in contentious cases before the International Court of Justice. In fact, only States which are parties to the statute of the ICJ and other states on conditions to be laid down by the Security Council may be such parties. Therefore, a private individual like A cannot bring an action before it.

Q: May the United States be sued in our courts for the value of private properties requisitioned by its Army during the last World War, as well as Japan for the "Mickey Mouse" money in payment for private properties, which have not been redeemed until now? May the suit be brought to the ICJ? (1979 Bar)

A: No! Even foreign states are entitled to the doctrine of state immunity in the local state. The suit may not be brought before the ICJ without the consent of the United States as jurisdiction of the ICJ in contentious cases is based upon the consent of the parties.

Q: The State of Nova, controlled by an authoritarian government, had unfriendly relations with its neighboring state, America; Bresia, another neighboring state, had been shipping arms and ammunitions to Nova for use in attacking America. To forestall am attack, America placed floating mines on the territorial waters surrounding Nova. America supported a group of rebels organized to overthrow the government of Nova and to replace it with a friendly government. Nova decided to file a case against America in the International Court of Justice.

1) **What grounds may Nova's cause of action against America be based?**
2) **On what grounds may America move to dismiss the case with the ICJ?**
3) **Decide the case. (1994 Bar)**

A: 1) If Nova and America are members of the UN, Nova can premise its cause of action on a violation of Art. 2(4) of the UN Charter, which requires members to refrain from threat or use of force against the territorial integrity of political independence of any state. If either or both America and Nova are not members of the UN, Nova may premise its cause of action of violation of the non-use of force principle in customary international law which exist parallel as to Art. 2(4) of the UN Charter.

In the case concerning the Military and Parliamentary activities in and against Nicaragua (1986 ICJ Report 14), the International Court of Justice considered the planting mines by one state within the territorial waters of another as a violation of Art. 2(4) of the UN Charter. If the support provided by America to rebels of Nova goes beyond the mere giving of monetary or psychological support but consist in the provision of arms and training, the acts of America can be considered as indirect aggression amount to another violation of Art. 2(4).

In addition, even if the provision of support is not enough to consider the act a violation of the non-use of force principle, this is a violation of the principle of non-intervention in customary international law.

Aggression is the use of armed force by a state against the sovereignty or territorial integrity or political independence of another state or in any other manner inconsistence with the UN Charter.

2) By virtue of the principle of sovereign immunity, no sovereign state can be made a party to a proceeding before the ICJ unless it has given its consent. If America has not accepted the jurisdiction of the ICJ, it can invoke the defense of lack of jurisdiction. Even if it has accepted the jurisdiction of the ICJ but the acceptance limited and the limitation applies to the case, it may invoke such

limitations of its consent as a bar to the assumption of jurisdiction.

If the jurisdiction has been accepted, America can involve the principle of anticipatory self-defense recognized under customary international law because Nova is planning to launch an attack against America by using the arms it brought from Bresia.

3) If jurisdiction over America is established, the case should be decided in favor of Nova, because America violated the principle against the use of force and the principle of non-intervention. The defense of anticipatory self-defense cannot be sustained because there is no showing that Nova had mobilized to such an extent that if America were to wait for Nova to strike first it would not be able to retaliate.

However, if jurisdiction over America is not established, the case should be decided in its favor because of the principle of sovereign immunity.

Q: The sovereignty over certain island is disputed between State A and State B. These two states agreed to submit their disputes to the ICJ.

1) **Does the ICJ have the jurisdiction to take cognizance of the case?**
2) **Who shall represent the parties before the Court?**
3) **What language shall be used in the pleading and the oral arguments?**
4) **In case State A, the petitioner fails to appear at the oral argument, can State B, the respondent, move for the dismissal of the action? (1994 Bar)**

A: 1) The ICJ has jurisdiction because the parties have jointly submitted the case to it and have thus indicated their consent to its jurisdiction.

2) Parties to a case may appoint agents to appear before the ICJ in their behalf, and these agents need not be their own nationals. However, under Art. 16 of the Statute of ICJ, no member of the Court may appear as agent in any case.
3) Under Art. 39 of the Statute of ICJ, the official languages of the Court are English and French. In the absence of an agreement, each party may use the language it prefers. At the request of any party, the Court may authorize a party to use a language other than English or French.
4) Under Art. 51 of the Statute of ICJ, whenever one of the parties does not appear before the court or fails to defends its case, the other party may ask the Court to decide in favor of its claim. However, the Court must, before doing so, satisfy itself that it has jurisdiction and that the claim is well-founded in fact and in law.

PIMENTEL, JR., *v*. OFFICE OF THE EXECUTIVE SECRETARY
462 SCRA 622, 6 July 2005
En Banc, Garcia *J.*

This is a petition for *mandamus* 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 §21, Article VII of the 1987 Constitution.

The Rome State of the International Criminal Court
The Rome Statute established the International Criminal Court which "shall have the power to exercise its jurisdiction over person for the most serious crimes of international concern x x x and shall be complementary to the national criminal jurisdictions." (Article I, Rome Statute) Its jurisdiction covers the crime of genocide, crimes against humanity, war crimes, and the crime of aggression

as defined in the Statute (Article 5, Rome Statute). The Statute was opened for signature by all states in Rome on July 17, 1988 and had remained open for signature until December 31, 2000 at the United Nations Headquarters in New York. The Philippines signed the Statute on December 28, 2000 through *Charge d' Affairs* Enrique A. Manalo of the Philippine Mission to the United Nations. Its provisions, however, require that it be subject to ratification, acceptance or approval of the signatory states (Article 25, Rome Statute).

Issues

It is the theory of the petitioners that ratification of a treaty, under both domestic law and international law, is a function of the Senate. Hence, it is the duty of the executive department to transmit the signed copy of the Rome Statute to the Senate to allow it to exercise its discretion with respect to ratification of treaties. Moreover, petitioners submit that the Philippines has a ministerial duty to ratify the Rome Statute under treaty law and customary international law. Petitioners invoke the Vienna Convention on the Law of Treaties enjoining the states to refrain from acts which would defeat the object and purpose of a treaty when they have signed the treaty prior to ratification unless they have made their intention clear not to become parties to the treaty (Article 18, Vienna Convention on the Law of Treaties).

On *Locus Standi* of Petitioners

The petition at bar was filed by Senator Aquilino Pimentel, Jr. who asserts his legal standing to file the suit as member of the Senate; Congresswoman Loretta Ann Rosales, a member of the House of Representatives and Chairperson of its Committee on Human Rights; the Philippine Coalition for the Establishment of the International Criminal Court which is composed of individuals and corporate entities dedicated to the

Philippine ratification of the Rome Statute; the Task Force Detainees of the Philippines, a juridical entity with the avowed purpose of promoting the cause of human rights and human rights victims in the country; the Families of Victims of Involuntary Disappearances, a juridical entity duly organized and existing pursuant to Philippine Laws with the avowed purpose of promoting the cause of families and victims of human rights violations in the country; Bianca Hacintha Roque and Harrison Jacob Roque, aged two (2) and one (1), respectively, at the time of filing of the instant petition, and suing under the doctrine of inter-generational rights enunciated in the case of *Oposa vs. Factoran, Jr. 224 SCRA 792 (1993)* and a group of fifth year working law students from the University of the Philippines College of Law who are suing as taxpayers.

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We find that among the petitioners, only Senator Pimentel has the legal standing to file the instant suit. The other petitioners maintain their standing as advocates and defenders of human rights, and as citizens of the country. They have not shown, however, that they have sustained or will sustain a direct injury from the non-transmittal of the signed text of the Rome Statute to the Senate. Their contention that they will be deprived of their remedies for the protection and enforcement of their rights does not persuade. The Rome Statute is intended to complement national criminal laws and courts. Sufficient remedies are available under our national laws to protect our citizens against human rights violations and petitioners can always seek redress for any abuse in our domestic courts.

As regards Senator Pimentel, it has been held that “to the extent the powers of Congress are impaired, so is the power of each member thereof, since his office confers a right to participate in the exercise of the powers of that

institution."[*Del Mar vs. Philippine Amusement and Gaming Corporation, 346 SCRA 485 (2000)*] Thus, legislators have the standing to maintain inviolate the prerogatives, powers and privileges vested by the Constitution in their office and are allowed to sue to question the validity of any official action which they claim infringes their prerogatives as legislators. The petition at bar invokes the power of the Senate to grant or withhold its concurrence to a treaty entered into by the executive branch, in this case, the Rome Statute. The petition seeks to order the executive branch to transmit the copy of the treaty to the Senate to allow it to exercise such authority. Senator Pimentel, as member of the institution, certainly has the legal standing to assert such authority of the Senate.

The Substantive Issue

The core issue in this petition for *mandamus* is whether the Executive Secretary and the Department of Foreign Affairs have a ministerial duty to transmit to the Senate the copy of the Rome Statute signed by a member of the Philippine Mission to the United Nations even without the signature of the President.

We rule in the negative.

In our system of government, the President, being the head of state, is regarded as the sole organ and authority in external relations and is the country's sole representative with foreign nations(*Cortes, The Philippine Presidency: A Study of Executive Power (1966), p. 187*) As the chief architect of foreign policy, the President acts as the country's mouthpiece with respect to international affairs. Hence, the President is vested with the authority to deal with foreign states and governments, extend or withhold recognition, maintain diplomatic relations, enter into treaties, and otherwise transact the business of foreign relations [*Cruz, Philippine Political Law (1996 Ed.),*

p. 223] . In the realm of treaty-making, the President has the sole authority to negotiate with other states.

Nonetheless, while the President has the sole authority to negotiate and enter into treaties, the Constitution provides a limitation to his power by requiring the concurrence of 2/3 of all the members of the Senate for the validity of the treaty entered into by him. xxx

The participation of the legislative branch in the treaty-making process was deemed essential to provide a check on the executive in the field of foreign relations (*Cortes, supra note 12, p. 189*). By requiring the concurrence of the legislature in the treaties entered into by the President, the Constitution ensures a healthy system of checks and balance necessary in the nation's pursuit of political maturity and growth [*Bayan vs. Zamora, 342 SCRA 449 (2000)*].

In filing this petition, the petitioners interpret Section 21, Article VII of the 1987 Constitution to mean that the power to ratify treaties belongs to the Senate.

We disagree.

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 [*Cruz, International Law (1998 Ed.), pp. 172-174*]. [emphasis supplied]

Petitioners' arguments equate the signing of the treaty by the Philippine representative with ratification. It should be underscored that the signing of the treaty and the ratification are two separate and distinct steps in the treaty-making process. As earlier discussed, the signature is primarily intended as a means of authenticating the instrument and as a symbol of the good faith of the parties. It is usually performed by the state's authorized representative in the diplomatic mission. Ratification, on the other hand, is the formal act by which a state confirms and accepts the provisions of a treaty concluded by its representative. It is generally held to be an executive act, undertaken by the head of the state or of the government (*Bayan vs. Zamora, supra note 15*). Thus, Executive Order No. 459 issued by President Fidel V. Ramos on November 25, 1997 provides the guidelines in the negotiation of international agreements and its ratification. It mandates that after the treaty has been signed by the Philippine representative, the same shall be transmitted to the Department of Foreign Affairs. The Department of Foreign Affairs shall then prepare the ratification papers and forward the signed copy of the treaty to the President for ratification. After the President has ratified the treaty, the Department of Foreign Affairs shall submit the same to the Senate for concurrence. Upon receipt of the concurrence of the Senate, the Department of Foreign Affairs shall comply with the provisions of the treaty to render it effective. xxx

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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 [*Salonga and Yap, Public International Law (5th Edition), p. 138*]. 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 (*Cruz, International Law, supra note 16, p.174*).

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 (Bayan vs. Zamora, *supra* note 15). 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 (*Cruz, International Law, supra note 16, p.174*). 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 (*Salonga and Yap, supra note 18*), 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. [*See Severino vs. Governor-General, 16 Phil. 366 (1910)*]. 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.

Jurisdiction of States

Bases of Jurisdiction
1. Territoriality Principle
2. Nationality Principle
3. Protective Principle
4. Universality Principle

Exemptions from Jurisdiction
Doctrine of Sovereign Immunity
Act of State Doctrine
Right of Legation
Classes of Heads of Missions
Diplomatic Corps
Privileges and Immunities
Letter of Credence
Functions of Diplomatic Representatives
Waiver of Diplomatic Immunity and Privileges
Duration of Immunity
Termination of Diplomatic Relation
Consular Immunity
2 Kinds of Consuls
Consular Privileges and Immunities

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BASES OF JURISDICTION

A. Territoriality Principle

- ☀ all persons, property, transactions and occurrences within the territory of a State are under its jurisdiction, as well as over certain consequences produced within the territory by persons acting outside it.
- ☀ vests jurisdiction in state where offense was committed
- ☀ *Art. 14, NCC*

EXTRATERRITORIAL JURISDICTION –

- often claimed by States with respect to so-called continuing offenses where the commission of the crime has started in one State and is consummated in another. Under such situation, both states have jurisdiction.

Q: What is the meaning or concept of extraterritoriality? (1977 Bar)

A: The term "extraterritoriality has been used to denote the status of a person or things physically present on a State's territory, but wholly or partly withdrawn from the State's jurisdiction" by a rule of international law.

Note: The concept of extraterritoriality is already obsolete.

Q: Distinguish "exTERritoriality" and "exTRAterritoriality."
A:

exTERritoriality	exTRAterritoriality
exception of persons and property from local jurisdiction on basis of international customs	used to denote the status of a person or things physically present on a State's territory, but wholly or partly withdrawn from the State's jurisdiction" by a rule of international law

Q: How can the observance of our law on national theory be enforced upon individuals, and upon states? (1979 Bar)

A: All persons within our national territory are subject to the jurisdiction of the Philippines, with certain exceptions like heads and diplomatic agents of foreign states.

States are required under international law, specifically under Article II, paragraph 4 of the UN Charter, to respect the territorial integrity of other states. Any encroachments upon our territory, for example, by a foreign vessel, may be punished under our own laws, or by sanctions allowed under the generally accepted principles of international law.

Q: A crime was committed in a private vessel registered in Japan by a Filipino against an Englishman while the vessel is anchored in a port of State A. Where can he be tried? (1979 Bar)

A: Under both the English and French rules, the crime will be tried by the local state A, if serious enough as to compromise the peace of its port; otherwise by the flag state, Japan if it involves only the members of the crew and is of such a petty nature as not to disturb the peace of the local state.

B. Nationality Principle

- a State may punish offenses committed by its nationals *anywhere* in the world.
- vest jurisdiction in state of offender
- *Art. 15, NCC;* tax laws

C. Protective Principle

- States claim extraterritorial criminal jurisdiction to punish crimes committed abroad which are prejudicial to their national security or vital interests, even where the offenses are perpetrated by non-nationals.
- vest jurisdiction in state whose national interests is injured or national security compromised
- counterfeiting, treason, espionage

Q: Explain the Protective Personality Principle. (1991 Bar)

A: Protective Personality Principle is the principle on which the State exercise jurisdiction over the acts of an

alien even if committed outside its territory, if such acts are adverse to the interest of the national state.

D. Universality Principle

- ☀ A State has extraterritorial jurisdiction over *all* crimes regardless of where they are committed or who committed them, whether nationals or non-nationals. This is, however, generally considered as forbidden.
- ☀ vest jurisdiction in state which has custody of offender of universal crimes
- ☀ piracy, genocide

Q: A Filipino owned construction company with principal office in Manila leased an aircraft registered in England to ferry construction workers to the Middle East. While on a flight to Saudi Arabia with Filipino crew provided by the lessee, the aircraft was highjacked by drug traffickers. The hijackers were captured in Damaseus and sent to the Philippines for trial. Do courts of Manila have jurisdiction over the case? (1981 Bar)

A: Yes. Hijacking is actually piracy, defined in People vs. Lol-lo, 43 Phil 19 as robbery or forcible depredation in the high seas without lawful authority and done *animo furandi* and in the spirit and intention of universal hostility.

Piracy is a crime against all mankind. Accordingly, it may be punished in the competent tribunal if any country where the offender may be found or into which he may be carried.

The jurisdiction on piracy unlike all other crimes has no territorial limits. As it is against all, all so may punish it. Nor does it matter that the crime was committed within the jurisdictional 3-mile limit of a foreign state for those limits, though neutral to war, are not neutral to crimes.

DOCTRINE OF SOVEREIGN IMMUNITY

Under this doctrine, a state enjoys immunity from the exercise of jurisdiction by another state. The courts of one state may not assume jurisdiction over another state.

Restrictive Application of the Doctrine of State Immunity

Q: The Republic of Balau opened and operated in Manila an office engaged in trading of Balau products with the Philippine products. In one transaction, the local buyer complained that the Balau goods delivered to him were substandard and he sued the Republic of Balau before the RTC of Pasig for damages. (1996 Bar)

a) How can the Republic of Balau invoke its sovereign immunity? Explain.
b) Will such defense of sovereign immunity prosper? Explain.

A: a) By filing a motion to dismiss in accordance with Section 1 (a) Rule 16 of the Rules of Court on the ground that the court has no jurisdiction over its person.

According to the case of *Holy See vs. Rosario*, in Public International Law, when a state wishes to plead sovereign immunity in a foreign court, it requests the Foreign office of the state where it is being sued to convey to the court that it is entitled to immunity. In the Philippines, the practice is for the foreign government to first secure an executive endorsement of its claim of immunity. In some case, the defense of sovereign immunity is submitted directly to the local court by the foreign state through counsel by filing a motion to dismiss on the ground that the court has no jurisdiction over its person.

b) No. The sale of Balau products as a contract involves a commercial activity. As held by the Supreme Court in the case of USA vs. Ruiz and USA vs. Guinto, it was stated

that a foreign state couldn't invoke immunity from suit if it enters into a commercial contract. The Philippines adheres to restrictive Sovereign Immunity.

In February 1990, the Ministry of the Army, Republic of Indonesia, invited for a bid for the supply of 500,000 pairs of combat boots for the use of the Indonesian Army. The Marikina Shoe Corporation, a Philippine Corporation, which has a branch office and with no assets in Indonesia, submitted a bid to supply 500,000 pairs of combat boots at $30 per pair delivered in Jakarta on or before October 1990. The contract was awarded by the Ministry of the Army to Marikina Shoe Corporation and was signed by the parties in Jakarta. Marikina Shoe Expo was able to deliver only 200,000 pairs of combat boots in Jakarta by October 30, 1990 and received payment for 100,000 pairs or a total of $3,000,000. The Ministry of the Army promised to pay for the other 100,000 pairs already delivered as soon as the remaining 300,000 pairs of combat boots are delivered, at which time the said 300,000 pairs will also be paid for.

Q: Marikina Shoe Corporation failed to deliver any more combat boots. On June 1, 1991, the Republic of Indonesia filed an action before the RTC of Pasig, to compel Marikina Shoe Corporation to perform the balance of its obligation under the contract and for damages. In its Answer, Marikina Shoe Corporation sets up a counterclaim for $3,000,000 representing the payment for the 100,000 pairs of combat boots already delivered but unpaid. Indonesia moved to dismiss the counterclaim asserting that it is entitled to sovereign immunity from suit. The trial court denied the motion to dismiss and issued two writs of garnishment upon Indonesian Government funds deposited in the PNB and BPI. Indonesia went to the Court of Appeals on a petition for certiorari under Rule 65 of the Rules of

Court. How would the Court of Appeals decide the case? (1991 Bar)

A: The Court of Appeals should dismiss the petition in so far as it seeks to annul the order denying the motion of the Government of Indonesia to dismiss the counterclaim. The counterclaim in this case is a compulsory counterclaim since it arises from the same contract involved in the complaint. As such, it must be set up, otherwise, it will be barred. Above all, as held in Froilan vs. Pan Oriental Shipping Co. 95 Phil 905, by filing a complaint, the state of Indonesia waived its immunity from suit. It is not right that it can sue in the courts of the Philippines if in the first place it cannot be sued. The defendant therefore acquires the right to set up a compulsory counterclaim against it.

However, The Court of Appeals should grant the petition of the Indonesian Government insofar as it sought to annul the garnishment of the funds of Indonesia, which were deposited in the PNB and BPI.

Consent to the exercise of jurisdiction of a foreign court does not involve waiver of the separate immunity from execution. (You can look but you can't touch.)

Thus as held in the case of Dexter vs. Carpenters, P2d 705, it was held that consent to be sued does not give consent to the attachment of the property of sovereign government.

Exemptions from Jurisdiction

1. Doctrine of State Immunity;
2. Act of State Doctrine – court of one state will not sit in judgment over acts of government of another state done in its territory.
3. Diplomatic Immunity;
4. Immunity of UN Specialized agencies, other International Organizations, and its Officers;
5. Foreign Merchant vessels exercising the right of innocent passage;
6. Foreign armies passing through or stationed in the territory with the permission of the State;
7. Warships and other public vessels of another State operated for non-commercial purposes.

ACT OF STATE DOCTRINE

Q: What is an Act of State?

A: An act of state is an act done by the sovereign power of a country, or by its delegate, within the limits of the power vested in him. An act of State cannot be questioned or made the subject of legal proceedings in court of law.

Courts cannot pass judgment on acts of State done within its territorial jurisdiction. It is different from Sovereign Immunity from Suit. Here, you cannot sue a sovereign State in the courts of another State.

Q: Why?

