EN BANC

G.R. No. 206510 – MOST REV. PEDRO D. ARIGO, *Vicar Apostolic of Puerto Princesa* D.D.; MOST REV. DEOGRACIAS S. INIGUEZ, JR., *Bishop-Emeritus of Caloocan*, FRANCES Q. QUIMPO, CLEMENTE G. BAUTISTA, JR., *Kalikasan-PNE*, MARIA CAROLINA P. ARAULLO, RENATO M. REYES, JR., *Bagong Alyansang Makabayan,* HON. NERI JAVIER COLMENARES, *Bayan Muna Party-list*, ROLAND G. SIMBULAN, Ph.D., *Junk VFA Movement*, TERESITA R. PEREZ, Ph.D., HON. RAYMOND V. PALATINO, *Kabataan Party-list*, PETER SJ. GONZALES, *Pamalakaya*, GIOVANNI A. TAPANG, Ph.D., *Agham*, ELMER C. LABOG, *Kilusang Mayo Uno*, JOAN MAY E. SALVADOR, *Gabriela*, JOSE ERIQUE A. AFRICA, THERESA A. CONCEPCION, MARY JOAN A. GUAN, NESTOR T. BAGUINON, Ph.D., A. EDSEL F. TUPAZ, *petitioners*, vs. **SCOTT H. SWIFT *in his capacity as Commander of the U.S. 7th Fleet*, MARK A. RICE *in his capacity as Commanding Officer of the USS Guardian*, PRESIDENT BENIGNO S. AQUINO III *in his capacity as Commander-in-Chief of the Armed Forces of the Philippines*, HON. ALBERT F. DEL ROSARIO, *Secretary, Department of Foreign Affairs*, HON. PAQUITO OCHOA, JR., *Executive Secretary, Office of the President*, HON. VOLTAIRE T. GAZMIN, *Secretary, Department of National Defense*, HON. SECRETARY RAMON JESUS P. PAJE, *Secretary, Department of Environment and Natural Resources*, VICE ADMIRAL JOSE LUIS M. ALANO, *Philippine Navy Flag Officer in Command, Armed Forces of the Philippines*, ADMIRAL RODOLFO D. ISORENA, *Commandant, Philippine Coast Guard*, COMMODORE ENRICO EFREN EVANGELISTA, *Philippine Coast Guard Palawan*, MAJOR GEN. VIRGILIO O. DOMINGO, *Commandant of Armed Forces of the Philippines Command*, LT. GEN. TERRY G. ROBLING, *US Marine Corps Forces, Pacific, and Balikatan 2013 Exercise Co-Director*,** *respondents*.

Promulgated: SEPTEMBER 16, 2014

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CONCURRING OPINION

LEONEN, *J.*:

Prefatory

I agree that the petition should be dismissed primarily because it is moot and academic.

The parties who brought this petition have no legal standing. They also invoke the wrong remedy. In my view, it is time to clearly unpack the rudiments of our extraordinary procedures in environmental cases in order to avoid their abuse. Abuse of our procedures contributes to the debasement of

the proper function of the remedies and invites inordinate interference from this court from what may be technical and political decisions that must be made in a different forum. Our sympathy for environmental concerns never justifies our conversion to an environmental super body.

The writ of kalikasan is not an all-embracing legal remedy to be wielded like a political tool. It is both an extraordinary and equitable remedy which assists to prevent environmental catastrophes. It does not replace other legal remedies similarly motivated by concern for the environment and the community's ecological welfare. Certainly, when the petition itself alleges that remedial and preventive remedies have occurred, the functions of the writ cease to exist. In case of disagreement, parties need to exhaust the political and administrative arena. Only when a concrete cause of action arises out of facts that can be proven with substantial evidence may the proper legal action be entertained.

Citizen's suits are suits brought by parties suffering direct and substantial injuries; although in the environmental field, these injuries may be shared with others. It is different from class suits brought as representative suits under *Oposa v. Factoran*.[1] In my view, there is need to review this doctrine insofar as it allows a nonrepresentative group to universally represent a whole population as well as an unborn generation binding them to causes of actions, arguments, and reliefs which they did not choose. Generations yet unborn suffer from the legal inability to assert against false or unwanted representation.

Citizen's suits are procedural devices that allow a genuine cause of action to be judicially considered in spite of the social costs or negative externalities of such initiatives. This should be clearly distinguished in our rules and in jurisprudence from class suits that purport to represent the whole population and unborn generations. The former is in keeping with the required constitutional protection for our people. The latter is dangerous and should be used only in very extraordinary or rare situations. It may be jurisprudentially inappropriate.

In my view, decisions relating to environmental concerns should be more balanced. It must attend in a more sober way to the required balance of all interests. Hence, our rule with respect to standing should require that parties bringing the suit are sufficiently and substantially possessed of individual interest and capability so that they can properly shape the issues brought before this court. The capability of the parties to bring suit can readily be seen through the allegations made in their petition.

Our doctrine regarding sovereign immunity also needs to be refined in

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[1] G.R. No. 101083, July 30, 1993, 224 SCRA 792 [Per J. Davide, Jr., En Banc].

the proper case with respect to its nature, source, and its limitations.

The doctrine of sovereign immunity evolves out of the theory and practice of sovereignty and the principle *par in parem non habet jurisdictionem*. Its particular contours as an international norm have evolved far beyond the form it took when the theory of absolute sovereignty was current. Contemporarily, it is understood as a basic right extended to states by other states on the basis of respect for sovereignty and independence.[2] There appears to be a consensus among states that sovereign immunity as a concept is legally binding.[3] However, there remains to be a lack of international agreement as to how it is to be invoked and the extent of immunity in some cases.[4]

This vagueness arises from the debate on which among the sources of international law the doctrine of sovereign immunity draws its binding authority and the content of the doctrine given its source.

This doctrine of relative jurisdictional immunity (sovereign immunity) of states and their agents becomes binding in our jurisdiction as international law only through Section 2 of Article II or Section 21 of Article VII of the Constitution. Article XVII, Section 3 of the Constitution is a limitation on suits against our state. It is not the textual anchor for determining the extent of jurisdictional immunities that should be accorded to other states or their agents. International law may have evolved further than the usual distinction between *acta jure imperii* and *acta jure gestionis*. Indications of state practice even of public respondents show that jurisdictional immunity for foreign states may not apply to certain violations of *jus cogens* rules of international customary law. There can be tort exemptions provided by statute and, therefore, the state practice of an agent's sovereign being sued in our courts.

International law does not also prohibit legislation that clarifies national policy and, therefore, our own considerations of state practice in relation to the limits of jurisdictional immunities for other sovereigns. Neither does international law prohibit domestic courts from shaping exceptions to jurisdictional immunity based upon our reading of the Constitution as well as international and municipal law.