A: Would unduly vex the peace of nations based on the doctrine of sovereign equality of States – "*Par in parem non habet imperium*"

Q: What is the meaning or concept of "Act of State" Doctrine? (1977 Bar)

A: The Act of State Doctrine states that every sovereign state is bound to respect the independence of other states and the court of one country will not sit in judgment to the acts of the foreign government done within its territory.

Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

DIPLOMATIC IMMUNITY

THE RIGHT OF LEGATION

It is the right to send and receive diplomatic missions. It is strictly not a right since no State can be compelled to enter into diplomatic relations with another State. Diplomatic relations is established by mutual consent between two States.

Q: Is the state obliged to maintain diplomatic relations with other states?

A: No, as the right of legation is purely consensual. If it wants to, a state may shut itself from the rest of the world, as Japan did until the close of the 19th century. However, a policy of isolation would hinder the progress of a state since it would be denying itself of the many benefits available from the international community.

Active right of legation – send diplomatic representatives
Passive right of legation – receive diplomatic representatives

Resident Missions

Classes of heads of missions [A N E M I C]

a. **A**mbassadors or **n**uncios accredited to Heads of State and other heads of missions of equivalent rank;
b. **E**nvoys **m**inisters and **i**nternuncios accredited to Heads of State;
c. ***C**harges d'affaires* accredited to Ministers for Foreign Affairs.

Functions of Diplomatic Missions

1. representing sending state in receiving state;
2. protecting in receiving state interests of sending state and its nationals;
3. negotiating with government of receiving state;
4. promoting friendly relations between sending and receiving states and developing their economic, cultural and scientific relations;
5. ascertaining by all lawful means conditions and developments in receiving state and reporting thereon to government of sending state; and
6. in some cases, representing friendly governments at their request.

Diplomatic Corps

A body formed by all diplomatic envoys accredited to the same State. The ***Doyen*** or head of this body is usually the Papal Nuncio, or the oldest accredited ambassador or plenipotentiary.

Privileges and immunities

a. Personal inviolability;
b. Inviolability of premises and archives;
c. Right of an official communication;
d. Exemption from local jurisdiction;
e. Exemption from subpoena as witness;
f. Exemption from taxation

Q: Who are the usual agents of diplomatic intercourse?

A: The diplomatic relations of a state are usually conducted through:

i. The head of state;
ii. The foreign secretary or minister; and
iii. The members of the diplomatic service.

Sometimes the state may appoint special diplomatic agents charged with either political or ceremonial duties,

such as the negotiation of a treaty or attendance at a state function like a coronation or a funeral.

Q: How are the regular diplomatic representatives classified?

A:

i. Ambassadors or nuncios accredited to heads of states
ii. Envoys, ministers and internuncios accredited to heads of states
iii. *Charges d' affaires* accredited to ministers for foreign affairs

The diplomatic corps consists of different diplomatic representatives who have been accredited to the local or receiving state. A doyen du corps or a dean, who is usually the member of the highest rank and the longest service to the state, heads it.

In Catholic countries, the dean is the Papal Nuncio.

Q: How are diplomatic representatives chosen?

A: The appointment of diplomats is not merely a matter of municipal law for the receiving state is not obliged to accept a representative who is a *persona non grata* to it. Indeed, there have been cases when duly accredited diplomatic representatives have been rejected, resulting in strained relations between the sending and receiving state.

To avoid such awkward situation, most states now observe the practice of agreation, by means of which inquiries are addressed to the receiving state regarding a proposed diplomatic representative of the sending state. It is only when the receiving state manifests its agreement or consent that the diplomatic representative is appointed and formally accredited.

Q: What is agreation?

A: It is a practice of the states before appointing a particular individual to be the chief of their diplomatic mission in order to avoid possible embarrassment. It consist of two acts:

i. The Inquiry, usually informal, addressed by the sending state to the receiving state regarding the acceptability of an individual to be its chief of mission; *and*

ii. The agreement, also informal, by which the receiving state indicates to the sending state that such person, would be acceptable.

Letter of Credence (Letre d' Creance)

The document, which the envoy receives from his government accrediting him to the foreign state to which he is being sent. It designates his rank and the general object of his mission and asks that he be received favorably and that full credence be given to what he says on behalf of his state.

Letter Patent (Letre d' Provision)

The appointment of a consul is usually evidenced by a commission, known sometimes as letter patent or letre d' provision, issued by the appointing authority of the sending state and transmitted to the receiving state through diplomatic channels.

Functions of diplomatic representatives

The functions of 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 its nationals.

c) Negotiating with the government of the receiving state.

d) Ascertainment through lawful means of the conditions and developments in the receiving state and reporting thereon to the government of the sending state.

e) Promoting friendly relations between the sending and receiving state and developing their economic, cultural and scientific relations.

f) In some cases, representing friendly governments at their request.

Pointers on Diplomatic Immunities and Privileges

The more important are the following:

a) The person of a diplomatic agent shall be inviolable and 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.

b) A diplomatic agent shall enjoy immunity from the criminal, civil and administrative jurisdiction of the receiving state, except in certain cases as, for example, when the civil action deals with property held by him in a private or proprietary capacity.

c) The diplomatic premises shall be inviolable, and the agents of the receiving state may not enter them without the consent of the head of the mission. Such premises, their furnishings and other property thereon and the means of transportation of the mission shall be immune from search, requisition, attachment or execution. (See movie "**Red Corner"** starring Richard Gere).

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

e) The receiving state shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the government and other missions, and consulates of the sending state wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. The official correspondence of the mission shall be inviolable.

f) Subject to its laws and regulations concerning national security, the receiving state shall insure to all members of the mission freedom of movement and travel in its territory.

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

h) A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional, or municipal except in certain specified cases like the imposition of indirect taxes.

i) The mission and its head shall have the right to use the flag and emblem of the sending state on the premises of the mission, including the residences of the head of the mission and on his means of transport.

Q: Who may waive the diplomatic immunity and privileges?

A: The waiver may be made expressly by the sending state. It may also be done impliedly, as when the person entitled to the immunity from jurisdiction commences litigation in the local courts and thereby opens himself to any counterclaim directly connected with the principal claim.

However, waiver of immunity from jurisdiction with regard to civil and administrative proceedings shall not be held to

mean implied waiver of the immunity with respect to the execution of judgment, for which a separate waiver shall be necessary.

Q: Is Diplomatic Immunity a Political Question?
A: Diplomatic immunity is essentially a political question and the courts should refuse to look beyond the determination by the executive branch. **(DFA vs. NLRC, 1996)**

Duration of the diplomatic immunities
Unless waived, diplomatic immunities and privileges begin from the moment diplomatic agent arrives in the territory of the receiving state or, if already there, form the moment his appointment is notified to its government, and lasts until he leaves, which must be within a reasonable period following the termination of his mission.

With respect to his official acts, however, his immunity from the jurisdiction of the receiving state continues indefinitely as these are the acts attributed not to him but to the sending state. But this rule does not apply to his private acts, for which he may later be sued or prosecuted should he return in a private capacity to the receiving state or fail to leave it in due time after the end of his mission.

Q: Who else besides the head of the mission are entitled to diplomatic immunities and privileges?
A: The diplomatic immunities and privileges are also enjoyed by the diplomatic suite or retinue, which consists of the official and non-official staff of the mission.

The official staff is made up of the administrative and technical personnel of the mission, including those performing clerical work, and the member of their respective families. The non-official staff is composed of

the household help, such as the domestic servants, butlers, and cooks and chauffeurs employed by the mission.

As a rule, however, domestic servants enjoy immunities and privileges only to the extent admitted by the receiving state and insofar as they are connected with the performance of their duties.

Q: Italy, through its Ambassador, entered into a contract with Abad for the maintenance and repair of specified equipment at its Embassy and Ambassador's Residence, such as air conditioning units, generator sets, electrical facilities, water heaters, and water motor pumps. It was stipulated that the agreement shall be effective for a period of four years and automatically renewed unless cancelled. Further, it provided that any suit arising from the contract shall be filed with the proper courts in the City of Manila.

Claiming that the Maintenance Contract was unilaterally, baselessly and arbitrarily terminated, Abad sued the State of Italy and its Ambassador before a court in the City of Manila. Among the defenses they raised were "sovereign immunity" and "diplomatic immunity". (2005 Bar)

(a) As counsel of Abad, refute the defenses of "sovereign immunity" and "diplomatic immunity" raised by the State of Italy and its Ambassador.

(b) At any rate, what should be the court's ruling on the said defenses?

A: (a) As a counsel of Abad, I shall argue that the contract is not a sovereign function and that the stipulation that any suit arising under the contract shall be filed with the proper courts of the City of Manila is a waiver of the sovereign immunity from suit of Italy. I shall also argue that the

ambassador does not enjoy diplomatic immunity, because the suit relates to a commercial activity.

(b) The court should reject the defenses. Since the establishment of a diplomatic mission requires the maintainance and upkeep of the embassy and the residence of the ambassador, Italy was acting in pursuit of a sovereign activity when it entered into the contract. The provision in the contract regarding the venue of lawsuits is not necessarily a wavier of sovereign immunity from suit. It should be interpreted to apply only where Italy elects to sue in the Philippine courts or waives its immunity by a subsequent act. The contract does not involve a commercial activity of the ambassador, because it is connected with his official functions. [Republic of Indonesia v. Vinzon, 405 SCRA 126 (2003)]

Q: A group of high-ranking officials and rank and file employees stationed in a foreign embassy in Manila were arrested outside embassy grounds and detained at Camp Crame on suspicion that they were actively collaborating with "terrorists" out to overthrow or destabilize the Philippine Government. The Foreign Ambassador sought their immediate release, claiming that the detained embassy officials and employees enjoyed diplomatic immunity. If invited to express your legal opinion on the matter, what advice would you give. (2003 Bar)

A: I shall advise that the high ranking officials and rank and file employees be released because of their diplomatic immunity. Article 29 of the Vienna Convention on Diplomatic Relations provides:

"The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention."

Under Article 37 of the Vienna Convention on Diplomatic Relations, members of the administrative and technical staff of the diplomatic mission, shall, if they are not nationals of or permanent residents in the receiving State, enjoy the privileges and immunities specified in Article 29.

Under Article 9 of the Vienna Convention on Diplomatic Relations, the remedy is to declare the high-ranking officials and rank and file employees *personae non gratae* and ask them to leave.

Alternative A: Under the Vienna Convention on Diplomatic Relations, a diplomatic agent "shall not be liable to any form of arrest or detention (Article 29) and he enjoys immunity from criminal jurisdiction (Article 31).

This immunity may cover the "high ranking officials" in question, who are assumed to be diplomatic officers or agents.

With respect to the "rank and file employees" that are covered by the immunity referred to above, provided that are not nationals or permanent residents of the Philippines pursuant to Article 37(2) of the said Convention.

If the said rank and file employees belong to the service staff of the diplomatic mission (such as drivers) they may be covered by the immunity (even if they are not Philippine nationals or residents) as set out in Article 37(3), if at the time of the arrest they were in "acts performed in the course of their duties." If a driver was among the said rank and file employees and he was arrested while driving a diplomatic vehicle or engaged in related acts, still he would be covered by the immunity.

Q: A foreign ambassador to the Philippines leased a vacation house in Tagaytay for his personal use. For some reason, he failed to pay the rentals for more

than one year. The lessor filed an action for the recovery of his property in court.

a) Can the foreign ambassador invoke his diplomatic immunity to resist the lessor's action?

b) The lessor gets hold of evidence that the ambassador is about to return to his home country. Can the lessor ask the court to stop the ambassador's departure from the Philippine? (2000 Bar)

A: a) No, the foreign ambassador cannot invoke the diplomatic immunity to resist the action, since he is not using the house in Tagaytay City for the purposes of his mission but merely for vacation. Under 3(1)(a) of the Vienna Convention on Diplomatic Relations, a diplomatic agent has no immunity in case of 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 purposes of the mission.

b) No, the lessor cannot ask the court to stop the departure of the ambassador from the Philippines. Under Article 29 of the Vienna Convention, a diplomatic agent shall not be liable to any form of arrest or detention.

Q: The United States Ambassador from the Philippines and the American Consul General also in the Philippines quarreled in the lobby of Manila Hotel and shot each other. May the Philippine courts take jurisdiction over them for trial and punishment for the crime they may have committed? (1979 Bar)

A: The Ambassador is immune from prosecution for all crimes committed by him whether officially or in his private capacity.

The consul is immune from criminal prosecution ONLY for acts committed by him in connection with his official functions.

Q: The Ambassador of State X to the Philippines bought in the name of his government two houses and lots at Forbes Park, Makati. One house is used as the chancery and residence of the ambassador, and the other as quarters for nationals of State X who are studying in De La Salle University. The Register of Deeds refused to register the sale and to issue Transfer Certificates of Title in the name of State X. Is his refusal justified?

A: The prohibition in the Constitution against alienation of lands in favor of aliens does not apply to alienation of the same in favor of foreign governments to be used as chancery and residence of its diplomatic representatives. The receiving state is under obligation to facilitate the acquisition on its territory, in accordance with its laws, by the sending state of premises necessary for its mission, or to assist the latter in obtaining accommodation in some other way. Therefore, the refusal of the Register of Deeds to register the sale and the issuance of TCT in the name of state X is unjustified.

However, in so far as the house and lot to be used as quarters of the nationals of State X who are studying in De La Salle University are concerned, the Register of Deeds correctly refused registration. Here, the prohibition in the constitution against the transfer of properties to parties other than the Filipino citizens or corporation 60% of the capital of which is owned by such citizens should be followed.

Termination of Diplomatic Relation

A diplomatic mission may come to an end by any of the usual methods of terminating official relations like:

Under Municipal Law: **[R A D A R]**

a) Resignation
b) Accomplishment of the purpose
c) Death
d) Abolition of the office
e) Removal

Under the International Law: **[W E R]**

a) **War** - the outbreak of war between the sending and receiving states terminates their diplomatic relations, which is usually severed before the actual commencement of hostilities;
b) **Extinction** - extinction of either the sending state or the receiving state will also automatically terminate diplomatic relations between them; *OR*
c) **Recall** – may be demanded by the receiving state when the foreign diplomat becomes a *persona non grata* to it for any reason. Where the demand is rejected by the sending state, the receiving state may resort to the more drastic method of dismissal, by means of which the offending diplomat is summarily presented with his passport and asked to leave the country.

Q: Will the termination of diplomatic relations also terminate consular relations between the sending and receiving states?

A: NO. Consuls belong to a class of state agents distinct from that of diplomatic officers. They do not represent their state in its relations with foreign states and are not intermediaries through whom matters of state are discussed between governments.
They look mainly after the commercial interest of their own state in the territory of a foreign state.

They are not clothed with diplomatic character and are not accredited to the government of the country where they exercised their consular functions; they deal directly with local authorities.

2 Kinds of Consuls

b) ***consules missi*** – professional or career consuls who are nationals of the sending state and are required to devote their full time to the discharge of their duties.
c) ***consules electi*** –may or may not be nationals of the sending state and perform their consular functions only in addition to their regular callings.

Q: Where do consuls derive their authority?
A: Consuls derive their authority from two principal sources, to wit, the **letter patent or *letter 'de provision***, which is the commission issued by the sending state, and the **exequator**, which is the permission given them by the receiving state to perform their functions therein.

Q: Do consuls enjoy their own immunities and privileges? Explain.
A: Yes, but not to the same extent as those enjoyed by the diplomats.

Like diplomats, consuls are entitled to the inviolability of their correspondence, archives and other documents, freedom of movement and travel, immunity from jurisdiction for acts performed in their official capacity and exemption from certain taxes and customs duties.

However, consuls are liable to arrest and punishment for grave offenses and may be required to give testimony, subject to certain exceptions.

The consular offices are immune only with respect to that part where the consular work is being performed and they may be expropriated for purposes of national defense or public utility.

Q: Discuss the differences, if any, in the privileges or immunities of diplomatic envoys and consular officers from the civil and criminal jurisdiction of the receiving state. (1995 Bar)

A: Under Article 32 of the Vienna Convention of Diplomatic Relations, a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state. He shall also enjoy immunity from its civil and administrative jurisdiction except in the case of:

a) A *real action* relating to private immovable property situated in the territory of the receiving state, unless he holds it on behalf of the sending state for the purpose of the mission;

b) An *action relating to succession* in which the diplomatic agent is involved as executor, administrator, heir or legatee as 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 of his official functions.

On the other hand, under Article 41 of the Vienna Convention on the Consular Relations, a consular officer does not enjoy immunity from the criminal jurisdiction of the receiving state. Under Article 43 of the Vienna Convention on Consular Relations, consular officers are not 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.

However, this does not apply in respect of a civil action either:

a) Arising out of a CONTRACT concluded by a consular officer in which he did not enter expressly or impliedly as an agent of the sending state.
b) By a third party for DAMAGES arising from an accident in the receiving state caused by a vehicle, vessel or aircraft.

Q: D, the Ambassador of the Kingdom of Nepal to the Philippines leased a house in Baguio City as his personal vacation home. On account of military disturbance in Nepal, D did not receive his salary and allowances from his government and so he failed to pay his rental for more than one year. E, the lessor, filed an action for recovery of his property with the RTC of Baguio City. (2000, 1989 Bar)

a) **Can the action of E prosper?**
b) **Can E ask for the attachment of the furniture and other personal properties of d after getting hold of evidence that D is about to leave the country?**
c) **Can E ask the court to stop D's departure from the Philippines?**

A: a) Yes Article 31 of the Vienna Convention on Diplomatic Relations provides:

> "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 real action relating to private immovable property situated in the territory of the receiving state, unless he holds it on behalf of the sending state for the purpose of the mission.*

The action against the ambassador is a real action involving private immovable property situated within the territory of the Philippines as the receiving state. The action falls within the exception to the grant of immunity from the civil and administrative jurisdiction of the Philippines.

Alternative A: No, the action will not prosper. Although the action is a real action relating to private immovable property within the territory of the Philippines, nonetheless, the vacation house may be considered property held by the Ambassador in behalf of his State (Kingdom of Nepal)

for the purposes of the mission, and therefore, such is beyond the civil and administrative jurisdiction of the Philippines, including its court.

b) No, E cannot ask for the attachment of the personal properties of the Ambassador. Article 30 and 31 of the Vienna Convention on Diplomatic Relations provide that the papers, correspondence and the property of the diplomatic agent shall be inviolable. Therefore, a writ of attachment cannot be issued against the furniture and any personal property. Moreover, on the assumption that the Kingdom of Nepal grants similar protection to Philippine diplomatic agents, Section 4 of RA 75 provides that any writ or process issued by any court in the Philippines for the attachment of the goods or chattel of the ambassador of a foreign state to the Philippines shall be void.

c) No, E cannot ask the court to stop the departure of the Ambassador of the Kingdom of Nepal from the Philippines. Article 29 of the Vienna Convention on Diplomatic Relations provides: "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention.

Q: Explain, using example, the meaning of *exequator*. (1991 Bar)
A: *Exequator* is an authorization from the receiving state admitting the head of a consular post to the exercise of his functions. For example, if the Philippines appoint a consul general for New York, he cannot start performing his functions unless the President of the United States issues an exequator to him.

Q: X, a secretary and consul in the American embassy in Manila, bought from B a diamond ring in the amount of P 50,000, which he later gave as a birthday present to his Filipino girlfriend. The purchase price was paid in check drawn upon the Citibank. Upon presentment

for payment, the check was dishonored for insufficiency of funds. Because X's failure to make good of the dishonored check, B filed a complaint against X in the Office of the City Prosecutor of Manila for violation of BP 22. After preliminary investigation, the information was filed against X in the City Court of Manila. X filed a motion to dismiss the case against him on the ground that he is a Secretary and Consul in the American Embassy enjoying diplomatic immunity from criminal prosecution in the Philippines. If you were the judge, how would you resolve the motion to dismiss? (1997 Bar)

A: The motion to dismiss should be granted. As consul, X is not immune from criminal prosecution. Under paragraph 3 of Article 41 of the Vienna Conventions, a consular officer is not immune from the criminal jurisdiction of the receiving state. In Schneekenburger vs. Mora, 63 Phil 249, it was held that a consul is not exempt from criminal prosecution in the country where he is assigned.

However, as a secretary in the American Embassy, X enjoys diplomatic immunity from the criminal prosecution. As secretary, he is a diplomatic agent. Under paragraph 1 of Article 3 of the Vienna Convention, a diplomatic agent against enjoys immunity from the criminal jurisdiction of the receiving state.

Q: a) A consul of a South American country stationed in Manila was charged with serious physical injuries. May he claim immunity from jurisdiction of the local court? Explain.

b) Suppose after he was charged, he was appointed as his country's ambassador to the Philippines. Can his newly gained diplomatic status be a ground for the dismissal of his criminal case? Explain. (1995 Bar)

A: a) No, Under Article 41 of the Vienna Convention, consuls do not enjoy immunity from the criminal

jurisdiction of the receiving state. He is not liable to arrest or detention pending the trial unless the offense was committed against his father, mother, child, ascendant, descendant or spouse. Consuls are not liable to arrest and detention pending trial except in the case of grave crime and pursuant to a decision by the competent judicial authority. The crime of physical injuries is not a grave crime unless it is committed against the above-mentioned persons.

b) Yes, Under Article 40 of the Vienna Convention, if a diplomatic agent is in the territory of a third state, which has granted him a passport visa if such was necessary, while proceeding to take up his post, the third state shall accord him inviolability and such other immunities as may be required to ensure his transit.