I am of the view, therefore, that this case be dismissed principally for its procedural infirmities. We should reserve doctrinal exposition and declaration of the content of jurisdictional immunities for other sovereigns and their agents when the proper cases merit our attention and not yet unduly

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2 *See* J. Finke, *Sovereign Immunity: Rule, Comity or Something Else*?, 21 (4) EUR J INT LAW 853-881, 854 (2011) <http://www.ejil.org/pdfs/21/4/2112.pdf>.

3 Id. at 856.

4 Id.

limit such jurisprudence in relation to the law of the sea, municipal torts, and violations of international customary law of a jus cogens character. The results in this case would have been different if initiated with the proper remedy, by the proper parties in the proper court.

I
Procedural antecedents

This court was asked to issue a writ of kalikasan with temporary environmental protection order or TEPO pursuant to Rule 7 of A.M. No. 09-6-8-SC, otherwise known as the Rules of Procedure for Environmental Cases. Petitioners seek an immediate order from this court:

> 1) for respondents to cease and desist all operations over the Guardian grounding incident;
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> 2) for the demarcation of the metes and bounds of the damaged area, with an additional buffer zone;
>
> 3) for respondents to stop all port calls and war games under the Balikatan;
>
> 4) for respondents to assume responsibility for prior and future environmental damage in general and under the Visiting Forces Agreement (VFA);
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> 5) for the temporary definition of allowable activities near or around the Tubbataha Reefs [Natural] Park, but away from the damaged site and the additional buffer zone;
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> 6) for respondent Secretary of Foreign Affairs to negotiate with the United States representatives for an agreement on environmental guidelines and accountability pursuant to the VFA;
>
> 7) for respondents and appropriate agencies to commence administrative, civil, and criminal proceedings against erring officers and individuals;
>
> 8) for the declaration of exclusive criminal jurisdiction of Philippine authorities over erring USS Guardian personnel;
>
> 9) for respondents to pay just and reasonable compensation in the settlement of all meritorious claims for damages caused to the Tubbataha Reefs;
>
> 10) for respondents to cooperate in securing the attendance of witnesses and the collection and production of evidence, including objects connected with the offenses related to the grounding of the Guardian;
>
> 11) for respondents US officials and their representatives to place a deposit to the TRNP Trust Fund, as defined in Section 17 of RA

> 10067, as a bona fide gesture towards full reparations;
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> 12) for respondents to undertake rehabilitation measures for areas affected by the grounding of the Guardian;
>
> 13) for respondents to publish on a quarterly basis the environmental damage assessment, valuation, and valuation methods, in all stages of negotiations to ensure transparency and accountability;
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> 14) for the convention of a multisectoral technical working group that will provide scientific and technical support to the Tubbataha Protected Area Management Board (TPAMB);
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> 15) for respondents Department of Foreign Affairs, Department of National Defense, and the Department of Environmental and Natural Resources to review the VFA and the Mutual Defense Treaty in light of the right to a balanced and healthful ecology, and any violation related thereto;
>
> 16) for the declaration of the grant of immunity under Articles V and VI of the VFA as being violative of equal protection and/or the peremptory norm of nondiscrimination;
>
> 17) for permission to resort to continuing discovery measures; and
>
> 18) for other just and equitable environmental rehabilitation measures and reliefs.[5]

Petitioners include representatives from people's organizations, non-government organizations, accredited public interest groups, environmental institutes, government officials, and academicians.[6] Respondents, on the other hand, are the American commanding officers of the *USS Guardian* and the *Balikatan* 2013 Exercises, incumbent Philippine government officials, and Philippine military officers involved, by virtue of their office, in issues arising out of the grounding of the *USS Guardian* in Tubbataha Reefs and its subsequent salvage.[7]

The *USS Guardian* is a fifth Avenger Class Mine Countermeasures, United States Navy ship.[8] The three diplomatic notes issued by the Embassy of the United States of America in the Philippines dated December 3, 2012,[9] December 31, 2012,[10] and January 14, 2013[11] all sought clearance for the ship to "enter and exit the territorial waters of the Philippines and to arrive at the port of Subic Bay for the purpose of routine ship replenishment,

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5 *Rollo*, pp. 89–92.
6 Id. at 5–7.
7 Id. at 7–8.
8 Id. at 13.
9 Id. at 194.
10 Id. at 196.
11 Id. at 198.

maintenance, and crew liberty."[12]

Thus, on January 17, 2013, while en route to Makasaar, Indonesia, the *USS Guardian* ran aground in the Tubbataha Reefs' south atoll, approximately 80 miles east-southeast of Palawan.[13] In a statement issued on January 25, 2013, US Ambassador to the Philippines Harry K. Thomas expressed his regret over the incident, recognizing the legitimate concerns over the damage caused to the reef.[14] On February 5, 2013, a joint statement was issued by the Philippines and the United States where the latter undertook to provide compensation.[15] On the same day, a salvage plan was submitted by a Singaporean company contracted by the US Navy to conduct the *USS Guardian* salvage operations.[16] The salvage operations were completed on March 30, 2013.[17]

On April 17, 2013, petitioners filed the present petition for writ of kalikasan with prayer for temporary environmental protection order (TEPO).

Acting on petitioners' petition but without necessarily giving due course, this court on May 8, 2013 issued a resolution. The resolution a) required respondents, except the President of the Republic of the Philippines, to comment within ten (10) days from notice of the resolution; and b) held in abeyance the issuance of a TEPO.[18]

We note that on May 27, 2013, the Office of Legal Affairs of the Department of Foreign Affairs sent a letter to this court, requesting that the notice of this court's resolution dated May 8, 2013 be returned, as it was not an agent for the service of processes upon American respondents.[19]

The pleadings presented the following issues: a) whether petitioners have legal standing to file a petition for writ of kalikasan with prayer for temporary environmental protection order (TEPO), and b) whether the doctrine of sovereign immunity applies to foreign respondents.

Petitioners argued that they have *locus standi*.[20] Having categorized the petition as a citizen's suit, they alleged that they are representing "others, including minors and generations yet unborn" in asserting their

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12 All three notes were similarly worded as regards its request for diplomatic clearance. The amendments only pertained to the arrival and departure dates of the vessel.
13 *Rollo*, pp. 333–334.
14 Id. at 336.
15 Id. at 161.
16 Id.
17 Id.
18 Id. at 145.
19 Id. at 255.
20 Id. at 31.

constitutional right to a balanced and healthful ecology.[21] Petitioners cited this court's ruling in *Oposa v. Factoran* that Article II, Section 16 of the 1987 Constitution was immediately enforceable. The pronouncement was anchored on the premise that the right to a balanced and healthful ecology belonged "to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation."[22]

Petitioners also alleged that the American respondents are not immune from suit.[23] Citing *Nicolas v. Romulo*,[24] they argued that Article V of the Visiting Forces Agreement or VFA, which pertained to "Criminal Jurisdiction,"[25] establishes a waiver of the US military officers involved in the incident's[26] immunity from suit in light of their violation of Republic Act 10067, or the Tubbataha Reefs Natural Park (TRNP) Act of 2009,[27] including its entry in the area without proper permit.[28] Also citing US cases *New York v. United States Army Corps of Engineers (E.D.N.Y. September 24, 2012)* and *Trudeau v. FTC (456 F.3d 178, D.C. Cir. 2006)*, petitioners further argued that existing US federal statutes clearly provide that American government agencies have statutorily waived their immunity from any equitable action involving environmental damages.[29] They referred to both Resource Conservation and Recovery Act of 1976 (RCRA) and the Federal Tort Claims Act (FTCA) as legal bases.[30]

Petitioners stated that RCRA waives sovereign immunity in citizen's suits when a) there is a need to enforce a permit, standard, or regulation; b) there is a need to abate an imminent and substantial danger to health or the environment; or c) the United States Environmental Protection Agency is required to perform a nondiscretionary duty.[31]

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21 Id. at 5–7.
22 *Rollo*, p. 32.
23 Id. at 37–38.
24 598 Phil. 262 (2009) [Per J. Azcuna, En Banc].
25 Sections 1 and 2 of Article V provide:
"1. Subject to the provisions of this article:
(a) Philippine authorities shall have jurisdiction over United States personnel with respect to offenses committed within the Philippines and punishable under the law of the Philippines.
(b) United States military authorities shall have the right to exercise within the Philippines all criminal and disciplinary jurisdiction conferred on them by the military law of the United States over United States personnel in the Philippines.
2. (a) Philippine authorities exercise exclusive jurisdiction over United States personnel with respect to offenses, including offenses relating to the security of the Philippines, punishable under the laws of the Philippines, but not under the laws of the United States.
(b) United States authorities exercise exclusive jurisdiction over United States personnel with respect to offenses, including offenses relating to the security of the United States, punishable under the laws of the United States, but not under the laws of the Philippines.
(c) For the purposes of this paragraph and paragraph 3 of this article, an offense relating to security means: (1) treason, (2) sabotage, espionage or violation of any law relating to national defense."
26 *Rollo*, p. 36.
27 Id. at 19.
28 Id. at 47, as per Rep. Act No. 10067, sec. 19.
29 Id. at 47.
30 Id. at 38.
31 Id.

On the other hand, the FTCA provides that "the U.S. Government is liable in tort in the same manner and to the same extent as private individuals under like circumstances [but only] if the laws of the state in which the wrongful act occurred provide recovery in similar situations involving private parties."[32]

Petitioners also argued that the *USS Guardian* is liable *in rem*[33] to the Philippines for response costs and damages resulting from the destruction, loss, and injury caused to the Tubbataha Reefs.[34] Aside from not having had prior permit to enter the area, petitioners pointed out that the American respondents had committed gross and inexcusable negligence when it failed to utilize its technical expertise and equipment in preventing the incident.[35] It is their position that this necessarily rendered sovereign immunity inapplicable to American respondents, even if they were acting within the scope of their authority, office, or employment.[36]

II
The parties do not have legal standing

Petitioners brought this case as a citizen's suit under the Tubbataha Reefs Natural Park Act of 2009, in conjunction with the Rules of Procedure for Environmental Cases.[37]

Section 37 of the Tubbataha Reefs Natural Park Act of 2009 allows any citizen to file a civil, criminal, or administrative case against:

> (a) Any person who violates or fails to comply with the provisions of this Act its implementing rules and regulations; or
>
> (b) Those mandated to implement and enforce the provisions of this Act with respect to orders, rules and regulations issued inconsistent with this Act; and/or
>
> (c) Any public officer who wilfully or grossly neglects the performance of an act, specifically enjoined as a duty by this Act or its implementing rules and regulations; or abuses his authority in the performance of his duty; or, in any manner improperly performs his duties under this act or its implementing rules and regulations: Provided,

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32 Id. at 41.

33 Petitioners cited the United States Code (*16 U.S.C.A. § 19jj-1(b)*) for the definition of liability *in rem*: "Any instrumentality, including but not limited to a vessel, vehicle, aircraft, or other equipment that destroys, causes the loss of, or injures any park system resource or any marine or aquatic park resource shall be liable in rem to the United States for response costs and damages resulting from such destruction, loss, or injury to the same extent as a person is liable under subsection (a) of this section."

34 *Rollo*, p. 40.

35 Id. at 48.

36 Id.

37 Id. at 4.

> however, That, no suit can be filed until after a thirty (30)-day notice has been given to the public officer and the alleged violator concerned and no appropriate action has been taken thereon. The court shall exempt such action from the payment of filing fees, upon prima facie showing of the non-enforcement or violations complained of and exempt the plaintiff from the filing of an injunction bond for the issuance of preliminary injunction. In the event that the citizen should prevail, the court shall award reasonable attorney's fees, moral damages and litigation costs as appropriate.

While the Tubbataha Reefs Natural Park Act enumerates causes of action available against duty-bearers, it does not specifically describe the parties who may file a case.

The "environmental" nature of this petition, based upon the alleged violation of the Tubbataha Reefs Natural Park Act, by itself does not and should not automatically render the Rules of Procedure for Environmental Cases applicable. At best, it must be reconciled with rules on parties as contained in the Rules of Court. This is to preclude a situation where the interpretation of the Rules of Procedure for Environmental Cases results in a ruling inconsistent or contrary to established legal concepts. It is my position that unless the remedy sought will serve the purpose of preventing an environmental catastrophe, the traditional procedural route should be taken. This means that even in environmental cases, Rule 3, Section 2, 3, or 12 of the 1997 Rules of Civil Procedure should still also apply.

Real party in interest

Rule 3, Section 2 pertains to *real party in interest*:

> **SEC. 2. *Parties in interest.*—** A real party in interest is the party who stands to be benefited or injured by the judgment in the suit, or the party entitled to the avails of the suit. Unless otherwise authorized by law or these Rules, every action must be prosecuted or defended in the name of the real party in interest. (2a)[38]

A real party in interest is a litigant whose right or interest stands to benefit or get injured by the judgment of the case.[39] The interest referred to must be material interest, founded upon a legal right sought to be enforced.[40] They bring a suit because the act or omission of another has caused them to directly suffer its consequences.[41] Simply put, a real party in interest has a cause of action based upon an existing legal right-duty correlative.

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38 RULES OF CIVIL PROCEDURE, Rule 3, sec. 2.

39 *See Consumido v. Ros*, 555 Phil. 652, 658 (2007) [Per J. Tinga, Second Division].

40 Id.

41 *Rebollido v. Court of Appeals*, 252 Phil. 831, 839 (1989) [Per J. Gutierrez, Jr., Third Division], *citing Lee et al. v. Romillo, Jr.*, 244 Phil. 606, 612 (1988) [Per J. Gutierrez, Jr., Third Division].