***MUNICHER* v. CA**
G.R. No. 142396, 11 February 2003

If the acts giving rise to a suit are those of a foreign government done by its foreign agent, although not necessarily a diplomatic personage, but acting in his official capacity, the complaint could be barred by the *immunity of the foreign sovereign from suit without its consent*.

Q: Adams and Baker are American citizens residing in the Philippines. Adams befriended Baker and became a frequent visitor at his house. One day, Adams arrived with 30 members of the Philippine National Police, armed with a Search Warrant authorizing the search of Baker's house and its premises for dangerous drugs being trafficked to the United States of America.

The search purportedly yielded positive results, and Baker was charged with Violation of the Dangerous

Drugs Act. Adams was the prosecution's principal witness. However, for failure to prove his guilt beyond reasonable doubt, Baker was acquitted.

Baker then sued Adams for damages for filing trumped-up charges against him. Among the defenses raised by Adams is that he has diplomatic immunity, conformably with the Vienna Convention on Diplomatic Relations. He presented Diplomatic Notes from the American Embassy stating that he is an agent of the United States Drug Enforcement Agency tasked with "conducting surveillance operations" on suspected drug dealers in the Philippines believed to be the source of prohibited drugs being shipped to the U.S. It was also stated that after having ascertained the target, Adams would then inform the Philippine narcotic agents to make the actual arrest. (2005 Bar)

(a) As counsel of plaintiff Baker, argue why his complaint should not be dismissed on the ground of defendant Adams' diplomatic immunity from suit.

(b) As counsel of defendant Adams, argue for the dismissal of the complaint.

A: (a) As a counsel of Baker, I shall argue that Baker has no diplomatic immunity, because he is not performing diplomatic functions.

Alternative A: (a) As a counsel for Baker, I will argue that Adam's diplomatic immunity cannot be accepted as the sole basis for the dismissal of the damage suit, by mere presentation of Diplomatic Notes stating that he is an agent of the US Drug Enforcement Agency. His diplomatic status was matter of serious doubt on account of his failure to disclose it when he appeared as principal witness in the earlier criminal (drug) case against Baker, considering that as a matter of diplomatic practice a diplomatic agent may be allowed or authorized to give evidence as a witness by the sending state. Thus, his diplomatic status was not sufficiently established.

(b) As counsel of Adams, I shall argue that since he was acting within his assigned functions with the consent of the Philippines, the suit against him is a suit against the United States without its consent and is barred by state immunity from suit. [Minucher v. CA, 397 SCRA 244, (2003)]

JURISDICTIONAL ASSISTANCE

Extradition Defined
Extradition distinguished from Double Criminality
Basis for Allowing Extradition
Rules in Interpretation of Extradition Treaty
Extradition Distinguished from Deportation
Fundamental Principles Governing Extradition
Extradition of War Criminals and Terrorists
Attentat Clause
Five Postulates of Extradition
Right of Asylum
Asylum Distinguished from Refugees
3 Essentials Elements of Refugees
Non-Refoulment Principle
Nationality Distinguished from Citizenship
Doctrine of Effective Nationality
Statelessness

—ooo—

Extradition
The delivery of an accused or a convicted individual to the State in whose territory he is alleged to have committed a crime by the State on whose territory the alleged criminal or criminal happens to be at the time.

The legal duty to extradite a fugitive from justice is based only on treaty stipulations, which are classified under two major types:

Older Type	Principle of Double Criminality
One, which contains a specific list of offenses that a fugitive should have committed in order to be extradited.	Sometimes called "no list treaty" The more modern type contains no list of crimes but provides that the offenses in question should be punishable in both states. It should not require that the name of the crime described should be the same in both countries. It is enough that the particular act charged is a crime in both jurisdictions.

Q: What is extradition? To whom does it apply?
Held: It is the "process by which persons charged with or convicted of crime against the law of a State and found in a foreign State are returned by the latter to the former for trial or punishment. It applies to those who are merely charged with an offense but have not been brought to trial; to those who have been tried and convicted and have subsequently escaped from custody; and those who have been convicted in absentia. It does not apply to persons merely suspected of having committed an offense but against whom no charge has been laid or to a person whose presence is desired as a witness or for obtaining or enforcing a civil judgment." (Weston, Falk, D' Amato, International Law and Order, 2nd ed., p. 630 [1990], cited in Dissenting Opinion, Puno, J., in Secretary of Justice v. Hon. Ralph C. Lantion, G.R. No. 139465, Jan. 18, 2000, En Banc)

Q: Discuss the basis for allowing extradition.
Held: Extradition was first practiced by the Egyptians, Chinese, Chaldeans and Assyro-Babylonians but their basis for allowing extradition was unclear. Sometimes, it

was granted due to pacts; at other times, due to plain good will. The classical commentators on international law thus focused their early views on the nature of the duty to surrender an extraditee --- whether the duty is legal or moral in character. Grotius and Vattel led the school of thought that international law imposed a legal duty called civitas maxima to extradite criminals. In sharp contrast, Puffendorf and Billot led the school of thought that the so-called duty was but an "imperfect obligation which could become enforceable only by a contract or agreement between states.

Modern nations tilted towards the view of Puffendorf and Billot that under international law there is no duty to extradite in the absence of treaty, whether bilateral or multilateral. Thus, the US Supreme Court in US v. Rauscher (119 US 407, 411, 7 S Ct. 234, 236, 30 L. ed. 425 [1886]), held: “x x x it is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the states where their crimes were committed, for trial and punishment. This has been done generally by treaties x x x Prior to these treaties, and apart from them there was no well-defined obligation on one country to deliver up such fugitives to another; and though such delivery was often made it was upon the principle of comity x x x.” (Dissenting Opinion, Puno, J., in Secretary of Justice v. Hon. Ralph C. Lantion, G.R. No. 139465, Jan. 18, 2000, En Banc)

Q: What is the nature of an extradition proceeding? Is it akin to a criminal proceeding?

Held: [A]n extradition proceeding is sui generis. It is not a criminal proceeding which will call into operation all the rights of an accused as guaranteed by the Bill of Rights. To begin with, the process of extradition does not involve the determination of the guilt or innocence of an accused. His guilt or innocence will be adjudged in the court of the

state where he will be extradited. Hence, as a rule, constitutional rights that are only relevant to determine the guilt or innocence of an accused cannot be invoked by an extraditee especially by one whose extradition papers are still undergoing evaluation. As held by the US Supreme Court in United States v. Galanis:

"An extradition proceeding is not a criminal prosecution, and the constitutional safeguards that accompany a criminal trial in this country do not shield an accused from extradition pursuant to a valid treaty." (Wiehl, Extradition Law at the Crossroads: The Trend Toward Extending Greater Constitutional Procedural Protections To Fugitives Fighting Extradition from the United States, 19 Michigan Journal of International Law 729, 741 [1998], citing United States v. Galanis, 429 F. Supp. 1215 [D. Conn. 1977])

There are other differences between an extradition proceeding and a criminal proceeding. An extradition proceeding is summary in natural while criminal proceedings involve a full-blown trial. In contradistinction to a criminal proceeding, the rules of evidence in an extradition proceeding allow admission of evidence under less stringent standards. In terms of the quantum of evidence to be satisfied, a criminal case requires proof beyond reasonable doubt for conviction while a fugitive may be ordered extradited "upon showing of the existence of a prima facie case." Finally, unlike in a criminal case where judgment becomes executory upon being rendered final, in an extradition proceeding, our courts may adjudge an individual extraditable but the President has the final discretion to extradite him. The United States adheres to a similar practice whereby the Secretary of State exercises wide discretion in balancing the equities of the case and the demands of the nation's foreign relations before making the ultimate decision to extradite.

As an extradition proceeding is not criminal in character and the evaluation stage in an extradition proceeding is not akin to a preliminary investigation, the due process safeguards in the latter do not necessarily apply to the former. This we hold for the procedural due process required by a given set of circumstances "must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action." The concept of due process is flexible for "not all situations calling for procedural safeguards call for the same kind of procedure." (Secretary of Justice v. Hon. Ralph C. Lantion, G.R. No. 139465, Oct. 17, 2000, En Banc [Puno])

Q: Will the retroactive application of an extradition treaty violate the constitutional prohibition against "ex post facto" laws?

Held: The prohibition against ex post facto law applies only to criminal legislation which affects the substantial rights of the accused. This being so, there is no merit in the contention that the ruling sustaining an extradition treaty's retroactive application violates the constitutional prohibition against ex post facto laws. The treaty is neither a piece of criminal legislation nor a criminal procedural statute. (Wright v. CA, 235 SCRA 341, Aug. 15, 1994 [Kapunan])

Q: The Philippines and Australia entered into a Treaty of Extradition concurred in by the Senate of the Philippines on September 10, 1990. Both governments have notified each other that the requirements for the entry into force of the Treaty have been complied with. It took effect in 1990.

The Australian government is requesting the Philippine government to extradite its citizen, Gibson, who has committed in his country the indictable

offense of Obtaining Property by Deception in 1985. The said offense is among those enumerated as extraditable in the Treaty.

For his defense, Gibson asserts that the retroactive application of the extradition treaty amounts to an *ex post facto* law. Rule on Gibson's contention. (2005 Bar)

A: The contention of Gibson is not tenable. The prohibition in Section 22, Article III of the Constitution refers to *ex post facto* laws. An extradition treaty is not a criminal law. [Wright v. CA, 235 SCRA 341 (1994)]

Q: Discuss the rules in the interpretation of extradition treaties.
Held: [A]ll treaties, including the RP-US Extradition Treaty, should be interpreted in light of their intent. Nothing less than the Vienna Convention on the Law of Treaties to which the Philippines is a signatory provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." X x x. It cannot be gainsaid that today, countries like the Philippines forge extradition treaties to arrest the dramatic rise of international and transnational crimes like terrorism and drug trafficking. Extradition treaties provide the assurance that the punishment of these crimes will not be frustrated by the frontiers of territorial sovereignty. Implicit in the treaties should be the unbending commitment that the perpetrators of these crimes will not be coddled by any signatory state.

It ought to follow that the RP-US Extradition Treaty calls for an interpretation that will minimize if not prevent the escape of extraditees from the long arm of the law and expedite their trial. X x x

[A]n equally compelling factor to consider is the understanding of the parties themselves to the RP-US Extradition Treaty as well as the general interpretation of the issue in question by other countries with similar treaties with the Philippines. The rule is recognized that while courts have the power to interpret treaties, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is accorded great weight. The reason for the rule is laid down in Santos III v. Northwest Orient Airlines, et al. (210 SCRA 256, 261 [1992]), where we stressed that a treaty is a joint executive-legislative act which enjoys the presumption that "it was first carefully studied and determined to be constitutional before it was adopted and given the force of law in the country." (Secretary of Justice v. Hon. Ralph C. Lantion, G.R. No. 139465, Oct. 17, 2000, En Banc [Puno])

Q: What is the difference, if any, between extradition and deportation? (1995 Bar)
A:

BASIS	EXTRADITION	DEPORTATION
Nature	Normally committed with criminal offenses in the territory of the requesting state	Even if no crime was committed as long as the alien is extraditable
Benefit	Effected for the benefit of the state to which the person being extradited will be surrendered because he is a fugitive criminal in that state	Effected for the protection of the state expelling an alien because his presence is inimical to public good

How?	Effected on the basis of an extradition treaty or upon the request of another state	The unilateral act of the state expelling the alien
Where?	The alien will be surrendered to the state asking for his extradition	The undesirable alien may be sent to any state willing to accept him

Fundamental Principles Governing Extradition:

a) There is no legal obligation to surrender a fugitive unless there is a treaty.
b) Religious and political offenses are generally not extraditable.
c) A person extradited can be prosecuted by the requesting state only for the crime for which he was extradited; and
d) Unless provided for in a treaty, the crime for which a person is extradited must have been committed in the territory of the requesting state.

Q: John is a former President of the *Republic X*, bent on regaining power which he lost to President Harry in an election. Fully convinced that he was cheated, he set out to destabilize the government of President Harry by means of a series of protest actions. His plan was to weaken the government and when the situation became ripe for a take-over, to assassinate President Harry.

William, on the other hand, is a believer in human rights and a former follower of President Harry. Noting the systematic acts of harassment committed by government agents against farmers protesting the seizure of their lands, laborers complaining of low wages, and students seeking free tuition, William

organized groups which held peaceful rallies in front of the Presidential Palace to express their grievances.

On the eve of the assassination attempt, John's men were caught by member of the Presidential Security Group. President Harry went on air threatening to prosecute plotters and dissidents of his administration. The next day, the government charged John with assassination attempt and William with inciting to sedition.

John fled to *Republic A*. William, who was in *Republic B* attending a lecture on democracy, was advised by his friends to stay in *Republic B*.

Both *Republic A* and *Republic B* have conventional extradition treaties with *Republic X*.

If *Republic X* requests the extradition of John and William, can *Republic A* deny the request? Why? State your reason fully. (2002 Bar)

A: *Republic A* can refuse to extradite John, because his offense is a political offense. John was plotting to take over the government and the plan of John to assassinate President Harry was part of such plan. However, if the extradition treaty contains an *attentat* clause, *Republic A* can extradite John because under the *attentat* clause, the taking of the life or attempt against the life of a head of state or that of the members of his family does not constitute a political offense and is therefore extraditable.

Alternative A: *Republic A* may or can refuse the request of extradition of William because he is not in its territory and thus it is not in the position to deliver him to *Republic X.*

Even if William were in the territorial jurisdiction of *Republic A*, he may not be extradited because inciting to sedition, of which he is charged, constitutes a political offense. It is a standard provision of extradition treaties, such as the one between *Republic A* and *Republic X*, that political offenses are not extraditable.

Alternative A: *Republic B* can deny the request the request of *Republic X* to extradite William, because his offense was not a political offense. On the basis of the predominance of proportionality test, his acts were not directly connected to any purely political offense.

Q: On November 1, 1976, A, B, C and D, self styled Moro rebels long wanted by the authorities for the fatal ambuscade of a bus load of innocent civilians, hijacked a PAL lane on its Manila-Davao flight which they forcibly diverted to, and landed in Jakarta Indonesia. In that country, A, B, C and D sought political asylum, invoking the UN Declaration on Human Rights. Reacting, the Philippine Government, through proper diplomatic channels sought after their extradition. May Indonesia grant asylum or should it extradite A, B, C and D to the Philippines. (1976 Bar)

Q: Sergio Osmeña III and Eugenio Lopez Jr. both charged with attempted assassination of President Marcos before the military tribunal, escaped from military custody, flew to Hong Kong and then to California USA where they are reportedly seeking political asylum. There is no extradition treaty however between the Philippines and the United States. Assuming that the Philippine Government desires the surrender of the above-named fugitives to the Philippines to face trial before the military tribunal, how can this be legally done under International Law? (1978 Bar)

A: The Philippines may only request and cannot demand the surrender of the two fugitives. As territorial sovereign, the United States is not obliged to return them but may decide to do so for reasons of comity. This is likely, however, because the escapees are sought for political offense and can claim the right of asylum under the Universal Declaration of Human Rights.

Q: Explain, using example, the principle of Double Criminality. (1991 Bar)

A: The principle of double criminality is the rule in extradition which states that for a request to be honored, the crime for which the extradition is requested must be a crime in both the requesting state and the state to which the fugitive fled. For example, since murder is a crime both in the Philippines and Canada, under the Treaty of extradition between the Philippines and Canada, the Philippines can request Canada to extradite Filipino who has fled to Canada.

Q: Patrick is charged with illegal recruitment and *estafa* before the RTC of Manila. He jumped bail and managed to escape to America. Assume that there is an extradition treaty between the Philippines and America and it does not include illegal recruitment as one of the extraditable offenses. Upon surrender of Patrick by the US Government to the Philippines, Patrick protested that he could not be tried for illegal recruitment. Decide. (1998 Bar)

A: Under the principle of specialty in extradition, Patrick cannot be tried for illegal recruitment since this is not included in the list of extraditable offenses in the extradition treaty between the Philippines and the United States, unless the United States does not object to the trial of Patrick for illegal recruitment.

Q: The Extradition Treaty between France and the Philippines is silent as to applicability with respect to crimes committed prior to its effectivity.

a) Can France demand the extradition of A, a French national residing in the Philippines, for an offense committed in France prior to the effectivity of the treaty? Explain.

b) Can A contest his extradition on the ground that it violates the ex post facto provision in the Philippine Constitution? Explain. (1996 Bar)

A: a) In Clough vs. Strakesh, 109 Fed 330, it was held that an extradition treaty applies to Crimes committed before its effectivity unless the extradition treaty expressly exempts them. As Whiteman points out, extradition does not define crimes but merely provides a means by which a state may obtain the return and punishment of persons charged with or convicted of having committed a crime who fled the jurisdiction of the state whose law has been violated. It is therefore immaterial whether at the time of the commission of the crime for which extradition is sought no treaty was in existence. If at the time of extradition is requested there is in force between the requesting and the requested state a treaty covering the offense on which the request is based, the treaty is applicable.

b) No, as held in **WRIGHT vs. CA, 295 SCRA 341**, the prohibition against *ex post facto* laws in Section 22 of Article III of the Constitution applies to penal laws only and does not apply to extradition treaties.

Extradition of War Criminals and Terrorists
(Violators of crimes against international law)

As violators of crimes against international law, war criminals are subject to extradition in 1946, the UN General Assembly passed a resolution recommending to members and calling upon all non-members to extradite war criminals, including traitors.

Attentat Clause

A provision in an extradition treaty that stipulates that the murder of the head of a foreign government or the member of his family should not be considered as a political offense.

Doctrine of Reciprocity

If the requesting state is shown to be willing to surrender its own nationals for trial by the courts of another country, the detaining state must also surrender its own citizens for trial.

5 POSTULATES OF EXTRADITION

Extradition Is a Major Instrument for the Suppression of Crime.

FIRST, extradition treaties are entered into for the purpose of suppressing crime by facilitating the arrest and the custodial transfer of a fugitive from one state to the other.

With the advent of easier and faster means of international travel, the flight of affluent Criminals from one country to another for the purpose of committing crime and evading prosecution have become more frequent. Accordingly, governments are adjusting their methods of dealing with criminals and crimes that transcend international boundaries.

Today, "a majority of nations in the world community have come to look upon extradition as the major effective instrument of international co-operation in the suppression of crime". It is the only regular system hat has been devised to return fugitives to the jurisdiction of a court competent to try them in accordance with municipal and international law.

The Requesting State Will Accord Due Process to the Accused.

SECOND, an extradition treaty presupposes that both parties thereto have examined and that both accept and trust each other's legal system and judicial process. More pointedly, our duly authorized representative's signature on an extradition treaty signifies our confidence in the capacity and the willingness of the other state to protect the basic rights of the person sought to be extradited. That signature signifies our full faith that the accused will be given, upon extradition to the requesting state, all relevant and basic rights in the criminal proceedings that will take place therein; otherwise, the treaty would not have been signed, or would have been directly attacked for its unconstitutionality.

The Proceedings Are *Sui Generis*.

THIRD, as pointed out in Secretary of Justice vs. Lantion, extradition proceedings are not criminal in nature. In criminal proceedings, the constitutional rights of the accused are at fore; in extradition, which is *sui generis* - in a class by itself – they are not.

Given the foregoing, it is evident that the extradition court is not called upon to ascertain the guilt or the innocence of the person sought to be extradited. Such determination during the extradition proceedings will only result in needless duplication and delay.

Extradition is merely a measure of international judicial assistance through which a person charged with or convicted of a crime is restored to a jurisdiction with the best claim to try that person. It is not part of the function of the assisting authorities to enter into questions, which are the prerogative of that jurisdiction.

The ultimate purpose of extradition proceedings in court is only to determine whether the extradition request complies with the Extradition Treaty, and whether the person sought is extraditable.

Compliance Shall Be in Good Faith.

FOURTH, our executive branch of government voluntarily entered into the Extradition Treaty, and our legislative branch ratified it. Hence, the Treaty carries the presumption that its implementation will serve the national interest.

Fulfilling our obligations under the Extradition Treaty promotes comity with the requesting state. On the other hand, failure to fulfill our obligations thereunder paints a bad image of our country before the world community. Such failure would discourage other states from entering into treaties with us, particularly an extradition treaty that hinges on reciprocity.

Verily, we are bound by *pacta sunt servanda* to comply in good faith with our obligations under the Treaty. This principle requires that we deliver the accused to the requesting country if the conditions precedent to extradition, as set forth in the Treaty, is satisfied. In other words, the demanding government, where it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender." Accordingly, the Philippines must be ready and in a position to deliver the accused, should it be found proper.

There Is an Underlying Risk of Flight

FIFTH, persons to be extradited are presumed to be flight risks. This prima facie presumption finds reinforcement in the experience of the executive branch nothing short of confinement can ensure that the accused will not flee the jurisdiction of the requested state in order to thwart their extradition to the requesting state.

The present extradition case further validates the premise that persons sought to be extradited have a propensity to flee. Indeed, extradition hearings would not even begin, if only the accused were willing to submit to trial in the requesting country. Prior acts of herein respondent:

c) Leaving the requesting state right before the conclusion of his indictment proceedings there; *and*
d) Remaining in the requested state despite learning that the requesting state is seeking his return and that the crimes he is charged with are bailable - eloquently speak of his aversion to the processes in the requesting state, as well as his predisposition to avoid them at all cost.