Representatives as parties

Section 3 of Rule 3, on the other hand, discusses parties acting in representation of the real party in interest:

> **SEC. 3. *Representatives as parties.*** — Where the action is allowed to be prosecuted or defended by a representative or someone acting in a fiduciary capacity, the beneficiary shall be included in the title of the case and shall be deemed to be the real party in interest. A representative may be a trustee of an express trust, a guardian, an executor or administrator, or a party authorized by law or these Rules. An agent acting in his own name and for the benefit of an undisclosed principal may sue or be sued without joining the principal except when the contract involves things belonging to the principal.(3a)[42]

A "representative" is not the party who will actually benefit or suffer from the judgment of the case. The rule requires that the beneficiary be identified as he or she is deemed the real party in interest.[43] This means that acting in a representative capacity does not turn into a real party in interest someone who is otherwise an outsider to the cause of action.

This rule enumerates who may act as representatives, including those acting in a fiduciary capacity. While not an exhaustive list, it does set a limit by allowing only those who are "authorized by law or these Rules."[44] In environmental cases, this section may be used to bring a suit, provided that two elements concur: a) the suit is brought on behalf of an identified party whose right has been violated, resulting in some form of damage, and b) the representative authorized by law or the Rules of Court to represent the victim.

The citizen's suit under the Rules of Procedure for Environmental Cases is a representative suit. A citizen's suit is defined:

> SEC. 5. Citizen suit. – Any Filipino citizen in representation of others, including minors or generations yet unborn, may file an action to enforce rights or obligations under environmental laws. Upon the filing of a citizen suit, the court shall issue an order which shall contain a brief description of the cause of action and the reliefs prayed for, requiring all interested parties to manifest their interest to intervene in the case within fifteen (15) days from notice thereof. The plaintiff may publish the order once in a

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42 RULES OF CIVIL PROCEDURE, Rule 3, sec. 3.

43 *Ang, represented by Aceron v. Spouses Ang*, G.R. No. 186993, August 22, 2012, 678 SCRA 699, 709 [Per J. Reyes, Second Division].

44 RULES OF CIVIL PROCEDURE, Rule 3, sec. 3.

> newspaper of a general circulation in the Philippines or furnish all affected barangays copies of said order.

In my view, this rule needs to be reviewed. A citizen's suit that seeks to enforce environmental rights and obligations may be brought by any Filipino who is acting as a representative of others, including minors or generations yet unborn.[45] As representatives, it is not necessary for petitioners to establish that they directly suffered from the grounding of the *USS Guardian* and the subsequent salvage operations. However, it is imperative for them to indicate with certainty the injured parties on whose behalf they bring the suit. Furthermore, the interest of those they represent must be based upon concrete legal rights. It is not sufficient to draw out a perceived interest from a general, nebulous idea of a potential "injury."

This is particularly important when the parties sought to be represented are "minors and generations yet unborn."

"Minors and generations yet unborn" is a category of real party in interest that was first established in *Oposa v. Factoran.* In *Oposa v. Factoran*, this court ruled that the representatives derived their personality to file a suit on behalf of succeeding generations from "intergenerational responsibility."[46] The case mirrored through jurisprudence the general moral duty of the present generation to ensure the full enjoyment of a balanced and healthful ecology by the succeeding generations.[47]

Since environmental cases necessarily involve the balancing of different types and degrees of interests, allowing anyone from the present generation to represent others who are yet unborn poses three possible dangers.

First, they run the risk of foreclosing arguments of others who are unable to take part in the suit, putting into question its representativeness. *Second*, varying interests may potentially result in arguments that are bordering on political issues, the resolutions of which do not fall upon this court. *Third*, automatically allowing a class or citizen's suit on behalf of "minors and generations yet unborn" may result in the oversimplification of what may be a complex issue, especially in light of the impossibility of determining future generation's true interests on the matter.

Decisions of this court will bind future generations. The unbridled and misguided use of this remedy by supposed representatives may not only weaken the minors' and unborn's ability to decide for themselves but may have unforeseen and unintended detrimental effects on their interests.

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45 REVISED PROCEDURE ON ENVIRONMENTAL CASES, Rule II, sec. 5.
46 G.R. No. 101083, July 30, 1993, 224 SCRA 792, 803 [Per J. Davide, Jr., En Banc].
47 Id.

The last point is especially crucial in light of *res judicata*. A long-established doctrine on litigation, *res judicata*:

> . . . is an old axiom of law, dictated by wisdom and sanctified by age, and founded on the broad principle that it is to the ***interest of the public that there should be an end to litigation by the same parties over a subject once fully and fairly adjudicated***. It has been appropriately said that the doctrine is a rule pervading every well-regulated system of jurisprudence, ***and is put upon two grounds embodied in various maxims of the common law: one, public policy and necessity, which makes it to the interest of the State that there should be an end to litigation – interest reipublicae ut sit finis litium; the other, the hardship on the individual that he should be vexed twice for one and the same cause – nemo debet bis vexari pro una et eadem causa.*** A contrary doctrine would subject the public peace and quiet to the will and neglect of individuals and prefer the gratification of the litigious disposition on the part of suitors to the preservation of the public tranquillity and happiness.[48] (Emphasis supplied, citation omitted)

The elements of *res judicata* are:

> . . . (1) the ***former judgment must be final***; (2) the ***former judgment must have been rendered by a court having jurisdiction*** of the subject matter and the parties; (3) the ***former judgment must be a judgment on the merits***; and (4) there must be ***between the first and subsequent actions*** (*i*) ***identity of parties*** or at least such as representing the same interest in both actions; (*ii*) ***identity of subject matter***, or of the rights asserted and relief prayed for, the relief being founded on the same facts; and, (*iii*) ***identity of causes of action*** in both actions such that any judgment that may be rendered in the other action will, regardless of which party is successful, amount to *res judicata* in the action under consideration.[49] (Emphasis supplied, citation omitted)

An absolute identity of the parties is not required for *res judicata* to apply, for as long as there exists an identity or community of interest.[50]

Res judicata renders conclusive between the parties and their privies a ruling on their rights, not just for the present action, but in all subsequent suits. This pertains to all points and matters judicially tried by a competent court. The doctrine bars parties to litigate an issue more than once, and this is strictly applied because "the maintenance of public order, the repose of society . . . require that what has been definitely determined by competent tribunals shall be accepted as irrefragable legal truth."[51]

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48 *Heirs of Sotto v. Palicte*, G.R. No. 159691, June 13, 2013, 698 SCRA 294, 308 [Per J. Bersamin, First Division].

49 Id. at 304.

50 Id. at 306.

51 Id. at 308.

Considering the effect of *res judicata*, the ruling in *Oposa v. Factoran* has opened a dangerous practice of binding parties who are yet incapable of making choices for themselves, either due to minority or the sheer fact that they do not yet exist. Once *res judicata* sets in, the impleaded minors and generations yet unborn will be unable to bring a suit to relitigate their interest.

Perhaps it is time to revisit the ruling in Oposa v. Factoran.