These circumstances point to an ever-present, underlying high risk of flight. He has demonstrated that he has the capacity and the will to flee. Having fled once, what is there to stop him, given sufficient opportunity, from fleeing a second time?

Q: Is the respondent in extradition proceeding entitled to notice and hearing before the issuance of a warrant of arrest?
A: Both parties cite section 6 of PD 1069 in support of their arguments. It states:

“SEC. 6. Issuance of Summons; Temporary Arrest, Hearing, Service of Notices -

(1) Immediately upon receipt of the petition, the presiding judge of the court shall, as soon as practicable, summon the accused to appear and to answer the petition on the day and hour fixed in the order. He may issue a warrant for the immediate arrest of the accused which may be served any where within the Philippines if it appears to the presiding judge that the immediate arrest and temporary detention of the accused will best serve the ends of justice. Upon receipt of the answer, or should the accused after having received the summons fail to answer within the time fixed, the presiding judge shall hear the case or set another date for the hearing thereof.

(2) The order and notice as well as a copy of the warrant of arrest, if issued, shall be promptly served each upon the accused and the attorney having charge of the case."

Does this provision sanction RTC Judge Purganan's act of immediately setting for hearing the issuance of a warrant of arrest? We rule in the negative:

A. On the Basis of the Extradition law

It is significant to note that Section 6 of PD 1069, our Extradition Law, uses the word "immediate" to qualify the arrest of the accused. This "qualification would be rendered nugatory by setting for hearing the issuance of the arrest warrant. Hearing entails sending notices to the opposing parties, receiving facts and arguments from them, and giving them time to prepare and present such facts and arguments. Arrest subsequent to a hearing can no longer be considered "immediate". The law could not have intended the word as a mere superfluity but on the whole as a means of imparting a sense of urgency and swiftness in the determination of whether a warrant of arrest should be issued.

By using the phrase “if it appears,” the law further conveys that accuracy is not as important as speed at such early stage. The trial court is not expected to make an exhaustive determination to ferret out the true and actual situation, immediately upon the filling of the petition. From the knowledge and the material then available to it, the court is expected merely to get a good first impression - a prima facie finding - sufficient to make a speedy initial determination as regards the arrest and detention of the accused.

We stress that the prima facie existence of probable cause for hearing the petition and, a priori, for issuing an arrest warrant was already evident from the petition itself and its supporting documents. Hence, after having already determined therefrom that a prima facie finding did not exist, respondent judge gravely abused his discretion when he set the matter for hearing upon motion of Jimenez.

Moreover, the law specifies that the court se a hearing upon receipt of the answer or upon failure of the accused to answer after receiving the summons. In connection with the matter of immediate arrest, however, the word “hearing” is notably absent from the provision. Evidently, had the holding of a hearing at that stage been intended, the law could have easily so provided. It also bears emphasizing at this point that extradition proceedings are summary in nature. Hence, the silence of the Law and the Treaty leans to the more reasonable interpretation that there is no intention to punctuate with a hearing every little step in the entire proceedings.

Verily, as argued by petitioner, sending to persons sought to be extradited a notice of the request for their arrest and setting it for hearing at some future date would give them ample opportunity to prepare and execute an escape.

Neither the Treaty nor the Law could have intended that consequence, for the very purpose of both would have been defeated by the escape of the accused from the requested state.

B. On the Basis of the Constitution

Even Section 2 of Article III of our Constitution, which is invoked by Jimenez, does not require a notice or a hearing before the issuance of a warrant of arrest. It provides:

> "Sec. 2 - The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized."

To determine probable cause for the issuance of arrest warrants, the Constitution itself requires only the examination - under oath or affirmation - of complainants and the witnesses they may produce. There is no requirement to notify and hear the accused before the issuance of warrants of arrest.

In *Ho vs. People* and in all the cases cited therein, never was a judge required to go to the extent of conducting a hearing just for the purpose of personally determining probable cause for the issuance of a warrant of arrest. All we required was that the "judge must have sufficient supporting documents upon which to make his independent judgment, or at the very least, upon which to

verify the findings of the prosecutor as to the existence of probable cause."

In *Webb vs. De Leon*, the Court categorically stated that a judge was not supposed to conduct a hearing before issuing a warrant of arrest:

> "Again, we stress that before issuing warrants of arrest, judges merely determine personally the probability, not the certainty of guilt of an accused. In doing so, judges do not conduct a *de novo* hearing to determine the existence of probable cause. They just personally review the initial determination of the prosecutor finding a probable cause to see if it is supported by substantial evidence."

At most, in cases of clear insufficiency of evidence on record, judges merely further examine complainants and their witnesses. In the present case validating the act of respondent judge and instituting the practice of hearing the accused and his witnesses at this early stage would be discordant with the rationale for the entire system. If the accused were allowed to be heard and necessarily to present evidence during the prima facie determination for the issuance of a warrant of arrest, what would stop him from presenting his entire plethora of defenses at this stage -- if he so desires -- in his effort to negate a prima facie finding? Such a procedure could convert the determination of a prima facie case into a full-blown trial of the entire proceedings and possibly make trial of the main case superfluous. This scenario is also anathema to the summary nature of extraditions.

That the case under consideration is an extradition and not a criminal action is not sufficient to justify the adoption of a set of procedures more protective of the accused. If a different procedure were called for at all, a more restrictive

one – not the opposite – would be justified in view of respondent's demonstrated predisposition to flee.

Q: Is respondent Mark Jimenez entitled to bail during the pendency of the Extradition Proceeding?

A: We agree with petitioner: As suggested by the use of the word "conviction," the constitutional provision on bail quoted above, as well as Section 4 of Rule 114 pf the Rules of Court, applies only when a person has been arrested and detained for violation of Philippine criminal laws. It does not apply to extradition proceedings, because extradition courts do not render judgments of conviction or acquittal.

Moreover, the constitutional right to bail "flows from the presumption of innocence in favor of every accused who should not be subjected to the loss of freedom as thereafter he would be entitled to acquittal, unless his guilt be proved beyond reasonable doubt.

It follows that the constitutional provision on bail will not apply to a case like extradition, where the presumption of innocence is not at issue.

The provision in the Constitution stating that the "right to bail shall not be impaired even when the privilege of the writ of habeas corpus is suspended" does not detract from the rule that the constitutional right to bail is available only in criminal proceedings. It must be noted that the suspension of the privilege of the writ of habeas corpus finds application "only to persons judicially charged for rebellion or offenses inherent in or directly connected with invasion." Hence, the second sentence in the constitutional provision on bail merely emphasizes the right to bail in criminal proceedings for the aforementioned offenses. It cannot be taken to mean that the right is

available even in extradition proceedings that are not criminal in nature.

That the offenses for which Jimenez is sought to be extradited are bailable in the United States is not an argument to grant him one in the present case. To stress, extradition proceedings are separate and distinct from the trial for the offenses for which he is charged. He should apply for bail before the courts trying the criminal cases against him, not before the extradition court.

Q: Will Mark Jimenez detention prior to the conclusion of the extradition proceedings not amount of his right to due process?

A: Contrary to his contention, his detention prior to the conclusion of the extradition proceedings does not amount to a violation of his right to due process. We reiterate the familiar doctrine that the essence of due process is the opportunity to be heard but, at the same time, point out that the doctrine does not always call for a prior opportunity to be heard. Where the circumstances—such as those present in an extradition case – call for it, a subsequent opportunity to be heard is enough. In the present case, respondent will be given full opportunity to be heard subsequently, when the extradition court hears the Petition for Extradition. Hence, there is no violation of his right to due process and fundamental fairness.

Contrary to the contention of Jimenez, we find no arbitrariness, either, in the immediate deprivation of his liberty prior to his being heard. That his arrest and detention will not be arbitrary is sufficiently ensured by:

1) The DOJ's filing in court of the Petition with its supporting documents after a determination that the extradition request meets the requirements of the law and the relevant treaty;

2) The extradition judge's independent *prima facie* determination that his arrest will best serve the ends of justice before the issuance of a warrant for his arrest; and

3) His opportunity, once he is under the court's custody, to apply for bail as an exception to the no-initial-bail rule.

It is also worth noting that before the US government requested the extradition of respondent, proceedings had already been conducted in that country. But because he left the jurisdiction of the requesting state before those proceedings could be completed, it was hindered from continuing with the due processes prescribed under its laws. His invocation of due process now has thus become hollow. He already had that opportunity in the requesting state; yet instead of taking it, he ran away.

In this light, would it be proper and just for the government to increase the risk of violating its treaty obligations in order to accord Respondent Jimenez his personal liberty in the span of time that it takes to resolve the Petition for Extradition? His supposed immediate deprivation of liberty without the due process that he had previously shunned pales against the government's interest in fulfilling its Extradition Treaty obligations and in cooperating with the world community in the suppression of crime. Indeed, "constitutional liberties do not exist in a vacuum; the due process rights accorded to individuals must be carefully balanced against exigent and palpable government interests."

Too, we cannot allow our country to be a haven for fugitives, cowards and weaklings who, instead of facing the consequences of their actions, choose to run and hide. Hence, it would not be good policy to increase the risk of violating our treaty obligations if, through overprotection or

excessively liberal treatment, persons sought to be extradited are able to evade arrest or escape from our custody. In the absence of any provision - in the Constitution, the law or the treaty - expressly guaranteeing the right to bail in extradition proceedings, adopting the practice of not granting them bail, as a general rule, would be a step towards deterring fugitives from coming to the Philippines to hide from or evade their prosecutors.

The denial of bail as a matter of course in extradition cases falls into place with and gives life to Article 14 of the Treaty, since this practice would encourage the accused to voluntarily surrender to the requesting state to cut short their detention here. Likewise, their detention pending the resolution of extradition proceedings would fall into place with the emphasis of the Extradition Law on the summary nature of extradition cases and the need for their speedy disposition.

Q: What are the exceptions to the "No Bail" Rule in Extradition Proceedings?

A: The rule, we repeat, is that bail is not a matter of right in extradition cases.

However, the judiciary has the constitutional duty to curb grave abuse of discretion and tyranny, as well as the power to promulgate rules to protect and enforce constitutional rights. Furthermore, we believe that the right to due process is broad enough to include the grant of basic fairness to extraditees. Indeed, the right to due process extends to the "life, liberty or property" of every person. It is "dynamic and resilient, adaptable to every situation calling for its application."

Accordingly and to best serve the ends of justice, we believe and so hold that, after a potential extraditee has been arrested or placed under the custody of the law, bail

may be applied for and granted as an exception, only upon a clear and convincing showing of the following:

1) That, once granted bail, the applicant will not be a flight risk or a danger to the community; and
2) That there exist special, humanitarian and compelling circumstances including, as a matter of reciprocity, those cited by the highest court in the requesting state when it grants provisional liberty in extradition case therein.
3) That, the extraditee will abide with all the orders and processes of the extradition court.

Since this exception has no express or specific statutory basis, and since it is derived essentially from general principles of justice and fairness, the applicant bears the burden of proving the above two-tiered requirement with clarity; precision and emphatic forcefulness.

The Court realizes that extradition is basically an executive; not a judicial, responsibility arising from the presidential power to conduct foreign relations. In its barest concept, it partakes of the nature of police assistance amongst states, which is not normally a judicial prerogative.

Hence, any intrusion by the courts into the exercise of this power should be characterized by caution, so that the vital international and bilateral interests of our country will not be unreasonably impeded or compromised. In short, while this Court is ever protective of "the sporting idea of fair play," it also recognizes the limits of its own prerogatives and the need to fulfill international obligations.

Along this line, Jimenez contends that there are special circumstances that are compelling enough for the Court to grant his request for provisional release on bail. We have carefully examined these circumstances and shall now discuss them.

1. Alleged Disenfranchisement

While his extradition was pending, Respondent Jimenez was elected as a member of the House of Representatives. On that basis, he claims that his detention will disenfranchise his Manila district of 600,000 residents. We are not persuaded. In *People vs. Jalosjos*, the Court has already debunked the disenfranchisement argument xxx.

It must be noted that even before private respondent ran for and won a congressional seat in Manila, it was already of public knowledge that the United States was requesting extradition. Hence, his constituents were or should have been prepared for the consequences of the extradition case against their representative, including his detention pending the final resolution of the case. Premises considered and in line with Jalosjos, we are constrained to rule against his claim that his election to public office is by itself a compelling reason to grant him bail.

2. Anticipated Delay

Respondent Jimenez further contends that because the extradition proceedings are lengthy, it would be unfair to confine him during the pendency of the case. Again we are not convinced. We must emphasize that extradition cases are summary in nature. They are resorted to merely to determine whether the extradition petition and its annexes conform to the Extradition Treaty, not to determine guilt or innocence. Neither is it, as a rule, intended to address issues relevant to the constitutional rights available to the accused in a criminal action. We are not overruling the possibility that petitioner may, in bad faith, unduly delay the proceedings. This is another matter that is not at issue here. Thus, any further discussion of

this point would be merely anticipatory and academic. However, if the delay were due to maneuverings of respondent, with all the more reason would the grant of bail not be justified. Giving premium to delay by considering it as a special circumstance for the grant of bail would be tantamount to giving him the power to grant bail to himself. It would also encourage him to stretch out and unreasonably delay the extradition proceedings even more. This we cannot allow.

3. Not a Flight Risk?

Jimenez further claims that he is not a flight risk. To support this claim, he stresses that he learned of the extradition request in June 1999; yet, he has not fled the country. True, he has not actually fled during the preliminary stages of the request for his extradition. Yet, this fact cannot be taken to mean that he will not flee as the process moves forward to its conclusion, as he hears the footsteps of the requesting government inching closer and closer. That he has not yet fled from the Philippines cannot be taken to mean that he will stand his ground and still be within reach of our government if and when it matters; that is, upon the resolution of the Petition for Extradition.

In any event, it is settled that bail may be applied for and granted by the trial court at anytime after the applicant has been taken into custody and prior to judgment, even after bail has been previously denied. In the present case, the extradition court may continue hearing evidence on the application for bail, which may be granted in accordance with the guidelines in this Decision.

Discuss the Ten Points in Extradition proceedings.

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 in substance, whether it complies with the Extradition Treaty and the 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 hearing 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) their is no flight risk and no danger to the community; and (b) there exist a 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 to be heard is sufficient due process 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 the exercise of 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 escapes can unreasonably delay, mummify, mock, frustrate, checkmate and defeat the quest for bilateral justice and international cooperation.

10) At the bottom, extradition proceedings should be conducted with all deliberate speed to determine compliance with the Extradition Treaty and the Law; and while safeguarding basic individual rights, to avoid the legalistic contortions, delays and technicalities that may negate that purpose.

CUEVAS V. MUŇOZ
G.R. No. 140520, 18 December 2000, Second Division, De Leon, *J*.

JUAN ANTONIO MUÑOZ is charged with seven (7) counts of accepting an advantage as an agent contrary to Section 9(1)(a) of the Prevention of Bribery Ordinance of. Cap 201 of Hong Kong, and seven (7) counts of

conspiracy to defraud, contrary to the common law of Hong Kong, for each count of which, if found guilty, he may be punished with seven (7) and fourteen (14) years imprisonment, respectively. The Hong Kong Magistrate's Court issued a warrant for his arrest. Thereafter, the Philippine DOJ received a request for the provisional arrest of MUÑOZ pursuant to the RP-Hong Kong Extradition Agreement. The Philippine DOJ forwarded the request for provisional arrest to the NBI, which filed an application for the provisional arrest of MUÑOZ with RTC of Manila for and in behalf of the government of Hong Kong. RTC granted the application. However, CA declared the Order of Arrest null and void.

ISSUE: Whether Munoz should be provisionally arrested

HELD:
There was urgency for the provisional arrest of the respondent. "Urgency" connotes such conditions relating to the nature of the offense charged and the personality of the prospective extraditee which would make him susceptible to the inclination if he were to learn about the impending request for his extradition and/or likely to destroy the evidence pertinent to the said request or his eventual prosecution and without which the latter could not proceed. Such conditions exist in Munoz's case.

At the time the request for provisional arrest was made, respondent's pending application for the discharge of a restraint order over certain assets held in relation to the offenses with which he is being charged, was set to be heard by the Court of First Instance of Hong Kong on September 17, 1999. The Hong Kong DOJ was concerned that the pending request for the extradition of the respondent would be disclosed to the latter during the said proceedings, and would motivate respondent to flee the Philippines before the request for extradition could be made.

There is also the fact that respondent is charged with seven (7) counts of accepting an advantage as an agent and seven (7) counts of conspiracy to defraud, for each count of which, if found guilty, he may be punished with seven (7) and fourteen (14) years imprisonment, respectively. Undoubtedly, the gravity of the imposable penalty upon an accused is a factor to consider in determining the likelihood that the accused will abscond if allowed provisional liberty. It is, after all, but human to fear a lengthy, if not a lifetime, incarceration. Furthermore, it has also not possessed of sufficient resources to facilitate an escape from this jurisdiction.

That respondent did not flee despite the investigation conducted by the Central bank and the NBI way back in 1994, nor when the warrant for his arrest was issued by the Hong Kong ICAC in August 1997, is not a guarantee that he will no flee now that proceedings for his extradition are well on the way. Respondent is about to leave the protective sanctuary of his mother state to face criminal charges in another jurisdiction. It cannot be denied that this is sufficient impetus for him to flee the country as soon as the opportunity to do so arises.
Respondent also avers that his mother's impending death makes it impossible for him to leave the country. However, by respondent's own admission, his mother finally expired at the Cardinal Santos Hospital in Madaluyong City last December 5, 1999.24

The request for provisional arrest of respondent and its accompanying document are valid despite lack of authentication. There is no requirement for the authentication of a request for provisional arrest and its accompanying documents. The pertinent provision of the RP-Hong Kong Extradition Agreement enumerates the documents that must accompany the request, as follows: (1) an indication of the intention to request the surrender

of the person sought; (2) the text of a warrant of arrest or judgement of conviction against that person; (3) a statement of penalty for that offense; and (4) such further information as would justify the issue of a warrant of arrest had the offense been committed or the person convicted within the jurisdiction of the requested party. That the enumeration does not specify that these documents must be authenticated copies, is not a mere omission of law. This may be gleaned from the fact that while Article 11(1) does not require the accompanying documents of a request for provisional arrest to be authenticated, Article 9 of the same Extradition Agreement makes authentication a requisite for admission in evidence of any document accompanying a request for surrender or extradition. In other words, authentication is required for the request for surrender or extradition but not for the request for provisional arrest.

the provisions of PD 1069 and the RP-Hong Kong Extradition Agreement, as they are worded, serve the purpose sought to be achieved by treaty stipulations for provisional arrest. The process of preparing a formal request for extradition and its accompanying documents, and transmitting them through diplomatic channels, is not only time-consuming but also leakage-prone. There is naturally a great likelihood of flight by criminals who get an intimation of the pending request for their extradition. To solve this problem, speedier initial steps in the form of treaty stipulations for provisional arrest were formulated. Thus, it is an accepted practice for the requesting state to rush its request in the form of a telex or diplomatic cable, the practically of the use of which in conceded. even our own Extradition Law (PD 1069) allows the transmission of a request for provisional arrest via telegraph. In the advent of modern technology, the telegraph or cable have been conveniently replaced by the facsimile machine. Therefore, the transmission by the Hong Kong DOJ of the request for respondent's provisional arrest and the

accompanying documents, namely, a copy of the warrant of arrest against respondent, a summary of the facts of the case against him, particulars of his birth and address, a statement of the intention to request his provisional arrest and the reason therefor, by fax machine, more than serves this purpose of expediency.

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 breath 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 not right to notice and hearing during the evaluation stage of the extradition process. As aforesaid, P.D. 1069 xxx 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 extradites 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 extradites which can be precipitated by premature 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 judgement of a co-equal branch of the governments, 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 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 retrains 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.

GOVERNMENT OF HONG KONG SPECIAL ADMINISTRATIVE REGION V. JUDGE OLALIA, JR. AND MUÑOZ, GR No. 153675, April 19, 2007

Bail Can Be Granted to Potential Extraditee on Basis of Clear and Convincing Evidence

In its petition, Hong Kong sought the nullification of the Manila RTC's December 20, 2001 Order allowing Muñoz to post bail, and April 10, 2002 Order denying the motion to vacate the said Order filed by the Government of Hong Kong Special Administrative Region, represented by the Philippine Department of Justice. Hong Kong alleged that both Orders were issued by the judge with grave abuse of discretion amounting to lack or excess of jurisdiction as there is no provision in the Constitution granting bail to a potential extraditee.

A potential extraditee may be granted bail on the basis of clear and convincing evidence that the person is not a flight risk and will abide with all the orders and processes of the extradition court.

Thus held the Supreme Court in dismissing the petition of the Government of Hong Kong Special Administrative Region to nullify two orders by a Manila Regional Trial Court (RTC) allowing a potential extraditee to post bail.

In a unanimous decision penned by Justice Angelina Sandoval-Gutierrez in *Government of Hong Kong v. Judge Olalia, Jr. and Muñoz* (GR No. 153675), the Court also remanded to the Manila RTC, Branch 8 to determine whether Juan Antonio Muñoz is entitled to bail on the basis of "clear and convincing evidence." If Muñoz is not entitled to such, the trial court should order the cancellation of his bail bond and his immediate detention; and thereafter, conduct the extradition proceedings with dispatch.

Muñoz was charged before the Hong Kong Court with three counts of the offense of "accepting an advantage as agent," in violation of sec. 9 (1) (a) of the Prevention of Bribery Ordinance, Cap. 201 of Hong Kong. He also faces seven counts of the offense of conspiracy to defraud, penalized by the common law of Hong Kong.

Citing the various international treaties giving recognition and protection to human rights, the Court saw the need to reexamine its ruling in *Government of United States of America v. Judge Purganan* which limited the exercise of the right to bail to criminal proceedings.

It said that while our extradition law does not provide for the grant of bail to an extraditee, there is no provision prohibiting him or her from filing a motion for bail, a right under the Constitution.

"The time-honored principle of *pacta sunt servanda* demands that the Philippines honor its obligations under the Extradition Treaty….However, it does not necessarily mean that in keeping with its treaty obligations, the Philippines should diminish a potential extraditee's rights to life, liberty, and due process. More so, where these rights are guaranteed, not only by our Constitution, but also by international conventions, to which the Philippines

is a party. We should not, therefore, deprive an extraditee of his right to apply for bail, provided that a certain standard for the grant is satisfactorily met," the Court said.

RP, being a signatory to the 1996 UN General Assembly which adopted the International Covenant on Civil and Political Rights, is "under obligation to make available to every person under detention such remedies which safeguard their fundamental right to liberty," said the Court. The RP and Hong Kong signed in 1995 an extradition treaty which became effective in 1997.

The Court noted that Munoz had been detained from September 23, 1999 to December 20, 2001, or for over two years without having been convicted of any crime.

"If bail can be granted in deportation cases, we see no justification why it should not also be allowed in extradition cases. Likewise, considering that the Universal Declaration of Human Rights applies to deportation cases, there is no reason why it cannot be invoked in extradition cases. After all, both are administrative proceeding where the innocence or guilt of the person detained is not in issue," the Court said.

It further said that even if a potential extradite is a criminal, an extradition proceeding is not by its nature criminal, for it is not punishment for a crime, even though such punishment may follow extradition. It added that "extradition is not a trial to determine the guilt or innocence of potential extraditee. Nor is it a full-blown civil action, but one that is merely administrative in character. ***By Jay B. Rempillo*** **(SC website)**

The Right of Asylum

Every foreign State can be at least a provisional asylum for any individual, who, being persecuted in his home State, goes to another State. In the absence of any international treaty stipulating the contrary, no state is, by international laws, obliged to refuse admission into its territory to such a fugitive or in case he has been admitted, to expel him or deliver him up to the prosecuting state.

The right of asylum is not a right possessed by an alien to demand that a state protect him and grant him asylum. At present, it is just a privilege granted by a state to allow an alien escaping from the persecution of his country for political reasons to remain and to grant him asylum.

Q: Explain the right of asylum in international law. (Bar)
A: The right of asylum is the competence of every state inferred from its territorial supremacy to allow a prosecuted alien to enter and to remain on its territory under its protection and thereby grant asylum to him.

Asylum and Refugees

A *refugee* is any person who is outside the country of his nationality or the country of his former habitual residence because he has or had well founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.

3 Essential Elements to be considered a Refugee:

1) The person is outside the country of his nationality, or in the case of stateless persons, outside the country of habitual residence;
2) The person lacks national protection;

3) The person fears persecution in his own country.

The second element makes, a refugee a stateless person. Because a refugee approximates a stateless person, he can be compared to a vessel on the open sea not sailing under the flag of any state, or be called flotsam and *res nullius*.

Only a person who is granted asylum by another state can apply for refugee status; thus the refugee treaties imply the principle of asylum.

Q: Sandoval's Open Question No. 1
Is a refugee is included in the term stateless person or is it the other way around?

Suggested Answer: Analyze the elements before one could be considered a refugee.

Non-Refoulment Principle
Non-refoulment non-contracting state expel or return (refouler) a refugee, in any manner whatsoever, to the frontiers of territories where his life or freedom would be threatened. (Article 33 of the Convention Relating to the Status of Refugees)
The Principle of the non-refoulment was declared to be a generally accepted principle by the Convention relating to the status of stateless persons.

Nationality v. Citizenship
Nationality is the membership in a political community with all its concomitant rights and obligations. It is the tie that binds an individual to his state, from which he can claim protection from the laws, which he is also obliged to follow.

Citizenship has a more exclusive meaning in that it applies only to certain members of the state accorded more privileges than the rest of the people who owe it allegiance. Its significance is municipal and not international.

Nationality is Important in Int'l Law

It is important because an individual can ordinarily participate in international relations only through the instrumentality of the state to which he belongs, as when his government asserts a claim on his behalf for injuries suffered by him in foreign jurisdiction. This remedy would not be available to a stateless person who will have no state with international personality to intercede for him under the laws of nations.

Example, in the case of Holy See vs. Rosario, the defendant in this case can invoke his rights against the Holy See not under the Municipal Law but under International Law through his government, which will espouse his cause of action in his behalf. If this happens, his concern ceases to be a private one but becomes one for the public, that is, for the state.

DOCTRINE OF EFFECTIVE NATIONALITY

Within a third state, a person having more than one nationality shall be treated as if he had only one. Under the principle of effective nationality, the third state shall recognized conclusively in its territory either the nationality of the country in which he is habitually and principally present or the nationality of the country with which he appears to be in fact most closely connected.

Statelessness

Statelessness is the condition or status of an individual who is born without any nationality or who loses his nationality without retaining or acquiring another.

An example of the first case would be that of an individual born in a state where only the *jus sanguinis* is recognized to parents whose state observes only *jus soli*. The second case may be illustrated by an individual who, after renouncing his original nationality in order to be naturalized in another state, is subsequently denaturalized and thereafter denied repatriation by his former country.

Q: Who are stateless persons under International Law? (1995 Bar)
A: They are those who are not considered as national by any state under the operation of its laws.

Q: What are the consequences of statelessness? (1995 Bar)
A: These are:

i. No state can intervene or complain in behalf of the stateless person for an international delinquency committed by another state in inflicting injury upon him;
ii. He cannot be expelled by the state if he is lawfully in its territory except on grounds of national security or public order;
iii. He cannot avail himself of the protection and benefits of citizenship like securing for himself a passport or visa and personal documents.

Q: Victor Korchnoi, a stateless resident of Switzerland, was the challenger to the world chess title held by Russian Anatoly Karpov. After 32 grueling games were played in Baguio city, Karpov finally retained his title of a close 6 to 5 win. Korchnoi protested no-payment of his prize money and alleged unfair treatment he received from the tournament organizers in the Philippines particularly in the 32nd crucial game, which he attributes as the main case of his defeat. May he press for his right to the prize

money against the Philippine government through the Swiss government? (1978 Bar)

A: No, Switzerland even if she so desires, cannot espouse a diplomatic claim against the Philippines in behalf of Victor Korchnoi. Nationality is the basis of the right of state to espouse such claim. In this case, Korchnoi is not a Swiss national but a stateless person.

Q: Is a stateless person entirely without right, protection or recourse under the Law of Nations? Explain. (1995 Bar)

A: No. Under the Convention in Relation to the Status of Stateless Persons, the Contracting States agree to accord the stateless persons within their territories treatment at least as favorable as that accorded their nationals with respect to;

a) Freedom of religion;
b) Access to the courts;
c) Rationing of products in short supply;
d) Elementary education;
e) Public relief and assistance;
f) Labor legislation; *and*
g) Social Security

They also agree to accord them treatment not less favorable than that accorded to aliens generally in the same circumstances. The Convention also provides for the issuance of identity papers and travel documents to the stateless persons.

Q: What measures, if any, has International Law taken to prevent statelessness? (1995 Bar)

A: In the Convention on the Conflict of Nationality Laws of 1930, the Contracting States agree to accord nationality to persons born in their territory who would otherwise be stateless. The convention on the Reduction of Statelessness of 1961 provides that if the law of the

Contracting States results in the loss of nationality, as a consequence of marriage or termination of marriage, such loss must be conditional upon possession or acquisition of another nationality.

The Law on International Obligations

Sources of International Obligations
The Law of Treaties
Treaty Defined
2 Kinds of Treaties
Parties
Requisites for Validity
Peremptory Norm
Process of Treaty Making
Principle of Alternat
Subject Matters of Treaties
Subject Matters of Executive Agreements
Most Favored Nation Clause
Pacta Sunt Servanda
Rebus Sic Stantibus
Effect of Territorial Changes
Interpretation of Treaties
Termination of Treaties
State Responsibility for Injury to Aliens
Doctrine of State Responsibility
Conditions for Enforcement of Claim
1. nationality of the claim
2. exhaustion of local remedies
3. waiver
4. unreasonable delay
5. improper behavior by the injured alien

Methods of Pressing Claims
Nature and Measure of Damages

—ooo—

Sources:

1) **International agreements** – e.g. treaties concluded between States
2) **Customary international law** – e.g. the doctrine of *rebus sic stantibus*

A. THE LAW OF TREATIES

Treaty Defined

Q: What is a Treaty? Discuss.

Held: 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 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." (BAYAN [Bagong Alyansang Makabayan] v. Executive Secretary Ronaldo Zamora, G.R. No. 138570, Oct. 10, 2000, En Banc [Buena])

Protocol de Clôture

A final act, sometimes called protocol de cloture is an instrument which records the winding up of the proceedings of a diplomatic conference and usually includes a reproduction of the texts of treaties, conventions, recommendations and other acts agreed upon and signed by the plenipotentiaries attending the conference. *It is not the treaty itself.* It is rather a summary of the proceedings of a protracted conference which may have taken place over several years.

Q: What is a "protocol de cloture"? Will it require concurrence by the Senate?

Held: A final act, sometimes called protocol de cloture, is an instrument which records the winding up of the proceedings of a diplomatic conference and usually includes a reproduction of the texts of treaties, conventions, recommendations and other acts agreed upon and signed by the plenipotentiaries attending the conference. It is not the treaty itself. It is rather a summary of the proceedings of a protracted conference which may have taken place over several years. It will not require the concurrence of the Senate. The documents contained therein are deemed adopted without need for ratification. (Tanada v. Angara, 272 SCRA 18, May 2, 1997 [Panganiban])

Treaty as main instrument
"The treaty is the *main instrument* with which the society of States is equipped for the purpose of carrying out its multifarious transactions." LORD McNAIR

Synonymous words

a) Convention
b) Pact
c) Protocol

d) Agreement
e) Arrangement
f) Accord
g) Final Act
h) General Act
i) Exchange of Notes

☀ The use of particular terminology has no legal significance in international law. ☺

Matters usually dealt with by treaties:

a) lease of naval bases
b) the sale or cession of territory
c) the regulation of conduct of hostilities
d) the termination of war
e) the formation of alliances
f) the regulation of commercial relations
g) the settling of claims
h) the establishment of international organizations

2 Kinds of Treaties

a) *traites-lois* – law making treaties
b) *traits-contrats* – contract treaties

1969 Convention on the Law of Treaties

Adopted by the Conference of the Law of Treaties (Vienna Convention). Entered into force on January 27, 1960.

PARTIES

Rule: Only States may enter into treaties or international agreements. Agreements between State and individuals or entities other than States DO NOT come within the category of treaties.

Exceptions: States may enter into treaties or international agreements with:

a) International Organizations
b) Belligerent States

4 Essentials of Validity

1) *Capacity* of parties

Rule: Every State possesses capacity to conclude treaties as an attribute of its sovereignty.

Exceptions:

a) When it limits itself; or
b) When it is limited by some other international arrangements respecting some matters.

2) *Competence* of particular organs concluding the treaty

Rule: The municipal law of the State concerned shall determine what organ may conclude a treaty. As a rule, it is the Head of State who possesses the treaty-making power to be concurred in by the legislative branch.

Exceptions:

a) When it is in estoppel
b) When it has performed acts validating or curing the defects in competence.
c) When it has received benefits or has exercised its rights under the subject treaty without expressly reserving its non-liability or without interposing other valid reasons for receiving or exercising it.

3) Reality of *Consent*

Rule: The plenipotentiaries of States or the State itself must possess the capacity to consent which consent is given in a manner that is voluntary and free from fear, force, coercion, intimidation, or corruption.

Exceptions:

a) Ratification – waiving the right to withdraw from the treaty and declaring its consent thereon as valid.
b) Estoppel - exercising its rights and respecting the obligations in the treaty notwithstanding knowledge

of facts that vitiate its consent and exercises them without protest.

c) Prescription – filing of protest after the lapse of allowable period within which the same may be entertained. Thus, the State is deemed to have ratified its consent.

Remedy: Where the consent of a party has been given in error or induced through fraud on the part of the other party, the treaty would be VOIDABLE. Thus, the erring State must as soon as possible or within the time given in the treaty, withdraw or correct its consent.

Consent How Given

a) through a signature
b) exchange of instruments
c) ratification
d) acceptance
e) approval or accession; or
f) by other means so agreed.

4) <u>Legality of *Object*</u>

Rule: Immorality, illegality or impossibility of purpose or obligations makes a treaty null and void. *e.g.* a treaty by which a State agrees with another to appropriate a portion of the high seas.

Exceptions:

a) If the immorality, illegality or impossibility *does not run counter to a universally recognized peremptory norm of international law* but only against a remote and minor norm.

b) If it does not contravene or depart from an absolute or imperative rule or prohibition of international law. e.g. *jus dispositivum.*

PEREMPTORY NORM

A norm generally accepted 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. *e.g. jus cogens*

Q: Explain, using example, *jus cogens* in international law. (1991 Bar)

A: *Jus cogens* is a peremptory norm of general international law accepted and recognized by the international community as a whole. *e.g.* the prohibition against the use of force in dealing with States.

INCOMPATIBILITY *v*. INCONSISTENCY

Inconsistency raises the problem of conflict of obligations. Incompatibility, on the other hand, raises the question of nullity. *e.g.* Art. 103 of the UN Charter provides that in the event of conflict between the obligations of the Members under the UN Charter and their obligations under any international agreement, their obligations under the UN Charter shall prevail.

Effect of Form on Validity

There is no rule that treaties should be in written form. Oral treaties are NOT prohibited. However, orally agreed treaties are a rarity.

Note: The Vienna Convention, however, defines a "treaty" as "an international agreement concluded between States in written form and governed by international law, whether embodied in a singe instrument or in two or more related instruments and whatever its particular designation (is)."

PROCESS OF TREATY-MAKING

Usual Steps Taken

1) Negotiation of parties
2) Signature of the agreed text
3) Ratification or accession made by the treaty-making organs of States concerned
4) Exchange or deposit of the instruments of ratification or accession.

At present, treaties are prepared and adopted by means of international diplomatic conferences. Also, a large number of multilateral conventions have been adopted by international organizations such as the General Assemble of the UN.

Principle of Alternat

According to this principle, the order of the naming of the parties, and of the signatures of the plenipotentiaries is varied so that each party is named and its plenipotentiary signs first in the coy of the instrument to be kept by it.

★ However, with respect to treaties with many parties, the practice is usually to arrange the names *alphabetically* in English or in *French.*

Significance of Signature

Rule: The act of signature has *little legal significance* except as a means of authenticating the text of the treaty. It is the act of *ratification* that is required to make a treaty binding.

Exceptions:

a) the treaty provides that signature shall have such effect;
b) it is otherwise established that the negotiating States were agreed that signatures should have that effect; or
c) the intention of the State to give that effect to the signature appears from the full powers of its

representative or was expressed during the negotiations.

Ratification

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.

☀ State may ratify a treaty only when it is a signatory to it.

☀ There is no moral duty on the part of the States to ratify a treaty notwithstanding that its plenipotentiaries have signed the same. This step, however, should not be taken lightly.

☀ A treaty may provide that it shall not be valid even ratified but shall be valid only after the exchange or deposit of ratification has transpired.

Q: What is ratification? Discuss its function in the treaty-making process.

Held: Ratification is generally held to be an executive act, undertaken by the head of state or of the government, as the case may be, through which the formal acceptance of the treaty is proclaimed. A State may provide in its domestic legislation the process of ratification of a treaty. The consent of the State to be bound by a treaty is expressed by ratification when: (a) the treaty provides for such ratification, (b) it is otherwise established that the negotiating States agreed that ratification should be required, (c) the representative of the State has signed the treaty subject to ratification, or (d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative, or was expressed during the negotiation. (BAYAN [Bagong Alyansang Makabayan]

v. Executive Secretary Ronaldo Zamora, G.R. No. 138570, Oct. 10, 2000, En Banc [Buena])

Accession or Adherence
When a State, who has NOT SIGNED a treaty, accedes to it.

Binding Effects of a Treaty
As a rule, a treaty is binding only on the contracting parties, including not only the original signatories but also other states, which, although they may not have participated in the negotiation of the agreement, have been allowed by its terms to sign it later by a process known as accession. Non-parties are usually not bound under the maxim of ***pacta tertiis nec noceat nec prosunt*.**

Q: Enumerate instances when a third State who is non-signatory may be bound by a treaty.
A:

1. When a treaty is a mere formal expression of customary international law, which, as such is enforceable on all civilized states because of their membership in the family of nations.

2. Under Article 2 of its charter, the UN shall ensure that non-member States act in accordance with the principles of the Charter so far as may be necessary for the maintenance of international peace and security. Under Article 103, obligations of member-states shall prevail in case of conflict with any other international agreement including those concluded with non-members.

3. The treaty itself may expressly extend its benefits to non-signatory states.

4. Parties to apparently unrelated treaties may also be linked by the most-favored nation clause.

§21, A.VII, 1987 Phil. Constitution
No treaty or international agreement shall be valid and effective unless concurred in by at least 2/3 of ALL the Members of the Senate.

§20, A.VII, 1987 Phil. Constitution
The President may *contract or guarantee foreign loans* on behalf of the RP with the prior concurrence of the Monetary Board, and subject to such limitations as may be provided by law. The MB shall, within 30 days from the end of every quarter of the calendar year, submit to the Congress a complete report of its decisions on applications for loans to be contracted or guaranteed by the Government or government-owned and controlled corporations which would have the effect of increasing the foreign debt, and containing other matters as may be provided by law.

§4, A.XVIII, 1987 Phil. Constitution
All exiting treaties or international agreements which have not been ratified shall not be renewed or extended without the concurrence of at least 2/3 of ALL the Members of the Senate.

§25, A.XVIII, 1987 Phil. Constitution
After the expiration in 1991 of the Agreement between the RP and the USA concerning the Military Bases, foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State.

NOTE: This section prohibits, in the absence of a treaty, the stationing of troops and facilities of foreign countries in the Philippines. However, it DOES NOT INCLUDE the *temporary presence* in the Philippines of foreign troops for the purpose of a combined military exercise. Besides, the holding of combined military exercise is connected with defense, which is a sovereign function.

Q: Discuss the binding effect of treaties and executive agreements in international law.

Held: [I]n international law, there is no difference between treaties and executive agreements in their binding effect upon states concerned, as long as the 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. (BAYAN [Bagong Alyansang Makabayan] v. Executive Secretary Ronaldo Zamora, G.R. No. 138570, Oct. 10, 2000, En Banc [Buena])

Q: Does the Philippines recognize the binding effect of executive agreements even without the concurrence of the Senate or Congress?

Held: In our jurisdiction, we have recognized the binding effect of executive agreements even without the concurrence of the Senate or Congress. In Commissioner of Customs v. Eastern Sea Trading (3 SCRA 351, 356-357 [1961]), we had occasion to pronounce:

"x x x the right of the Executive to enter into binding agreements without the necessity of subsequent Congressional approval has been confirmed by long usage. From the earliest days of our history we have entered into executive agreements covering such subjects as commercial and consular relations, most-favored-nation rights, patent rights, trademark and copyright protection, postal and navigation arrangements and the settlement of

claims. The validity of these has never been seriously questioned by our courts. " (BAYAN [Bagong Alyansang Makabayan] v. Executive Secretary Ronaldo Zamora, G.R. No. 138570, Oct. 10, 2000, En Banc [Buena])

Q: An Executive Agreement was executed between the Philippines and a neighboring State. The Senate of the Philippines took it upon itself to procure a certified true copy of the Executive Agreement and after deliberating on it, declared, by a unanimous vote, that the agreement was both unwise and against the best interest of the country. Is an Executive Agreement binding from the standpoints a) of Philippine law and b) of international law? Explain. (2003 Bar)

A: a) YES, from the standpoint of Philippine law, the Executive Agreement is binding. According to Commissioner of Customs v. Eastern Sea Trading, 3 S 351 [1961], the President can enter into an Executive Agreement *WITHOUT* the necessity of concurrence by the Senate.

b) YES, it is also binding from the standpoint of international law. As held in Bayan V. Zamora, 342 S 449 [2000], in international law executive agreements are *equally binding as treaties* uon the States who are parties to them. Additionally, under Article 2(1)(a) of the Vienna Convention on the Law of Treaties, whatever may be the designation of a written agreement between States, whether it is indicated as a Treaty, Convention or Executive Agreement is not legally significant. Still it is considered a treaty and governed by the international law of treaties.

Q: The President authorized the Secretary of Public Works and Highways to negotiate and sign a loan

agreement with the German Government for the construction of a dam. The Senate, by a resolution, asked that the agreement be submitted to it for ratification. The Secretary of Public Works and Highways did not comply with the request of the Senate. (1994 Bar)

a) **Under the Constitution, what is the role of the Senate in the conduct of foreign affairs?**

b) **Is the president bound to submit the agreement to the Senate for ratification?**

A:

a) The Senate plays a role in the conduct of foreign affairs, because of the requirement in Section 21 Article VII of the Constitution that to be valid and effective, a treaty or international agreement must be concurred in by at least 2/3 of all members of the senate.

b) No, the President is not bound to submit the agreement to the Senate for ratification. Under Section 20 Article VII of the Constitution, only the prior concurrence of the Monetary Board is required for the President to contract foreign loans on behalf of the Republic of the Philippines.