That case was significant in that, at that time, there was need to call attention to environmental concerns in light of emerging international legal principles. While "intergenerational responsibility" is a noble principle, it should not be used to obtain judgments that would preclude future generations from making their own assessment based on their actual concerns. The present generation must restrain itself from assuming that it can speak best for those who will exist at a different time, under a different set of circumstances. In essence, the unbridled resort to representative suit will inevitably result in preventing future generations from protecting their own rights and pursuing their own interests and decisions. It reduces the autonomy of our children and our children's children. Even before they are born, we again restricted their ability to make their own arguments.

It is my opinion that, at best, the use of the Oposa doctrine in environmental cases should be allowed only when a) there is a clear legal basis for the representative suit; b) there are actual concerns based squarely upon an existing legal right; c) there is no possibility of any countervailing interests existing within the population represented or those that are yet to be born; and d) there is an absolute necessity for such standing because there is a threat of catastrophe so imminent that an immediate protective measure is necessary. Better still, in the light of its costs and risks, we abandon the precedent all together.

Class suit

The same concern regarding *res judicata* also applies to a class suit.

Rule 3, Section 12 of the Rules of Court states:

> **SEC. 12. *Class suit.*** — When the subject matter of the controversy is one of common or general interest to many persons so numerous that it is impracticable to join all as parties, a number of them which the court finds to be sufficiently numerous and representative as to fully protect the interests of all concerned may sue or defend for the benefit of all. Any party in interest shall have

the right to intervene to protect his individual interest. (12a)

In *Mathay et al. v. The Consolidated Bank and Trust Company,*[52] this court held that a class suit must essentially contain the following elements:

> The ***necessary elements for the maintenance of a class suit*** are accordingly ***(1) that the subject matter of the controversy be one of common or general interest to many persons,*** and ***(2) that such persons be so numerous as to make it impracticable to bring them all to the court.*** An action does not become a class suit merely because it is designated as such in the pleadings. ***Whether the suit is or is not a class suit depends upon the attending facts***, and the complaint, or other pleading initiating the class action should allege the existence of the necessary facts, to wit, ***the existence of a subject matter of common interest, and the existence of a class and the number of persons in the alleged class, in order that the court might be enabled to determine whether the members of the class are so numerous as to make it impracticable to bring them all before the court, to contrast the number appearing on the record with the number in the class and to determine whether claimants on record adequately represent the class and the subject matter of general or common interest***.
>
> The complaint in the instant case explicitly declared that the plaintiffs-appellants instituted the "present class suit under Section 12, Rule 3, of the Rules of Court in behalf of CMI subscribing stockholders" but did not state the number of said CMI subscribing stockholders so that the trial court could not infer, much less *make sure* as explicitly required by the statutory provision, ***that the parties actually before it were sufficiently numerous and representative in order that all interests concerned might be fully protected***, and that it was impracticable to bring such a large number of parties before the court.
>
> The statute also requires, as a prerequisite to a class suit, that the subject-matter of the controversy be of common or general interest to numerous persons. ***Although it has been remarked that the "innocent 'common or general interest' requirement is not very helpful in determining whether or not the suit is proper," the decided cases in our jurisdiction have more incisively certified the matter when there is such common or general interest in the subject matter of the controversy. By the phrase "subject matter of the action" is meant "the physical facts, the things real or personal, the money, lands, chattels, and the like, in relation to which the suit is prosecuted, and not the delict or wrong committed by the defendant***."[53] (Emphasis supplied, citations omitted)

The same case referred to the United States Federal Rules of Civil Procedure. After having been raised by *Mathay et al.* as legal basis for its class suit, this court held:

> . . . We have no conflict with the authorities cited; those were

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[52] 157 Phil. 551 (1974) [Per J. Zaldivar, Second Division].
[53] Id. at 563–565.

> rulings under the ***Federal Rules of Civil Procedure, pursuant to Rule 23 of which, there were three types of class suits,*** namely: ***the true, the hybrid, and the spurious, and these three had only one feature in common, that is, in each the persons constituting the class must be so numerous as to make it impracticable to bring them all before the court.*** The authorities cited by plaintiffs-appellants refer to the spurious class action Rule 23 (a) (3) which involves a right sought to be enforced, which is several, and there is a common question of law or fact affecting the several rights and a common relief is sought. The spurious class action is merely a permissive joinder device; between the members of the class there is no jural relationship, and the right or liability of each is distinct, the class being formed solely by the presence of a common question of law or fact. This permissive joinder is provided in Section 6 of Rule 3, of our Rules of Court. Such joinder is not and cannot be regarded as a class suit, which this action purported and was intended to be as per averment of the complaint.
>
> ***It may be granted that the claims of all the appellants involved the same question of law. But this alone, as said above, did not constitute the common interest over the subject matter indispensable in a class suit***. . . .[54] (Emphasis supplied, citations omitted)

In a class suit, petitioners necessarily bring the suit in two capacities: first, as persons directly injured by the act or omission complained of; and second, as representatives of an entire class who have suffered the same injury. In order to fully protect all those concerned, petitioners must show that they belong in the same universe as those they seek to represent. More importantly, they must establish that, in that universe, they can intervene on behalf of the rest.

These requirements equally apply in environmental cases.

Petitioners who bring the suit both for themselves and those they seek to represent must share a common legal interest — that is, the subject of the suit over which there exists a cause of action is common to all persons who belong to the group.[55] As a result, the right sought to be enforced is enjoyed collectively, and not separately or individually.[56] The substantial injury must have been suffered by both the parties bringing the suit and the represented class.

However, it is recognized that any damage to the environment affects people differently, rendering it impossible for the injury suffered to be of the same nature and degree for each and every person. For instance, second-hand smoke from one who lights up a cigarette may cause lung and other health complications of a much graver degree to exposed commuters,

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54 Id. at 567–568.

55 *See Re: Request of the Plaintiffs, Heirs of the Passengers of the Doña Paz to Set Aside the Order dated January 4, 1988 of Judge B.D. Chingcuangco,* A.M. No. 88-1-646-0, March 3, 1988, 159 SCRA 623, 627 [En Banc].

56 Id.

compared to those who are kept insulated by well-maintained and well-ventilated buildings. The same may be said for dumpsites along the shores of a bay. The gravity of injury they cause to those whose source of livelihood is purely fishing in the affected area would be entirely different from that suffered by an office worker.

The differences in effects, ranging from miniscule to grave, increase the possibility of "free-riders" in a case. This results in a *negative externality:* an environmental management concept that delves into the effect of an individual's or firm's action on others.[57] In this case, the effect on others is a disadvantage or an injury.

In most instances where this free-rider or negative externality exists, a suit is not filed because the cost of maintaining and litigating outweighs the actual damage suffered due to the act or omission of another. The theory is that bringing a class suit allows those who are not as affected as petitioners, though they may share the same interest, to latch their claim on someone else without any personal expense. There must be some assurances, however, that the interests are the same and the arguments that should have been brought by others who do not have the resources to bring the suit are properly represented. This is why the rules allow courts to be liberal in assessing "common interest."