Q: In accordance with the opinion of the Secretary of Justice, and believing that it would be good for the country, the President enters into an agreement with the Americans for an extension for another five (5) years of their stay at their military bases in the Philippines, in consideration of:

a) A yearly rental of one billion US dollars, payable to Philippine government in advance;

b) An undertaking on the part of the American government to implement immediately the min-Marshall plan for the country involving ten billion US dollars in aids and concessional loans, and

c) An undertaking to help persuade American banks to condone interests and other charges on the country's outstanding loans.

In return, the President agreed to allow American nuclear vessels to stay for short visits at Subic, and in case of vital military need, to store nuclear weapons at Subic and at Clark Field. A vital military need comes, under the agreement, when hostile military forces threaten the sea-lanes from the Persian Gulf to the Pacific.

The Nuclear Free Philippines Coalition comes to you for advice on how they could legally prevent the same agreement entered into by the President with the US government from going into effect. What would you advice them to do? Give your reasons. (Bar)

A: If the agreement is not in the form of treaty, it is not likely to be submitted to the Senate for ratification as required in Article VII, Section 21. It may not, therefore, be opposed in that branch of the government. Nor a judicial review is feasible at this stage because there is no justiciable controversy. While Article VIII, Section 1, paragraph 2 states that judicial power includes the duty of courts of justice to "determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government," it is clear that this provision does not do away with the political question doctrine. It was inserted in the Constitution to prevent courts from making use of the doctrine to avoid what otherwise are justiciable controversies, albeit involving the Executive Branch of the government during the martial law period. On the other hand, at this stage, no justiciable controversy can be framed to justify judicial review. I would therefore advice the Nuclear Free Philippines Coalition to resort to the media to launch a campaign against Agreement

Subject Matter of Treaties
1) Political Issues
2) Changes in National Policies
3) Involve International Agreements of a Permanent Character

Subject Matter of EAs
1) Have transitory effectivity
2) Adjustment of details carrying out well-established national policies and traditions
3) Arrangements of temporary nature
4) Implementation of treaties, statutes, well established policies.

Q: How does a treaty differ from executive agreement?

A: An executive agreement is not a treaty in so far as its ratification may not be required under the Constitution. However, the distinction is purely municipal and has no international significance. From the standpoint of international law, "treaties and executive agreement are alike in that both constitute equally binding obligations upon the nations." (FB Sayre, 39 Columbia Law Review, p. 75, 1939)

An executive agreement is NOT a treaty. As such, concurrence by two-thirds vote (2/3) of all the members of the Senate is not necessary for it to become binding and effective.

Q: Is VFA a treaty or a mere executive agreement?

A: In the case of Bayan vs. Zamora, VFA was considered a treaty because the Senate concurred in via 2/3 votes of all its members. But in the point of view of the US Government, it is merely an executive agreement.

Q: What is the implication if only the senate of the Philippines concur but not the senate of USA?

A: None, it is only a matter of policy and the same is governed by their respective Municipal Law.

Q: Senate Bill No. 1234 was passed creating a joint legislative-executive commission to give on behalf of the Senate, its advice, consent and concurrence to treaties entered into by the President. The bill contains the guidelines to be followed by the commission in the discharge of its functions. Is the bill constitutional? (1996 Bar)
A: NO, the bill is not constitutional. The Senate cannot delegate its power to concur to treaties ratified by the President.

Q: Can the House of Representatives take active part in the conduct of foreign relations, particularly in entering into treaties and international agreements? (1996 Bar)

A: NO. As held in US v. Curtiss Wright Export Corporation 299 US 304, it is the President alone who can act as representative of the nation in the conduct of foreign affairs. Although the Senate has the power to concur in treaties, the President alone can negotiate treaties and Congress is powerless to intrude into this. However, if the matter involves a treaty or an executive agreement, the HR may pass a resolution expressing its views on the matter.

Reservations
A *unilateral statement*, however phrased or named, made by a State, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or

modify the legal effect of certain provisions of the treaty in their application to that State.

When Reservation cannot be made

a) If the treaty itself provides that NO reservation shall be admissible, or
b) the treaty allows only *specified reservations* which do not include the reservation in question, or
c) the reservation is *incompatible* with the object and purpose of the treaty.

Form and Time of Reservation

Written statement or declaration recorded at the time of signing or ratifying or acceding to the treaty.

Objected Reservations

Parties to the treaty may object to the reservations of a State entering the treaty. A 1951 Advisory Opinion of the ICJ held that a reserving State may be a party to a treaty notwithstanding that one or more parties to the convention, but not all, objects to its reservations and such reservations are not contrary to the object and purpose of said convention.

REGISTRATION & PUBLICATION

Article 102, UN Charter

1. Every treaty and every international agreement entered into by any Member of the UN after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of para.1 of this Article may invoke that treaty or agreement before any organ of the UN.

★ The treaty, however, remains valid although not registered and not published in the UN.

Entry into Force
Means the date of effectivity of a treaty as provided in the stipulations of the parties. In the absence of such stipulation, it is deemed in force as soon as the consent of ALL the parties are established.

Q: Are Treaties Self-Executing?
A: Qualified answer. In international law, it self-executes from the time of its entry into force.
However, there is NO absolute rule that treaties are self-executing within the sphere of municipal law. Some municipal laws require further steps such as publication and promulgation before it can produce legal effect.

★ Nevertheless, in the Philippines, treaties are part of the law of the land. INCORPORATION CLAUSE.
★

MOST-FAVORED-NATION CLAUSE

Q: What is the "most-favored-nation" clause? What is its purpose?

A: 1. The most-favored-nation clause may be defined, in general, as a pledge by a contracting party to a treaty to grant to the other party treatment not less favorable than that which has been or may be granted to the "most favored" among other countries. The clause has been commonly included in treaties of commercial nature.

There are generally two types of most-favored-nation clause, namely, conditional and unconditional. According to the clause in its unconditional form, any advantage of whatever kind which has been or may in future be granted by either of the contracting parties to a third State shall simultaneously and unconditionally be extended to the other under the same or equivalent conditions as those

under which it has been granted to the third State. (Salonga & Yap, Public International Law, 5th Edition, 1992, pp. 141-142)

2. The purpose of a most favored nation clause is to grant to the contracting party treatment not less favorable than that which has been or may be granted to the "most favored" among other countries. The most favored nation clause is intended to establish the principle of equality of international treatment by providing that the citizens or subjects of the contracting nations may enjoy the privileges accorded by either party to those of the most favored nation (Commissioner of Internal Revenue v. S.C. Johnson and Son, Inc., 309 SCRA 87, 107-108, June 25, 1999, 3rd Div. [Gonzaga-Reyes])

Q: Explain the meaning of the concept of "most favored nation" treatment? (1997 Bar)
A: The most favored nation treatment is that granted by one country to another not less favorable than that which has been or may be granted to the most favored among other countries. It usually applies to commercial transactions such as international trade and investments.

Q: What is the essence of the principle behind the "most-favored-nation" clause as applied to tax treaties?

Held: The essence of the principle is to allow the taxpayer in one state to avail of more liberal provisions granted in another tax treaty to which the country of residence of such taxpayer is also a party provided that the subject matter of taxation x x x is the same as that in the tax treaty under which the taxpayer is liable.

In Commissioner of Internal Revenue v. S.C. Johnson and Son, Inc., 309 SCRA 87, June 25, 1999, the SC did not grant the claim filed by S.C. Johnson and Son, Inc., a non-resident foreign corporation based in the USA, with the BIR for refund of overpaid withholding tax on royalties pursuant to the most-favored-nation clause of the RP-US Tax Treaty in relation to the RP-West Germany Tax Treaty. It held:

Given the purpose underlying tax treaties and the rationale for the most favored nation clause, the concessional tax rate of 10 percent provided for in the RP-Germany Tax Treaty should apply only if the taxes imposed upon royalties in the RP-US Tax Treaty and in the RP-Germany Tax Treaty are paid under similar circumstances. This would mean that private respondent (S.C. Johnson and Son, Inc.) must prove that the RP-US Tax Treaty grants similar tax reliefs to residents of the United States in respect of the taxes imposable upon royalties earned from sources within the Philippines as those allowed to their German counterparts under the RP-Germany Tax Treaty.

The RP-US and the RP-West Germany Tax Treaties do not contain similar provisions on tax crediting. Article 24 of the RP-Germany Tax Treaty x x x expressly allows crediting against German income and corporation tax of 20% of the gross amount of royalties paid under the law of the Philippines. On the other hand, Article 23 of the RP-US Tax Treaty, which is the counterpart provision with respect to relief for double taxation, does not provide for similar crediting of 20% of the gross amount of royalties paid. X x x

X x x The entitlement of the 10% rate by U.S. firms despite the absence of matching credit (20% for royalties) would derogate from the design behind the most favored nation clause to grant equality of international treatment since the tax burden laid upon the income of the investor is not the

same in the two countries. The similarity in the circumstances of payment of taxes is a condition for the enjoyment of most favored nation treatment precisely to underscore the need for equality of treatment.

2 Types

a) *Unconditional* – any advantage of whatever kind which has been or may in future be granted by either of the contracting parties to a third State shall *simultaneously* and *unconditionally* be extended to the other under the same or equivalent conditions as those under which it has been granted to the third State.

b) *Conditional* – advantages are specified and limited not universal.

CIR V. JOHNSON & SON, INC. (1999)

The *purpose* of a most favored nation clause is to grant to the contracting party treatment not less favorable than that which has been or may be granted to the "most favored" among other countries. The most favored nation clause is *intended to establish the principle of equality of international treatment* by providing that the citizens or subjects of the contracting nations may enjoy the privileges accorded by either party to those of the most favored nation.

PACTA SUNT SERVANDA (PSS)

(AGREEMENT MUST BE KEPT)

Means that treaties must be performed in good faith. One of the oldest and most fundamental rules of international law.

Q: Explain the "pacta sunt servanda" rule.

Held: 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 x x x. 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." (Tanada v. Angara, 272 SCRA 18, May 2, 1997 [Panganiban])

Influences to ensure observance to PSS

a) national self-interest
b) a sense of duty
c) respect for promises solemnly given
d) desire to avoid the obloquy attached to breach of contracts

▪ Breach involves the obligation to make reparations. There is, however, no necessity to state this rule of reparation in the treaty itself because they are *indispensable complement* of failure to comply to one's obligations.

TAÑADA V. ANGARA (1997)

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 x x x. 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."

SEC. OF JUSTICE V. LANTION (2000)

The rule of *pacta sunt servanda*, one of the oldest and most fundamental maxims of international law, requires the parties to a treaty to keep their agreement therein in good faith. The observance of our country's legal duties under a treaty is also compelled by Section 2, Article II of the Constitution which provides that "[t]he 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." Under the doctrine of incorporation, rules of international law form part of the law of the land and no further legislative action is needed to make such rules applicable in the domestic sphere (citing Salonga & Yap, Public International Law, 1992 ed., p. 12).

CIR V. ROBERTSON (1986)

"The obligation to fulfill in good faith a treaty engagement requires that the stipulations be observed in their spirit as well as according to their letter and that what has been promised be performed without evasion, or subterfuge, honestly and to the best of the ability of the party which made the promise." (citing Kunz, The Meaning and Range of the Norm (Pacta Sunt Servanda, 29 A.J.I.L. 180 (1945); cited in Freidmann, Lisstzyn, Pugh, International Law (1969) 329). Somehow, the ruling becomes an anacoluthon and a persiflage.

AGUSTIN V. EDU (1979)

t is not for this country to repudiate a commitment to which it had pledged its word. The concept of *pacta sunt servanda* stands in the way of such an attitude, which is,

moreover, at war with the principle of international morality.

REBUS SIC STANTIBUS (RSS)
(THINGS REMAINING AS THEY ARE)
This doctrine involves the legal effect of change in conditions underlying the purposes of a treaty. Simply stated, *the disappearance of the foundation upon which it rests.*

Authors, jurists, and tribunals are varied in the application of this doctrine. A majority, however, hold that "the obligation of a treaty *terminates* when a change occurs in circumstances which existed at the time of the conclusion of the treaty and whose continuance formed, according to the intention or will of the parties, a condition of the continuing validity of the treaty." The change must be *vital* or *fundamental*. Also, under this doctrine, a treaty terminates if the performance of obligations thereof will injure fundamental rights or interests of any one of the parties.

Explain the "rebus sic stantibus" rule (i.e., things remaining as they are). Does it operate automatically to render a treaty inoperative?
Held: According to Jessup, the doctrine constitutes an attempt to formulate a legal principle which would justify non-performance of a treaty obligation if the conditions with relation to which the parties contracted have changed so materially and so unexpectedly as to create a situation in which the exaction of performance would be unreasonable. The key element of this doctrine is the vital change in the condition of the contracting parties that they could not have foreseen at the time the treaty was concluded.

The doctrine of rebus sic stantibus does not operate automatically to render the treaty inoperative. There is a

necessity for a formal act of rejection, usually made by the head of state, with a statement of the reasons why compliance with the treaty is no longer required. (Santos III v. Northwest Orient Airlines, 210 SCRA 256, June 23, 1992)

Limitations to RSS

a) It applies only to treaties of indefinite duration;
b) The vital change must have been unforeseen or unforeseeable and should have not been caused by the party invoking the doctrine.
c) It must be invoked within reasonable time; and
d) It cannot operate retroactively upon the provisions of a treaty already executed prior to the change in circumstances.

Rules Governing Termination of RSS

a) a fundamental change (FC) must have occurred with respect to circumstances existing at the time of the conclusion of the treaty;
b) the existence of those circumstances constituted the basis of the consent of the parties to be bound by the treaty; *and*
c) the change has radically transformed the extent of the obligations still to be performed under the treaty.

When FC cannot be invoked

a) if the treaty establishes a boundary
b) if the FC is the result of the breach by the party invoking it of an obligation owed to any other party to the treaty.

SANTOS V. NORTHWEST AIRLINES (1992)

Obviously, rejection of the treaty, whether on the ground of *rebus sic stantibus* or pursuant to Article 39, is NOT a function of the courts but of the other branches of

government. This is a political act. The conclusion and renunciation of treaties is the prerogative of the political departments and may not be usurped by the judiciary. The courts are concerned only with the interpretation and application of laws and treaties in force and not with their wisdom or efficacy.

PNCC V. CA (1997)

The principle of *rebus sic stantibus* neither fits in with the facts of the case. Under this theory, the parties stipulate in the light of certain prevailing conditions, and once these conditions cease to exist, the contract also ceases to exist. This theory is said to be the basis of Article 1267 of the Civil Code, which provides:

"ART. 1267. When the service has become so difficult as to be manifestly beyond the contemplation of the parties, the obligor may also be released therefrom, in whole or in part."

This article, which enunciates the doctrine of unforeseen events, is NOT, however, an absolute application of the principle of rebus sic stantibus, which would endanger the security of contractual relations. The parties to the contract must be presumed to have assumed the risks of unfavorable developments. It is therefore only in absolutely exceptional changes of circumstances that equity demands assistance for the debtor

EFFECT OF TERRITORIAL CHANGES
(1978 CONVENTION ON SUCCESSION OF STATES IN RESPECT TO TREATIES)

Dispositive Treaties
These are treaties which deal with rights over territory and are deemed to *run with the land* and are not affected by changes of sovereignty. e.g. treaties dealing with boundaries between States.

▪ When an existing State acquires a territory, it does not succeed to the predecessor State's treaties, but its own treaties becomes applicable to the newly acquired territory.

New States Formed Through Decolonization
a) a new State is under NO obligation to succeed to the old State as a party to a multilateral treaty, but if it wants to do so, it has to notify the depository that it regards itself as a succeeding party to the treaty.
b) a new State can be a party to an existing treaty between the predecessor State and another State only if the other State and the new State both agree. Such, however, may be implied from the conduct of both States.

New States Formed Through Secession or Disintegration
Succeeds AUTOMATICALLY to most of the predecessor's treaties applicable to the territory that has seceded or disintegrated.

☀ "**Clean Slate" Doctrine** – Under this doctrine, seceding or disintegrating States DOES NOT make succession to an existing treaty automatic.

Interpretation of Treaties

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*. There are, however, NO TECHNICAL RULES.

CANONS OF INTERPRETATION

Generally regarded by publicists as applicable to treaties consist largely of the application of principles of *logic, equity and common sense* to the text for the purpose of discovering its meaning.

TRAVAUX PREPARATOIRES

Preparatory works as a method of historical interpretation of a treaty. These works are examined for the purpose of ascertaining the intention of the parties.

★ The interpretation of one State, even according to its municipal laws and given by its authorized organs within the State, is NOT BINDING to the other party unless the latter accepts it.

★ No interpretation is needed when the text is clear and unambiguous.

★ A treaty may be authoritatively interpreted:
   a) by interpretation given by the treaty itself
   b) by mutual agreement or
   c) through international court arbitration

TERMINATION OF TREATIES

Most Common Causes:

a) Termination of the treaty or withdrawal of a party in accordance with the terms of the treaty;
b) In bipartite treaties, the extinction of one of the parties terminates the treaty. Moreover, when the rights and

obligations under the treaty would not devolve upon the State that may succeed to the extinct State.

c) Mutual agreement of ALL the parties;

d) Denunciation of the treaty by one of the parties. **RIGHT OF DENUNCIATION** – the right to give notice of termination or withdrawal which must be exercised if provided for in the treaty itself or impliedly;

e) Supervening impossibility of performance;

f) Conclusion of a subsequent inconsistent treaty between the same parties;

g) Violation of the treaty;

h) Doctrine of RSS;

i) War between the parties – war does not abrogate *ipso facto* all treaties between the belligerents.

j) Severance of diplomatic or consular relations;

k) Emergence of a new peremptory norm contrary to the existing treaty.

l) Voidance of the treaty because of defects in its conclusion or incompatibility with international law or the UN Charter.

B. STATE RESPONSIBILITY FOR INJURY TO ALIENS

Rule: NO State is under obligation to admit aliens. This flows from sovereignty.

Exception: If there is a treaty stipulation imposing that duty.

★ State may subject admission of aliens to certain legal conditions. *e.g.* quota system

★ State may expel aliens within its territory. Expulsion may be predicated on the ground that the presence of the alien in the territory will menace the security of the State.

★ This is subject to the “Non-Refoulement Principle.”

Reconduction

It means the forcible conveying of aliens. As a State cannot refuse to receive such of its subjects as are expelled from abroad, the home State of such aliens as are reconducted has the obligation to receive them.

Position of Aliens After Reception

When aliens are received, they are subject to the municipal laws of the receiving State.

a) Transient -
b) Domiciled/Residents – domicile creates a sort of qualified or temporary allegiance. Subjected to restrictions not usually imposed against transient aliens.

★ **Limitations** - aliens' rights are not at par with citizens' as regards political or civil rights.

★ **Bases of Grant of Rights**

a) Principle of Reciprocity
b) MFN treatment
c) Nationality treatment – equality between nationals and aliens in certain matters.
d) 1948 UDHR and other treaties

DOCTRINE OF STATE RESPONSIBILITY

A State is under obligation to make reparation to another State for the failure to fulfill its primary obligation to afford, in accordance with international law, the proper protection due to an alien who is a national of the latter State.

Rule: A State is responsible for the maintenance of law and order within its territory.
Exception: If the injury is not directly attributable to the receiving State and when it was proximately caused by the alien himself.

★ When acts of violence occur therein, it may be said that the State is indirectly responsible; on the other hand, the State cannot be regarded as an absolute insurer of the morality and behavior of all persons within its jurisdiction.

Q: Is the State liable for death and injury to aliens?
A: NO, unless it participates directly or is remiss or negligent in taking measures to prevent injury, investigate the case, punish the guilty, or to enable the victim or his heirs to pursue civil remedies.

Function
To provide, in the general world interest, adequate protection for the stranger, to the end that travel, trade and intercourse may be facilitated.

Essential Elements:
1) an act or omission in violation of international law
2) which is imputable to the State
3) which results in injury to the claimant either directly or indirectly through damage to a national.

Acts or Omissions Imputable to the State
It is necessary to distinguish acts of private individuals and those of government officials and organs.

Denial of Justice
This term has been restrictively construed as an injury committed by a court of justice. There is denial of justice when there is:

a) unwarranted delay, obstruction or denial of access of courts;
b) gross deficiency in the administration of judicial or remedial process;

c) failure to provide those guarantees usually considered indispensable to the proper administration of justice; or
d) a manifestly unjust judgment.

Why is there no denial of justice unless misconduct is *extremely gross?* – The reason is that the independence of the courts is an accepted canon of democratic government, and the law does not lightly hold a State responsible for error committed by the courts.

Minimum International Standard (MIS)
NO PRECISE DEFINITION
The treatment of an 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 governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. NEER'S CASE, US-MEXICAN CLAIMS COMMISSION

Expropriation of Foreign-Owned Property
Western countries maintain that MIS requires:
a) expropriation must be for a public purpose;
b) it must be accompanied by payment of compensation for the full value of the property that is prompt, adequate and effective.

★ Communist countries, however, maintain that States may expropriate the means of production, distribution and exchange without paying compensation.

★ Developing countries, hoping to attract foreign investments, are inclined to accept Western view.

CONDITIONS FOR ENFORCEMENT OF CLAIMS
1) nationality claim
2) exhaustion of local remedies

3) no waiver
4) no reasonable delay in filing the claim
5) no improper behavior by injured alien

Nationality of claim
In asserting the claims of its nationals, by resorting to diplomatic actions on his behalf, the State is in reality asserting its own right. It is the bond of nationality between the state and the individual which confers upon the State the right of diplomatic protection.

Doctrine of Genuine Link
The bond of nationality must be real and effective in order that a State may claim a person as its national for the purpose of affording him diplomatic protection. NOTTEBOHN CASE 1955 ICJ *

Doctrine of Effective Nationality
When a person who has more than one nationality is within a third State, he shall be treated as if had only one – either the nationality of the country which he is habitually and principally a resident or the nationality of the country with which in the circumstances he appears to be most closely connected – without prejudice to the application of its (3rd State's) law in matters of personal status and of any convention in force. ART. 5, HAGUE CONVENTION OF 1903. *

☀ *These two doctrines are used interchangeably by authors and commentators without any effort to make a distinction between the two. It may be treated alike.*

Q: What is the "doctrine of effective nationality" (genuine link doctrine)?
Held: This principle is expressed in Article 5 of the Hague Convention of 1930 on the Conflict of Nationality Laws as follows:

Art. 5. Within a third State a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any convention in force, a third State shall, of the nationalities which any such person possesses, recognize exclusively in its territory either the nationality of the country in which he is habitually and principally resident or the nationality of the country with which in the circumstances he appears to be in fact most closely connected. (Frivaldo v. COMELEC, 174 SCRA 245, June 23, 1989)

Non-Refoulement Principle

Non-refoulement is a principle in international law, specifically refugee law, that concerns the protection of refugees from being returned to places where their lives or freedoms could be threatened. Unlike political asylum, which applies to those who can prove a well-grounded fear of persecution based on membership in a social group or class of persons, non-refoulement refers to the generic repatriation of people, generally refugees into war zones and other disaster areas.

An example of the non-refoulement principle can be found in the 2007 issue of Israel jailing 320 refugees from the Darfur conflict in Western Sudan. Due to laws erected for the protection of Israel from the anti-Semitic atmosphere in the region, refugees fleeing to Israel in avoidance of the Darfur conflict were jailed in the interest of national security. After some 200 were determined to not be a threat, usual repatriation guidelines could not be followed in part due to non-refoulement principles. Many of them were released to Israeli collective farms called *kibbutzim* and *moshavim* to work until the conflict subsides enough for their return. (Source: Wikipedia)

FRIVALDO v. COMELEC
174 SCRA 245, 23 June 1989

The Nottobohm Case is not relevant in the petition before us because it dealt with a conflict between the nationality laws of two states as decided by a third State. No third State is involved in the case at bar, in fact, even the US is not claiming Frivaldo as its national. The sole question presented to us is WON Frivaldo is a citizen of the Philipines under our own laws, regardless of other nationality laws. We can decide this question alone as sovereign of our own territory, conformable the Sec. 1 of the Hague Convention (1903) which provides: "***it is for each State to determine under its laws who are its nationals."***

3 Modes of Acquiring Nationality

1) Birth
   a. *jus sanguinis* (by blood)
   b. *jus soli* (by place)

2) Naturalization
   a. naturalization proceedings
   b. marriage
   c. legitimation
   d. option
   e. acquisition of domicile
   f. appointment as government official

3) Resumption or Repatriation – recovery of the original nationality upon fulfillment of certain conditions.

5 Modes of Losing Nationality

1) Release
2) Deprivation
3) Expiration
4) Renunciation
5) Substitution

§1, AIV, 1987 Phil. Constitution

The following are citizens of the Philippines:

1) Those who are citizens of the Philippines at the time of the adoption of the Constitution;
2) Those whose fathers or mothers are citizens of the Philippines;
3) Those who elect Philippine citizenship pursuant to the provisions of the Constitution of 1935;
4) Those who are naturalized in accordance with law.

Exhaustion of Local Remedies

Rule: The alien himself must have first exhausted the remedies provided by the municipal law, if there be any.

Exceptions:

a) When the injury is inflicted directly by the State such as when its diplomats are attacked.
b) When there are no remedies to exhaust;
c) The application for remedies would result in no redress.

No waiver

The claim belongs to the State and not to the individual. Thus, waiver of individual does not preclude the State to pursue the claim.

CALVO CLAUSE

Named after an Argentinean lawyer and statesman who invented it stipulating that the alien agrees in advance not to seek diplomatic intervention.

- ☀ disregarded by international arbitral tribunals because the alien cannot waive a claim that does not belong to him but to his government.

Q: Is the Calvo clause lawful?

A: Insofar as it requires alien to exhaust the remedies available in the local state, it may be enforced as a lawful stipulation. However, it may not be interpreted to deprive the alien's state of the right to protect or vindicate his interests in case they are injured by local state.

No improper behavior by injured alien.
He who comes to court for redress must come with clean hands.

Methods of Pressing Claims
1) Diplomatic Intervention
2) International judicial settlement – The ICJ is authorized to assume jurisdiction to determine "the nature or extent of the reparation to be made for the breach of an international obligation," but only after the State-parties agree thereto.

What is the International standard of justice?
It is defined as the standard of the reasonable state and calls for compliance with the ordinary norms of official conduct observed in civilized jurisdictions. It may refer to the intrinsic validity of the laws passed by the state or to

the manner in which such laws are administered and enforced.

For example, a law imposing death penalty for a petty theft would fall short of the international standard. So to would one calling for the arbitrary punishment of accused persons without compliance with the usual requisites of due process.

Nature and Measure of Damages
Reparation may consist of restitution:

a) in kind
b) specific performance
c) apology
d) punishment of the guilty
e) pecuniary compensation
f) or the combination of the above

Measure – estimate of the loss caused to the injured individual, or, if he has lost his life, on the loss caused by the death to his dependents.

Q: What is the principle of attribution? (1992 Bar)
A: The acts of private citizens or groups cannot themselves constitute a violation by the Philippines if said acts cannot be legally attributed to the *Philippines as a State*.

Q: In a raid conducted by rebels in a Cambodian town, an American businessman who has been a long-time resident of the place was caught by the rebels and robbed of his cash and other valuable personal belongings. Within minutes two truckloads of government troops arrived prompting the rebels to withdraw. Government troopers immediately launched pursuit operations and killed several rebels. No cash or other valuable property taken from the American businessman was recovered.

In an action for indemnity filed by the US Government in behalf of the businessman for injuries and losses in cash and property, the Cambodian Government contended that under International Law it was not responsible for acts of the rebels.

1. Is the contention of the Cambodian Government correct? Explain.
2. Suppose the rebellion is successful and a new government gained control of the entire State, replacing the lawful Government that was toppled, may the new government be held responsible for the injuries or losses suffered by the American businessman? Explain. (1995 Bar)

A: 1. YES. Unless it clearly appears that the Cambodian government has failed to use promptly and with appropriate force its constituted authority, it can not be held responsible for the acts of the rebels for the rebels are not their agents and their acts were done without its volition. In this case, the government troopers immediately pursued the rebels and killed several of them.

2. YES. Victorious rebel movements are responsible for the illegal acts of their forces n the course of the rebellion. The acts of the rebels are imputable to them when they assume as duly constituted authorities of the State.

Pacific Settlement of International Disputes

Nature
International Dispute Defined
Optional Clause
Types

1. Negotiation
2. Good Offices
3. Mediation
4. Enquiry
5. Conciliation
6. Arbitration
7. Judicial Settlement

—ooo—

Nature

It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or arbitration, or to any other kind of pacific settlement (PS). (PCIJ on *STATUS OF EASTERN CARELIA.)*

Dispute – is a *disagreement* on a point of law or fact, a conflict of legal views or interests between two persons. The mere denial of the existence of a dispute does not prove its non-existence because disputes are matters for *objective determination*.

International Dispute – if the dispute arises between two or more States.

- The charging of one State and the denial of another of the dispute as charged, creates an international dispute as “there has thus arisen a situation in which the two sides hold clearly *opposite views* concerning the questions of the performance or non-performance of

their treaty obligations. Confronted with such a situation, the Court must conclude that international disputes have arisen." **ICJ Reports 1950**

Legal Dispute – the following are deemed constitutive of a legal dispute:

i. interpretation of a treaty;
ii. any question of international law;
iii. the existence of any fact which, if established, would constitute a breach of an international obligation;
iv. the nature or extent of the reparation to be made for the breach of an international obligation.

Dispute v. Situation

A ***dispute*** can properly be considered as a *disagreement* on a matter at issue between two or more States which has reached a stage at which the parties have formulated claims and counterclaims sufficiently definite to be passed upon by a court or other body set up for the purpose of pacific settlement. A ***situation,*** by contrast, is *a state of affairs* which has not yet assumed the nature of conflict between the parties but which may, though not necessarily, come to have that character.

Optional Clause

[OPTIONAL JURISDICTION CLAUSE**]**

The following are deemed legal disputes:

1. Interpretation of a treaty;
2. Any question of international law;
3. The existence of any fact which, if established, would constitute a breach of an international obligation; *and*
4. The nature or extent of the reparation to be made for the breach of an international obligation.

TYPES OF Pacific Settlement

I. Negotiation

The legal and orderly administrative process by which governments, in the exercise of their unquestionable

powers, conduct their relations with one another and discuss, adjust and settle their differences.
The chief and most common method of settling international disputes. By this method, the parties seek a solution of their differences by direct exchange of views between themselves. This is the very essence of diplomacy.

II. Good Offices

An attempt of a third party to bring together the disputing States to effect a settlement of their disputes. This is NOT to be regarded as an unfriendly act.

Tender of good office

A tender of good office may be made by:

a) Third State
b) international organs such as the UN; or
c) Individuals or eminent citizens of a third State.

III. Mediation

This is the action of a third party in bringing the parties to a dispute together and helping them in a more or less informal way to find a basis for the settlement of their dispute.

Mediation v. Good Offices

In good offices, once the parties have been brought together, the third party tendering good offices has no further functions to perform. In mediation, on the other hand, the third party mediates and is the more active one, for he proposes solution, offers his advice and in general attempts to conciliate differences.

IV. Enquiry

Enquiry is the establishment of the facts involved in a dispute and the clarification of the issues in order that their elucidation might contribute to its settlement.

▪ *Basis* – it rests on the theory that certain disputes could be settled if the facts of the case were established.

▪ *Object of Enquiry* - to ascertain the facts underlying a dispute and thereby prepare the way for a negotiated adjustment or settlement of the dispute.

V. Conciliation

This is the process of settling disputes by referring them to commissions or other international bodies, usually consisting of persons designated by agreement between the parties to the conflict, whose task is to elucidate the facts and make a report containing proposals, for a settlement, which, however, have no binding character. OPPENHEIM

▪ *Conciliation v. Enquiry* – in enquiry, the main object is to establish the facts. In conciliation, the main object is not only to elucidate the facts but to bring the parties to an agreement.

VI. Arbitration

This is a procedure for the settlement of disputes between States by a binding award on the basis of law and as the result of an undertaking voluntarily accepted.

☀ *Principle of Free Determination* – this principle applies to the competence of the arbitral tribunal, the law to be applied and the procedure to be followed.

☀ *Choice of Arbitrators* – the arbitrators should be either freely selected by the parties or, at least, the parties should have been given the opportunity of a free choice of arbitrators.

- States are under no legal obligation to arbitrate their disputes.

- ***compromis d' arbitrage*** – the agreement to arbitrate. It is the charter of the arbitral tribunal. Contains the following:
  a) the questions to be settled;
  b) the method of selecting arbitrators and their number;
  c) venue;
  d) expenses;
  e) the arbitral award;
  f) rules of procedure; and
  g) the law to be applied.

VII. Judicial Settlement

This means settlement by a *permanent* international court of justice, in accordance with judicial methods. Arbitration proceedings may be similar to the functions and process of judicial settlement but the arbitral tribunal is NOT a permanent body as compared to the body referred to in this type of PS.

Forcible Measures Short of War

Severance of Diplomatic Relations
Retorsion
Reprisals
Embargo
Boycott
Non-intercourse
Pacific Blockade
Collective Measures under the Charter

—ooo—

I. Severance of Diplomatic Relations

Severance may take place:

a) to mark severe disapproval of a State's conduct;
b) to influence the offending State to remedy the consequences of some unfriendly or illegal act;
c) to serve notice on the other State that the issue between them has reached a point where normal diplomatic intercourse is no longer possible and that sterner measures might possibly follow.

Suspension of Relations– has been used to denote a less drastic step than complete severance of diplomatic ties. It involves withdrawal of diplomatic representation, but not the severance of consular relations.

No breach in int'l. law – there exists no obligation to maintain diplomatic intercourse with other States, thus, severance of an existing relation does not tantamount to breach of international law.

II. Retorsion

Consists of an unfriendly, but not international illegal act of one State against another in retaliation for the latter's

unfriendly or inequitable conduct. It does not involve the use of force.

States resorting to retorsion retaliate by acts of the same or similar kind as those complained of. It is resorted to by States usually in cases of unfair treatment of their citizens abroad.

III. Reprisals

Any kind of forcible or coercive measures whereby one State seeks to exercise a deterrent effect or to obtain redress or satisfaction, directly or indirectly, for the consequences of the illegal acts of another State, which has refused to make amends for such illegal conduct.

Criteria for Legitimacy

a) that the State against which reprisals are taken must have been guilty of a breach of international law;
b) that prior to recourse to reprisals an adequate attempt must have been made, without success, to obtain redress from the delinquents State for the consequences of its illegal conduct; *and*
c) That acts of reprisals must not be excessive.

2 Kinds of Reprisals:

a) *Reprisal as a form of self-help* – is resorted to for the purpose of settling a dispute or redressing a grievance without going to war, consequently no state of war exists between the State resorting to reprisals and the State against whom such acts are directed.

b) *Reprisal taken by belligerents in the course of war* – the purpose of the latter kind of reprisals is to compel a belligerent to observe or desist from violating the laws of warfare; it presupposes, therefore, the existence of a state of war between the parties concerned.

c)

Reprisals	Retorsion
Consists of acts which would ordinarily be illegal.	Consists of retaliatory conduct which is legitimate or is not in violation of international law.
Generally resorted to by a State in consequence of an act or omission of another State which under international law constitutes an international delinquency.	Acts which give rise to retorsion though obnoxious do not amount to an international delinquency.

Forms of Reprisals

a) military occupation
b) display of force
c) naval bombardment
d) seizure of ships at sea
e) seizure of properties of nationals of the delinquent State
f) freezing of assets of its citizens
g) embargo
h) boycott
i) pacific blockade

Letters Of Marque or Special Reprisals

Act of a State granting their subjects who could not obtain redress for injury suffered abroad, authorizing them to perform acts of self-help against the offending State or its nationals for the purpose of obtaining satisfaction for the wrong sustained.

IV. Embargo (Sequestration / Hostile Embargo)
This is originally a form of reprisal consisting of *forcible detention of the vessels* of the offending State or of its nationals which happened to be lying in the ports of the injured or aggrieved State. Later, the practice was extended to such vessels also as were seized in the high seas, or even within the territorial waters of the offending State.

- ☀ Vessels sequestered are not considered condemned or confiscated, but must be returned when the delinquent State makes the necessary reparation.

Civic or Pacific Embargo
A form of embargo employed by a State to its own vessels within its national domain or of resources which otherwise might find their way into foreign territory.

Collective Embargo
Embargo by a group of States directed against an offending State. This may be:
a) collective embargo on import or export of narcotic drugs
b) collective embargo by way of enforcement action under the UN Charter

V. Boycott
A comparatively modern form of reprisal which consists of a *concerted suspension of trade and business relations* with the nationals of the offending State.

VI. Non-intercourse
Consists of suspension of ALL commercial intercourse with a State. A complete or partial interruption of economic relations with the offending State as a form of enforcement measure.

VII. Pacific Blockade

A naval operation carried out in time of peace whereby a State prevents access to or exit from particular ports or portions of the coast of another State for the purpose of compelling the latter to yield to certain demands made upon it by the blockading State.

☀ Third States do not acquire the status of neutrals because there is no belligerency between the blockader and the State.

Quarantine [See movie "Thirteen Days"]
The right to stop and search vessels of third States suspected of carrying specified cargo to the "quarantined" State has been asserted by the blockading State. THE CUBAN QUARANTINE.

☀ Blockade may no longer be resorted to by States Members as a measure of self-help. It may only be used collectively by or on behalf of the UN as an enforcement action under Article 41 of the UN Charter.

VIII. Collective Measures under the Charter

A system of peace enforcement under the UN Charter. It envisages the employment, if necessary, of compulsive measures to maintain or restore peace. These measures may or may not involve the use of armed forces.

The enforcement provisions of the Charter are brought into play only in the event that the SC determines, under Article 39, that there exists a "threat to peace, a breach of the peace, or an act of aggression."

Article 41, UN Charter

The SC may decide what measures not involving the use of armed forces are to be employed to give effect to its decisions, and it may call upon the Members of the UN to apply such measures. These may include complete or partial interruption of:

a) economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication; *and*
b) severance to the diplomatic relations.

Article 42, UN Charter

Should the SC consider that measures provided for in Article 41 would be *inadequate* or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include:

a) demonstrations
b) blockade and
c) other operations by air, sea, or land forces of Members of the UN.

The Laws of War

Definition of War
Legality of War
Rules of Warfare
Sanctions of the Laws of War
Commencement and Termination of War
Effects of Outbreak of War
Conduct of Warfare

—ooo—

War *INGRID DETTER DE LUPIS*
A sustained struggle by armed forces of a certain intensity between groups of certain size, consisting of individuals who are armed, who wear distinctive insignia and who are subjected to military discipline under responsible command.

Legality of War under UN
The use of armed force is allowed under the UN Charter only in case of individual or collective self-defense, or in pursuance of a decision or recommendation of the SC to take forcible action against an aggressor.

As Self-Defense – the use of force in self-defense is permitted only while the SC has not taken the necessary measures to maintain or restore international peace and security.

★ The laws of war are not applicable to war alone in its technical sense, but to all armed conflicts.

Nature of Enforcement Action under UN
UN Forces must behave in a manner consistent with the purposes and ideals of the Organization and must obey

the rules of war which represent a general international attempt to humanize armed conflict.

Temperamenta of Warfare
Grotius advocated moderation in the conduct of hostilities for reasons of humanity, religion and farsighted policy.

Rules of War Obsolete
The radical change in the character of war, both in scope and method, has rendered many of the traditional rules of warfare obsolete, or at any rate frightfully inadequate.

Sanctions of the laws of war
Observance of the rules of warfare by belligerents is secured through several means recognized by international law:

1) reprisals
2) punishment of war crimes committed by enemy soldiers and other enemy subjects
3) protest lodged with the neutral powers
4) compensation

☀ The taking of hostages, formerly considered a legitimate means of enforcing observance of the laws of war, is no longer permitted at present time.

International Humanitarian Law (IHL)
These are the laws of armed conflict. It used to be called the laws of war.

It regulates the conduct of actual conflict (jus in bello) as distinguished from laws providing for the instances of the lawful resort to force (jus ad bellum).

It is a functional and utilitarian body of laws, not just humanitarian.

It is part of International Criminal Law and deals with breaches of international rules on the laws of armed conflict entailing the personal liability of the individuals concerned, as opposed to the responsibility of the State

which is covered by Public International Law proper. (*IHL: A Field Guide to the Basics, The 2007 Metrobank Lecture on International Law, 22 Nov. 2007 by Associate Justice Adolfo S. Azcuna*)

COMMENCEMENT

☀ It was customary to notify an intended war by letters of defiance, herald, or preliminary warning by declaration or ultimatum.

☀ 1907 2nd Hague Conference – The contracting States recognized that hostilities between them ought not to commence without *previous and unequivocal warning* which might take the form of either:

a) a declaration of war giving reasons;
b) an ultimatum with a conditional declaration of war.

animo belligerendi

From the point of view of international law, war commences upon the commission of an act of force by one party done in *animo belligerendi*. War

Anglo-American Rule

Bound by a statement by the executive as to when a state of war is commenced.

Q: What are some kinds of non-hostile intercourse between the belligerents?

A: Among the kinds of non-hostile intercourse are flags of truce, cartels, passports, safe-conduct, safeguards and license to trade.

Q: By what agreements may hostilities be suspended between the belligerents?

A: Hostilities may be superceded by a suspension of arms, an armistice, a cease-fire, a truce, or a capitulation.

Suspension of Arms
It is the temporary cessation of hostilities by agreement of the local commanders for such purposes as the gathering of the wounded and the burial of the dead.

ARMISTICE
It is the suspension of all hostilities within a certain area (local) or in the entire region of the war (general) agreed upon by the belligerent governments, usually for the purpose of arranging terms of peace.

CEASEFIRE
It is the unconditioned stoppage of hostilities by order of an international body like the Security Council for the purpose of employing peaceful means of settling the conflict.

TRUCE
Sometimes use interchangeably with armistice, but is now understood to refer to a ceasefire with conditions attached.

CAPITULATION
It is the surrender of military troops, forts or districts in accordance with the rules of military honor.