Another essential element of a class suit is that petitioners must be sufficiently numerous and representative *so as to fully protect the interest of all concerned.* One of the dangers of bringing a class suit is that while the parties' environmental interest shares a common legal basis, the extent and nature of that interest differ depending on circumstances.

In the case of *Re: Request of the Plaintiffs, Heirs of the Passengers of the Doña Paz,*[58] which quoted Moore's Federal Practice we noted:

> A ***"true class action" — distinguished from the so-called hybrid and the spurious class action*** in U.S. Federal Practice — "involves principles of compulsory joinder, since . . . (were it not) for the numerosity of the class members all should . . . (be) before the court. Included within the true class suit . . . (are) the shareholders' derivative suit and a class action by or against an unincorporated association. . . . ***A judgment in a class suit, whether favorable or unfavorable to the class, is binding under res judicata principles upon all the members of the class, whether or not they were before the court. It is the non-divisible nature of the right sued on which determines both the membership of the class and the res judicata effect of the final determination of the right.***"[59] (Emphasis supplied)

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57 J. E. STIGLITZ, ECONOMICS OF THE PUBLIC SECTOR 215 (3rd ed., 2000).
58 A.M. No. 88-1-646-0, March 3, 1988, 159 SCRA 623, 627 [En Banc].
59 Id. at 627.

Those who bring class suits do so, carrying a heavy burden of representation. All the parties represented may not have consented to the agency imposed on them.

Courts, therefore, must ensure that the parties that bring the suit are sufficiently numerous to ensure that all possible interests and arguments have been considered. The community, class, group, or identity that is represented must be sufficiently defined so that the court will be able to properly assess that the parties bringing the suit are properly representative.

In view of the technical nature of some environmental cases, not only should the parties be representative in terms of the interests and arguments that they bring, they must likewise show that they have the capability to bring reasonably cogent, rational, scientific, well-founded arguments. This is so because if they purportedly represent a community, class, group, or identity, we should assume that all those represented would have wanted to argue in the best possible manner.

The cogency and representativeness of the arguments can readily be seen in the initiatory pleading. In the special civil actions invoked in this case, this court has the discretion to scrutinize the initiatory pleading to determine whether it should grant due course prior or after the filing of a comment. In my view, this pleading falls short of the requirement of representativeness.

For instance, it is clear in some of the reliefs that were requested that the arguments may not be what all those they purport to represent really want. As an illustration, the petition requests:

> 3) for respondents to stop all port calls and war games under the Balikatan;

The facts in this case and the writ of kalikasan certainly have no bearing on why this court should issue an injunction against all port calls in any part of the country made by all kinds of ships even if this is related to the Balikatan exercises. "War games" even undertaken solely on land has no bearing on the subject matter of this case. Also, in the facts as alleged in the pleading, it is not clear how all those affected by the ecological mishap that may have occurred in the Tubbataha Reefs would also be interested in stopping "war games under the Balikatan." The pleading asserts that it represents all generations yet unborn. Thus, it includes the sons and daughters of all government officials who are now involved in the Balikatan exercises. It also includes the military commanders who are now administering such exercise. The broad relief requested belies the

representativeness of the suit.

Of similar nature are the following prayers for relief in the petition:

> 4) for respondents to assume responsibility for prior and future environmental damage in general and under the Visiting Forces Agreement (VFA);
>
> 5) for the temporary definition of allowable activities near or around the Tubbataha Reefs [Natural] Park, but away from the damaged site and the additional buffer zone;
>
> 6) for respondent Secretary of Foreign Affairs to negotiate with the United States representatives for an agreement on environmental guidelines and accountability pursuant to the VFA;
>
> . . . .
>
> 8) for the declaration of exclusive criminal jurisdiction of Philippine authorities over erring USS Guardian personnel;
>
> . . . .
>
> 14) for the convention of a multisectoral technical working group that will provide scientific and technical support to the Tubbataha Protected Area Management Board (TPAMBl);
>
> 15) for respondents Department of Foreign Affairs, Department of National Defense, and the Department of Environmental and Natural Resources to review the VFA and the Mutual Defense Treaty in light of the right to a balanced and healthful ecology, and any violation related thereto;
>
> 16) for the declaration of the grant of immunity under Articles V and VI of the VFA as being violative of equal protection and/or the peremptory norm of nondiscrimination;
>
> 17) for permission to resort to continuing discovery measures

Not all environmental cases need to be brought as class suits. There is no procedural requirement that majority of those affected must file a suit in order that an injunctive writ or a writ of kalikasan can be issued. It is sufficient that the party has suffered its own direct and substantial interest, its legal basis is cogent, and it has the capability to move forward to present the facts and, if necessary, the scientific basis for its analysis for some of these cases to be given due course.

Parenthetically, the humility of bringing suits only in the name of petitioners will protect them from the charge that more than the legal arguments they want to bring, they also want to impose their own political views as views which are universally accepted.

In all environmental cases, it is also not necessary that generations yet unborn be represented. It is not also necessary that minors bring the suit. In my view, pleading their interests have no value added to the case except for its emotive effect at the risk of encouraging a paternal attitude toward our children and for those belonging to generations yet unborn. Certainly, it was not necessary with respect to the putative cause of action relating to the grounding of the *USS Guardian*.

With the class suit improperly brought, the parties who filed this petition have no legal standing. To protect the individuals, families, and communities who are improperly represented, this case should be dismissed.

III
A petition for a writ of kalikasan is a wrong remedy

Rule 7, Part III of the Rules of Procedure for Environmental Cases pertaines to the writ of kalikasan. It describes the nature of the writ:

> **Section 1.** *Nature of the writ.* - ***The writ is a remedy*** available to a natural or juridical person, entity authorized by law, people's organization, non-governmental organization, or any public interest ***group accredited by or registered with any government agency***, ***on behalf of persons whose constitutional right to a balanced and healthful ecology is violated, or threatened with violation by an unlawful act or omission*** of a public official or employee, or private individual or entity, ***involving environmental damage of such magnitude as to prejudice the life, health or property of inhabitants in two or more cities or provinces***. (Emphasis supplied)

The writ of kalikasan is a remedy that covers environmental damages the magnitude of which transcends both political and territorial boundaries.[60] It specifically provides that the prejudice to life, health, or property caused by an unlawful act or omission of a public official, public employee, or a private individual or entity must be felt in at least two cities or provinces.[61] The petition for its issuance may be filed on behalf of those whose right to a balanced and healthful ecology is violated, provided that the group or organization which seeks to represent is duly accredited.[62]

Two things must be examined: first, whether petitioners are qualified to bring this suit under the requirements of the provisions; and second,

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60 ANNOTATION TO THE RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, p. 133.
61 Id.
62 Id.

whether there are actual injured parties being represented. On the first issue, the following petitioners bring this case as individuals:

- Rev. Pedro Agiro, Vicar Apostolic of Puerto Princesa[63]
- Rev. Deogracias Iniguez, Jr., Bishop-Emeritus of Caloocan[64]
- Frances Quimpo[65]
- Teresita R. Perez, Ph.D[66]
- Giovanni Tapang, Ph.D[67]
- Jose Enrique Africa[68]
- Nestor Baguinon[69]
- A. Edsel Tupaz[70]

The following petitioners represent organizations:

- Clemente Bautista Jr., Coordinator of Kalikasan People's Network for the Environment[71]
- Maria Carolina Araullo, Chairperson of Bagong Alyansang Makabayan (Bayan)[72]
- Renato Reyes Jr., Secretary-General of Bagong Alyansang Makabayan (Bayan)[73]
- Hon. Neri Javier Colmenares, Representative of Bayan Muna Party-list[74]
- Roland Simbulan, Ph.D., Junk VFA Movement[75]
- Hon. Raymond Palatino, Representative of Kabataan Party-list[76]
- Peter Gonzales, Vice Chairperson of Pambansang Lakas ng Kilusang Mamamalakaya ng Pilipinas (Pamalakaya)[77]
- Elmer Labog, Chairperson of Kilusang Mayo Uno[78]
- Joan May Salvador, Secretary-General of Gabriela[79]
- Theresa Concepcion, Earth Island Institute[80]
- Mary Joan Guan, Executive Director for Center for Women's Resources[81]

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63 *Rollo*, p. 5.
64 Id.
65 Id.
66 Id. at 6.
67 Id.
68 Id.
69 Id. at 7.
70 Id.
71 Id. at 5.
72 Id.
73 Id.
74 Id.
75 Id. at 6.
76 Id.
77 Id.
78 Id.
79 Id.
80 Id.
81 Id.

Petitioners satisfy the first requirement as they comprise both natural persons and groups duly recognized by the government. It is doubtful, however, whether there are actual injured parties being represented. As discussed previously, a citizen's suit on an environmental issue must be resorted to responsibly.

Petitioners in this case also seek the issuance of a temporary environmental protection order or TEPO. Rule 7, Part III of the Rules of Procedure for Environmental Cases provides:

> SEC. 8. *Issuance of Temporary Environmental Protection Order (TEPO).* – If it appears from the verified complaint with a prayer for the issuance of an Environmental Protection Order (EPO) that the ***matter is of extreme urgency and the applicant will suffer grave injustice and irreparable injury,*** the executive judge of the multiple-sala court before raffle or the presiding judge of a single-sala court as the case may be, may issue *ex parte* a TEPO effective for only seventy-two (72) hours from date of the receipt of the TEPO by the party or person enjoined. Within said period, the court where the case is assigned, shall conduct a summary hearing to determine whether the TEPO may be extended until the termination of the case.
>
> The court where the case is assigned, shall periodically monitor the existence of acts that are the subject matter of the TEPO even if issued by the executive judge, and may lift the same at any time as circumstances may warrant.
>
> The applicant shall be exempted from the posting of a bond for the issuance of a TEPO. (Emphasis supplied)

A TEPO is an order which either directs or enjoins a person or government agency to perform or refrain from a certain act, for the purpose of protecting, preserving, and/or rehabilitating the environment.[82] The crucial elements in its issuance are the presence of "extreme urgency" and "grave injustice and irreparable injury" to the applicant.[83]

Petitioners hinge the basis for this prayer on the salvage operations conducted immediately after the incident. The remedy is no longer available considering that all activities to remove the grounded *USS Guardian* have been concluded.[84] Furthermore, the Notice to Mariners No. 011-2013 issued by the Philippine Coast Guard on January 29, 2013 effectively set the metes and bounds of the damaged area.[85] This notice also prohibited "leisure trips

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82 ANNOTATION TO THE RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, p. 113.
83 Id. at 114.
84 *Rollo*, p. 164.
85 Id.

to Tubbataha" and advised "all watercrafts transitting the vicinity to take precautionary measures."[86]

In light of the facts of this case, I vote that the petition be also dismissed for being moot and being brought through the wrong remedy.

IV
Doctrine of relative jurisdictional immunity (sovereign immunity)

It is my position that doctrine on relative jurisdictional immunity of foreign states or otherwise referred to as sovereign immunity should be further refined. ***I am of the view that immunity does not necessarily apply to all the foreign respondents should the case have been brought in a timely manner, with the proper remedy, and in the proper court. Those who have directly and actually committed culpable acts or acts resulting from gross negligence resulting in the grounding of a foreign warship in violation of our laws defining a tortious act or one that protects the environment which implement binding international obligations cannot claim sovereign immunity.***

Some clarification may be necessary to map the contours of relative jurisdictional immunity of foreign states otherwise known as the doctrine of sovereign immunity.

The doctrine of sovereign immunity can be understood either as a domestic or an international concept.[87]

As a domestic concept, sovereign immunity is understood as the non-suability of the state. In the case of the Republic of the Philippines as a State, this is contained in Article XVI, Section 3 of the 1987 Philippine Constitution, which provides that "[the] State may not be sued without its consent."

In *Air Transportation Office v. Spouses Ramos*,[88] this court underscored the practical considerations underlying the doctrine:

> ***Practical considerations dictate the establishment of an immunity from suit in favor of the State***. Otherwise, and the State is suable at the instance of every other individual, ***government service may be severely obstructed and public safety endangered because of the number of suits***

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86 Id. at 161.

87 J. Finke, *Sovereign Immunity: Rule, Comity or Something Else*?, 21 (4) EUR J INT LAW 853-881, 854 (2011) <http://www.ejil.org/pdfs/21/4/2112.pdf>.

88 G.R. No. 159402, February 23, 2011, 644 SCRA 36 [Per J. Bersamin, Third Division].

> ***that the State has to defend against*** . . . .[89](Emphasis supplied, citation omitted)

The textual reference to "[the] State" in Article XVI, Section 3 of the Constitution does not refer to foreign governments. Rather, as a doctrine in international law, the concept of sovereign immunity is incorporated into our jurisdiction as international custom or general principle of international law through Article II, Section 2, which provides:

> Section 2. The Philippine 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.[90]

Alternatively, should there be an international agreement or a treaty[91] that articulates the scope of jurisdictional immunity for other sovereigns, then it can be incorporated through Article VII, Section 21, which provides:

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

In *Republic of Indonesia v. Vinzon*,[92] this court ruled that "[the] rule that a State may not be sued without its consent is a necessary consequence of the principles of independence and equality of States."[93] However, it did not make any reference to Article XVI, Section 3 of the Constitution. Instead, it used Article II, Section 2[94] as basis for its discussion:

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

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89 Id. at 42.

90 CONST. (1987), art. II, sec. 2.

91 Unless the relevant treaty provision simply articulates an existing international customary norm in which case it will be arguably incorporated through Article II, Section 2 of the Constitution also.

92 452 Phil. 1100 (2003) [Per J. Azcuna, En Banc].