TERMINATION

a) by simple cessation of hostilities, without the conclusion of a formal treaty of peace – since no formal treaty of peace is concluded, the problems concerning ownership of property which have changed hands during the course of the war are generally settled by the application of the rule of *uti possidetis.*

b) by a treaty of peace – this is the usual method of terminating war. It may be a negotiated peace treaty. Or a peace treaty thru a *dictated treaty.*

c) by unilateral declaration – if the war results in the complete defeat or unconditional surrender of a belligerent the formal end of the war depends on the decision of the victor.

uti possidetis
Each belligerent is regarded as legally entitled to such property as are actually in its possession at the time hostilities ceased.

status quo ante bellum
Each of the belligerents is entitled to the territory and property which it HAD possession of at the commencement of the war.

Dictated Treaty
This happens where the decisive victory of one of the belligerents leads it to impose its will on the other. Imposed by the victor.

End of War NAVARRO VS. BARREDO
Termination of war when used in private contracts refers to the formal proclamation of peace by the US and not the cessation of hostilities between RP and Japan during the WWII.

Q: What is the meaning or concept of uti possidetis? (1977 Bar)
A: The problem concerning ownership of property which have changed hands during the course of the war are generally settled by the application of the rule of *uti possidetis*, by which each belligerent is regarded as legally entitled to such property as are actually in its possession at the time hostilities ceased.

Postliminium (See movie: “The Gladiator”)
A term borrowed from Roman Law concept which meant that persons or properties captured or seized and taken beyond (post) the boundary (limen) could be enslaved or

appropriated, but upon return they recovered their former status.

Modern Practice
To denote the doctrine that territory, individuals and property, after having come under the authority of the enemy, revert to the authority of the original sovereign *ipso facto* upon retaking possession.

Legitimate Acts of Military Occupant
Postliminium has no effects upon the acts of a military occupant during the occupation which under international law it is competent to perform *e.g.* collection of ordinary taxes. However, appropriation of property is not allowed to be performed by the military occupant, hence, the ownership of the property reverts back after the military occupancy without payment of compensation.

Q: When is the principle of postliminium applied? (1979 Bar)
A: Where the territory of one belligerent state is occupied by the enemy during war, the legitimate government is ousted from authority. When the belligerent occupation ceases to be effective, the authority of the legitimate government is automatically restored, together with all its laws, by virtue of the *jus postliminium.*

EFFECTS OF WAR OUTBREAK

1. Rupture of diplomatic relations and termination of consular activities
2. On enemy persons
3. On enemy properties
4. On trading and intercourse
5. On contracts
6. On treaties

Rupture of diplomatic relations / termination of consular activities

The respective diplomatic envoys are allowed to leave for their home countries. War also brings about the cessation of consular activity. The official residence of the envoy, the archives of the mission, and consular archives are usually left under the protection of another foreign envoy or consul of another State.

On enemy persons

International law leaves each belligerent free, within wide limits, to designate the persons whom it will treat as having enemy character.

Determination of enemy character

a) *territorial test* – enemy character depends on the residence or domicile of the person concerned

b) *nationality test* – this is the preferred continental practice. The subjects of the belligerent are deemed enemy persons regardless of where they are.

c) *activities test* – whether national or not, resident or not. Thus, subjects of a neutral State may be treated as enemies because of certain activities where they participate.

d) *territorial or commercial domicile test* – in matters pertaining to economic warfare.

e) *controlling interest test* – this is the test as to corporations in addition to the *place of incorporation test*. A corporation is regarded as enemy person if it:
   1) is incorporated in an enemy teriroty; *or*
   2) is controlled by individuals bearing enemy character.

Rules for interment of enemy aliens

(1) to provide for the internees' safety and welfare;
(2) to furnish adequate food and clothing
(3) to provide family accommodations with due privacy and facilities;
(4) to provide facilities for religious, intellectual and physical activities;
(5) to permit the use of their personal properties and financial resources;
(6) to permit a degree of communication with the outside world;
(7) the refrain from excessive or inhuman penal and disciplinary measures;
(8) to make transfers only in a humane manner;
(9) to record and duly certify deaths, and to inquire into deaths other than from natural causes;
(10) to release internees when the reasons for internment cease or when hostilities terminate. 1949 GENEVA CONVENTION

Locus standi during occupation

The practice of states are varied. Some consider the enemy persons *ex lege* during the whole duration of the hostilities. Some allowed them to sue and be sued subject to so many exceptions. In the Philippines, when an enemy subject is unable to sue during war, a right of action which has accrued to him before the war is deemed suspended for the duration of the war. Further, war suspends the operation of the statute of limitations.

On enemy property

In general, goods belonging to enemy persons are considered enemy property.

- public – confiscated

- private – sequestered only and subject to return or reimbursement

On trading and intercourse

The practice of belligerents in modern wars of forbidding by legislation all intercourse with alien enemies, except as such as are permitted under license. The main object of such laws was to prohibit transactions which would benefit the enemy or enemy persons.

On contracts

International law leaves each belligerent free to regulate this matter by his own domestic law. In general, it may be stated that States treat as void contracts which may give aid to the enemy or add to his resources, or necessitate intercourse or communication with enemy persons.

On treaties

Modern view is that war does NOT *ipso facto* terminate all treaties between belligerents.

- ☀ Treaties may contain provisions to the effect that it will remain in force notwithstanding the existence of war.

- ☀ Treaties dealing with political matters, such as treaties of alliance, and with commercial relations are deemed abrogated by the outbreak of war between the parties thereto.

CONDUCT OF WARFARE

(See movie: “The Patriot”)

3 Basic Principles of IHL:

1. Military necessity
2. Humanity
3. Chivalry

Doctrine of Military Necessity

A belligerent is justified in resorting to all measures which are indispensable to bring about the complete

submission of the enemy, as soon as possible, by means of regulated violence not forbidden by conventional or customary rules of war and with the least possible loss of lives, time and money.

Principle of Humanity
[THE ETHICS OF WARFARE]
Forbid the use of weapons which cause indiscriminate destruction or injury or inflict unnecessary pain or suffering.

Principle of Chivalry
This principle requires the belligerents to give proper warning before launching a bombardment or prohibit the use of perfidy in the conduct of hostilities. This principle does not prohibit *espionage.*

Q: Who constitute combatants?
A: They are the following:

1) **Regular Forces (RF)**– the army, navy, and air force. Non-combatant members of the armed forces include: chaplains, army services and medical personnel.

2) **Irregular Forces (IF)** – also known as ***franc*-tireurs** consist of militia and voluntary corps. They are treated as lawful combatants provided that:

a) they are commanded by a person responsible for his subordinates;
b) they wear a fixed distinctive sign recognizable for his subordinates;
c) they carry arms openly; *and*
d) they conduct their operations in accordance with the laws and customs of war.

Guerilla warfare – considered as IF.

Hostilities conducted by armed bodies of men who do not form part of an organized army.

3) Non-privileged Combatants (NPC) – individuals who take up arms or commit hostile acts against the enemy without belonging to the armed forces or forming part of the irregular forces. If captured, they are not entitled to the status of prisoners of war.

Mercenaries – considered as NPC
Those who, having been *recruited* in another country, from military forces for "personal gain," are not covered by protection.

Spies – A soldier employing false pretenses or acts through clandestine means to gather information from the enemy. A soldier not wearing uniform during hostilities runs the risk of being treated as a spy and not entitled to prisoner of war status. When caught, they are not to be regarded as prisoners of war. Military Scouts are not spies.

4) Levee en masse
Takes place when the population spontaneously rises in mass to resist the invader. They enjoy privileges due to armed forces.

NOTE: *Only RF, IF and Levee may be treated as prisoners of war under Protocol I of 1977. See this reviewer's section on POW.*

Restrictions on weapons
Prohibited weapons:
1) explosive bullets
2) use of dum-dum bullets
3) employment of projectiles whose only object is diffusion of asphyxiating, poisonous, or other gases, and all analogous liquids, materials or devices

4) the use of bacteriological methods of warfare.
5) The laying of “contact” mines
6) Explosives from balloons

3 Protocols on Restrictions

Protocol I on Fragmentation Weapons
Protocol II on Treacherous Weapons
Protocol III on Incendiary Weapons

Other Questionable weapons

1) Fuel explosive weapons that kill by air shock waves
2) Flame blast munitions that combine fuel air explosive effect with radiation in chemical fireball munitions;
3) Laser weapons which cause burns and blindness
4) Infrasound devices that cause damage to the central nervous system.

LIMITATION ON TARGETS OF ATTACK

Only military targets are subject to attack by the armed forces of a belligerent as a basic rule of warfare. Likewise, certain places and objectives are not subject to attack, such as:

1) **Neutralized areas or zones** – these are zones in the theater of operations established by special agreement between the belligerents for treatment of the wounded and civilians.
   EX: *Aland Islands, the Spitzbergen, the Magellan Straits, the Suez Canal and Panama Canal.*

2) **Open towns** – also known as “non defended locality.” A place free of combatants.

3) **Cultural property and places of worship**

4) **Civil defense** – includes personnel, buildings and assets, clearly indicated by a *blue triangle on an orange* background distinctive sign.

5) **Dangerous installations** – dams, dikes, or nuclear electric plants.

6) **Civilians and persons *hors de combat* –** persons *hors de combat* are those who are either wounded or, for other reasons, have permanently joined the civilian population.

7) **Parachutists** – those who bail out from *aircrafts in distress*. Must only be treated as POW.

8) **Hospitals, hospital ships and medical units** – a clear marking or a Red Cross to show their status**.**

9) **Food supplies and crops**

FORBIDDEN METHODS

No Quarter – such orders implying that *no survivors* are to be left after an attack.

Starvation

Reprisals – are not reprisals as a form of self-help, instead, belligerent reprisals are of a completely different type. These are acts of vengeance by a belligerent directed against groups of civilians or POWs in retaliation of or response to an attack by other civilians against the belligerent.

Perfidy on treachery – this includes:

a) Improper use of white flag
b) Feigning surrender or pretending to have been wounded or to have a civilian status
c) Using the uniform of the enemy
d) Claiming neutral status
e) Falsely flying the Red Cross flag

f) Making hospitals, churches and the like as shield from attack.
g) Area bombing

PRISONERS OF WAR (POW)

The following persons captured must be treated as POW:
1) members of the armed forces, as well as members of militias or volunteer corps forming part of such armed forces;
2) members of *other* militias or volunteer groups, including those of organized resistance movements, subject to compliance with certain conditions;
3) members of regular armed forces professing allegiance to a government or an authority not recognized by the capturing State;
4) various categories of persons accompanying an army unit, such as civilian members of military aircraft crew, war correspondents, etc., provided they are authorized to be with the army or unit;
5) members of the crew of merchant vessels and civilian aircraft who do not benefit by more favorable treatment under any other provisions of internal law;
6) members of the population of non-occupied territory who take up arms as a *levee en masse* against an invading army.

Q: What are the core crimes in IHL?
A: The core crimes in IHL are genocide, crimes against humanity, war crimes and aggression.

These core crimes are specified in the Statues of the ICC (or the Rome Statute for an ICC) which describes them as the most serious crimes of concern to the international community as a whole. These crimes are within the jurisdiction of the ICC.

NOTE: Although the Philippines has signed but not yet ratified the Rome Statute establishing the ICC, the ICC Statute's and definitions of the core crimes are authoritative statements for us since they are practically lifted from customary international law sources and from the Geneva Conventions of 1949 and other treaties to which we are parties. (*IHL: A Field Guide to the Basics, The 2007 Metrobank Lecture on International Law, 22 Nov. 2007 by Associate Justice Adolfo S. Azcuna*)

1949 Geneva Convention III

The rules of POW applies to prisoners of war who are captured in a properly declared war or any other kind of "armed conflict," even if any of the combatant powers do not recognize the existence of a state of war and even though these conflicts are "not of an international character."

Q: Is guerilla warfare recognized under International Law and may a captured guerilla demand treatment afforded a prisoner of war under the 1949 Geneva Convention? Explain.

A: Yes. Under Article 4 of the 1949 Geneva Convention on Prisoners of War, guerilla warfare, which consists in hostilities conducted in territory occupied by the enemy by armed bodies of men who do not form part of an organized army, is recognized. Guerillas are entitled to be treated as prisoners of war provided they fulfill the following conditions:

1) They are commanded by a person responsible for his subordinates;
2) They have a fixed distinctive emblem recognizable at a distance;
3) They carry arms openly; *and*
4) They conduct their operations in accordance with the laws and custom of war. **(1982 Bar)**

When POW should be returned

Upon cessation of war or hostilities. However, POWs facing criminal trial may be detained until the termination of the proceedings or punishment.

When is a Territory Deemed Under Military Occupation?

Territory is deemed to be occupied when it is placed as a matter of fact under the authority of the hostile army.

TAN SE CHIANG v. DIRECTOR OF POSTS

Belligerent occupation becomes an accomplished fact the moment the government of the invaded territory is rendered incapable of publicly exercising its authority and the invader is in a position to substitute and has substituted his own authority for that of the legitimate government of the occupied territory.

NOTE: Belligerent occupation is different from Military occupation.

Rights & Duties of a Belligerent Occupant

to continue orderly government
to exercise control over the occupied territory and its inhabitants.

NOTE: The belligerent occupant *cannot* compel the inhabitants to swear allegiance to him.

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His rights over the occupied territory are merely that of *administration*; hence he cannot, while the war continues, annex the territory or set it up as an independent State.

Q: Can the belligerent occupant impose and collect taxes or contributions?

A: YES. Under the Hague Regulations, the occupant is empowered to collect taxes, dues and tolls, as far as possible in accordance with "the rules of assessment and incidence in force," and he is bound to defray the "expenses of administration" out of the proceeds.

Contributions – are money impositions on the inhabitants over and above such taxes.

Conditions on levying taxes:

1) they must be for the needs of the army or local administration;
2) they can be imposed by written order of the Commander-in-Chief only, in contradistinction to requisitions which may be demanded by the Commander in a locality;
3) a receipt must be given to each contributor;
4) the levy must be made as far as possible, in accordance with the rules in existence and the assessment in force for taxes.

Neutrality

Neutrality Defined
Neutrality v. Neutralization
Rights and Duties of Neutrals and Belligerents
Passage of Belligerent Warships
Prohibition of Warlike Activities in Neutral Territory
Neutral Asylum to Land and Naval Forces of Belligerent
Right of Angary
Blockade
Contraband
Unneutral Service
Right of Visitation

Neutrality

An *attitude of impartiality* adopted by third States towards belligerents and recognized by the belligerents, such attitude creating rights and duties between the impartial States and the belligerents.

Neutrality vs. Neutralization (1988 Bar)

Neutrality	Neutralization
Obtains only during war	A condition that applies in peace and war
A status created under international law, by means of a stand on the part of a state not to side with any of the parties at war	A status created by means of a treaty
Brought about by a unilateral declaration by neutral state	Cannot be effected by unilateral act only but must be recognized by other states.

Q: Switzerland and Austria are outstanding examples of neutralized states. What are the characteristics of neutralized states? (1988 Bar)

A: Whether simple or composite, a state is said to be neutralized where its independence and integrity are guaranteed by an international convention on the condition that such state obligates itself never to take up arms against any other state, except for self-defense, or enter into such international obligations as would indirectly involve it in war. A state seeks neutralization where it is weak and does not wish to take an active part in international politics. The power that guarantees its neutralization may be motivated either by balance of power considerations or by desire to make the state a buffer between the territories of the great powers.

Rights and Duties of Neutrals & Belligerents
The nature of their rights are *correlative*, that is, a right of a neutral gives rise to a corresponding duty on the part of the belligerents, and a right of a belligerent corresponds to a duty of the neutral.

1) **duty of abstention (*negative*)** – should not give assistance, direct or indirect, to either belligerent in their war efforts.

2) **duty of prevention (*positive*)** – places the neutral State under obligation to prevent its territory from becoming a base for hostile operations by one belligerent against the other.

3) **duty of acquiescence (*passive*)** – requires a neutral to submit to acts of belligerents with respect to the commerce of its nationals if such acts are warranted under the law of nations.

PASSAGE OF BELLIGERENT WARSHIPS

A neutral State may allow passage of belligerent warships through the maritime belt forming part of its territorial waters. What is prohibited is the passage upon its national rivers or canals. The exception, however, are the canals which have become international waterways (such as the Suez Canal and the Panama Canal).

PROHIBITION OF WARLIKE ACTIVITIES IN NEUTRAL TERRITORY

The Hague Convention No. XIII provides that "belligerents are forbidden to use neutral ports and waters as base of naval operations against their adversaries." Thus, a neutral must prevent belligerent warships from cruising within its maritime belt *for the purpose of capturing enemy vessels as soon as they leave it*.

In the event that a neutral port or roadstead is used for repairs, the neutral state may allow it as long as such repairs are absolutely necessary to render them seaworthy, **not** repairs which would add in any way to their fighting force. Also, belligerent warships cannot take shelter in a neutral port for any undue length of time in order to evade capture. The maximum length of stay permissible is 24 hours, unless the neutral state has prescribed otherwise in their municipal laws or unless the nature of repairs to be done or the stress of weather would require a longer time.

Neutral ports may not become places of asylum or permanent rendezvous for belligerent prizes. The rule is that a prize may not be brought into a neutral port, except under certain circumstances.

NEUTRAL ASYLUM TO LAND AND NAVAL FORCES OF BELLIGERENT

POW's who escape into neutral territory or are brought into neutral territory by enemy troops who themselves take refuge there shall become free *ipso facto*, and the neutral State shall leave such prisoners at liberty, but if it allows them to remain in its territory, it may assign them a place of residence so as to prevent them from rejoining their forces.

As regards **fugitive soldiers**, the neutral State is not obliged to grant them asylum, although it is not forbidden to do so.

Belligerent aircraft and their personnel, if they are compelled to land in neutral territory, must be interned.

In case a belligerent men-of-war refuses to leave neutral port in which it is not entitled to remain, the neutral State concerned has the right to take such measures as it deems necessary to render the ship incapable of putting to sea for the duration of the war. When the belligerent ship is detained by a neutral State, the officers and crew are likewise interned, either in the ship itself or in another vessel or on land, and may be subjected to such restrictions as may be necessary.

RIGHT OF ANGARY

A right of a belligerent to *requisition and use*, subject to certain conditions, or even to destroy in case of necessity, neutral property found in its territory, in enemy territory or in the high seas.

3 Conditions

a. there must be an urgent need for the property in connection with the offensive or defensive war;
b. the property is within the territory or jurisdiction of the belligerent;

c. compensation must be paid to the owner.

NOTE: A neutral subject within the territory of a belligerent is not entitled to indemnity from either side against the loss of property occasioned by legitimate acts of war.

BLOCKADE
An operation of war carried out by belligerent seacraft or other means, for the purpose of preventing ingress and egress of vessels or aircraft of all nations to and from the enemy coast or any part thereof.

CONTRABAND
A term used to designate those goods which are susceptible of use in war and declared to be contraband by a belligerent, and which are found by that belligerent on its way to assist the war operations or war effort of the enemy. STONE

Requisites:
a) susceptible of use in war
b) destined for the use of a belligerent in its war effort.

Kinds of Contrabands
a) *absolute* – goods which by their very nature are intended to be used in war.
b) *conditional* – goods which by their nature are not destined exclusively for use in war, but which are nevertheless of great value to a belligerent in the prosecution of the war. *e.g.* foodstuff, clothing, fuel, horses, etc.

Hostile destination
In case of absolute contraband it is necessary only to prove that the goods had as their destination any point within enemy or enemy-controlled territory. In the case of conditional contraband, it is required that the goods be

destined to the authorities or armed forces of the enemy. In both, the destination as of *moment of seizure* is critical.

Doctrine of continuous voyage
Goods which are destined to a neutral port cannot be regarded as contraband of war.

Consequences of contraband carriage
Neutral States are not under obligation to prevent their subjects from carrying contraband to belligerents. However, Neutral States have the *duty to acquiesce* in the suppression by belligerents of trade in contraband.

Doctrine of Infection
Under the British and American practice, the penalty for carriage of contraband would be confiscation of the contraband cargo. Innocent cargo belonging to the same owner would also be subject to confiscation. Innocent cargo belonging to another owner would be released, but without compensation for delay and detention in the Prize Court.

Doctrine of Ultimate Consumption
Goods intended for civilian use which may ultimately find their way to and be consumed by the belligerent forces are also liable to seizure on the way.

Doctrine of Ultimate Destination
The liability of contraband to capture is determined not by their ostensible but by their *real destination*. Even if the vessel stops at an intermediate neutral port, it will still be considered as one continuous voyage provided it can be shown that its cargo will ultimately be delivered to a hostile destination.

UNNEUTRAL SERVICE

Denotes carriage by neutral vessels of certain persons and dispatches for the enemy and also the taking of direct part in the hostilities and doing a number of other acts for the enemy. A neutral vessel engaged in unneutral service may be captured by a belligerent and treated, in general, in the same way as neutral vessels captured for carriage of contraband.

RIGHT OF VISITATION

The right of belligerents (exercised only by men-of-war and military aircraft of belligerents) to visit and, if it be needed, to search neutral merchantmen for the purpose of ascertaining whether they really belong to the merchant marine of neutral States, and if this is found to be the case, whether they are attempting to break blockade, carrying contraband or rendering unneutral service. Only private or merchant vessels may be subjected to visit and search.

CAPTURE

Takes place if the cargo, or the vessel, or both, are liable to confiscation, or if grave suspicion requires further search which can only be undertaken in a port.

TRIAL BEFORE A PRIZE COURT

The captured vessel and cargo, must be brought before a Prize Court for trial.

END