93 Id. at 1107.

94 CONST. (1987), art. II, sec. 2 states, "The Philippines renounces war as an instrument of national policy, ***adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.***"

> cannot assert jurisdiction over one another. A contrary attitude would "unduly vex the peace of nations."[95] (Emphasis supplied, citations omitted)

V
Sovereign immunity under international law

Under international law, sovereign immunity remains to be an abstract concept. On a basic level, it is understood as a basic right extended to states by other states on the basis of respect for sovereignty and independence.[96] There appears to be a consensus among states that sovereign immunity as a concept is legally binding.[97] Nevertheless, legal scholars observe that there remains to be a lack of agreement as to how it is to be invoked or exercised in actual cases.[98] Finke presents:

> States accept sovereign immunity as a legally binding concept, but only on a very abstract level. ***They agree on the general idea of immunity, but disagree on the extent to which they actually must grant immunity in a specific case***.[99] (Emphasis supplied, citations omitted)

This vagueness arises from the debate about the sources of international law for the doctrine of sovereign immunity.

Article 38(1) of the Statute of the International Court of Justice (ICJ Statute)[100] enumerates the classic sources of international law:[101]

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. ***international conventions***, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. ***international custom, as evidence of a general practice accepted as law***;
>
> c. the ***general principles of law recognized by civilized nations***;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

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95 *Republic of Indonesia v. Vinzon*, 452 Phil. 1100, 1107 (2003) [Per J. Azcuna, En Banc].

96 J. Finke, *Sovereign Immunity: Rule, Comity or Something Else*?, 21 (4) EUR J INT LAW 853-881, 854 (2011) <http://www.ejil.org/pdfs/21/4/2112.pdf>.

97 Id. at 856.

98 Id.

99 J. Finke, *Sovereign Immunity: Rule, Comity or Something Else*?, 21 (4) EUR J INT LAW 856-857 (2011) <http://www.ejil.org/pdfs/21/4/2112.pdf>.

100 Available at <http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf>.

101 *See* D. Kennedy, *The Sources of International Law*, 2 (1) AMERICAN UNIVERSITY INT LAW REVIEW, 1-96 (1987).

International conventions, or treaties, are "international agreement[s] 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."[102] *International custom, or customary international law*, pertains to principles, not necessarily expressed in treaties, resulting from practices consistently followed by states due to a sense of legal obligation.[103] *General principles of law recognized by civilized nations* are "(those) principles of law, private and public, which contemplation of the legal experience of civilized nations leads one to regard as obvious maxims of jurisprudence of a general and fundamental character."[104]

Sovereign immunity under treaty law

Attempts have been made to establish sovereign immunity under treaty law.[105] On a multilateral level, two treaties on this issue have been codified: a) the European Convention on State Immunity (ECSI), and b) the UN Convention on Jurisdictional Immunities of States (UNCJIS).

The European Convention on State Immunity is a treaty established through the Council of Europe on May 16, 1972.[106] In the Council of Europe's explanatory report, sovereign immunity is defined as "a concept of international law, which has developed out of the principle *par in parem non habet imperium*, by virtue of which one State is not subject to the jurisdiction of another State."[107] The treaty arose out of the need to address cases where states become involved in areas of private law:

> For many years State immunity has occupied the attention of eminent jurists. It is also the object of abundant case law. ***The development of international relations and the increasing intervention of States in spheres belonging to private law have posed the problem still more acutely by increasing the number of disputes opposing individuals and foreign States***.

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102 VIENNA CONVENTION ON THE LAW OF TREATIES (1961), art. 2(1)(a) <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

103 E. Posner and Jack L. Goldsmith, *A Theory of Customary International Law* (John M. Olin Program in Law and Economics Working Paper No. 63, 1998). *See also* M. Panezi, *Sources of Law in Transition: Re-visiting general principles of International Law,* Ancilla Juris, <http://www.anci.ch/_media/beitrag/ancilla2007_66_panezi_sources.pdf>. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW (1987), sec.102(2).

104 E. Posner and Jack L. Goldsmith, *A Theory of Customary International Law* 70 (John M. Olin Program in Law and Economics Working Paper No. 63, 1998). See *also*, E. LAUTERPACHT, INTERNATIONAL LAW BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT, Vol. I, The General Works.

105 J. Finke, *Sovereign Immunity: Rule, Comity or Something Else*?, 21 (4) EUR J INT LAW 853-881, 857 (2011) <http://www.ejil.org/pdfs/21/4/2112.pdf>.

106 COUNCIL OF EUROPE - EXPLANATORY REPORT ON THE EUROPEAN CONVENTION ON STATE IMMUNITY (ETS No. 074), <http://conventions.coe.int/Treaty/EN/Reports/Html/074.htm>.

107 Id.

> There are, at present, ***two theories***, that of ***absolute State immunity*** which is the logical consequence of the principle stated above ***and*** that of ***relative State immunity which is tending to predominate on account of the requirement of modern conditions***. ***According to this latter theory, the State enjoys immunity for acts jure imperii but not for acts jure gestionis, that is to say when it acts in the same way as a private person in relations governed by private law.*** This divergence of opinion causes difficulties in international relations. States whose courts and administrative authorities apply the theory of absolute State immunity are led to call for the same treatment abroad. (Emphasis supplied)

However, the European Convention on Sovereign Immunity's application is limited to the signatories of the treaty:

> The Convention requires each Contracting State to give effect to judgments rendered against it by the courts of another Contracting State. ***It is in particular for this reason that it operates only between the Contracting States on the basis of the special confidence subsisting among the Members of the Council of Europe***. ***The Convention confers no rights on nonContracting States***; in particular, it leaves open all questions as to the exercise of jurisdiction against non-Contracting States in Contracting States, and vice versa.

On the other hand, the UN Convention on Jurisdictional Immunities of States[108] is a treaty adopted by the UN General Assembly in December 2004. It was opened for signature on January 27, 2005, but is yet to be in force[109] for lacking the requisite number of member-state signatories.[110] At present, it only has 28 signatories, 16 of which have either ratified, accepted, approved, or acceded to the treaty.[111]

UNCJIS refers to jurisdictional immunities of states as a principle of customary international law.[112] Scholars, however, point out that this posture is not accurate. According to Nagan and Root:[113]

> It may be true that ***all states recognize jurisdictional immunity, but*** as we have already alluded to, that is so only at an abstract level; ***there is "substantial disagreement on detail and substance***."[114] (Emphasis supplied, citations omitted)

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108 December 2, 2004.

109 The Philippines is not a signatory to the Convention.

110 *See* art. 30 of Convention.

111 Status according to the UN Treaty Collection as of 07-17-2014, <https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=III-13&chapter=3&lang=en>.

112 UN CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTIES, preamble.

113 W. Nagan and J. L. Root, *The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the UN Charter, and the Application of Modern Communications Theory*, 38 N.C. J. INT'L L. & COMM. REG. 375 (2013) <http://www.law.unc.edu/journals/ncilj/issues/volume38/issue-2-winter-2013/the-emerging-restrictions-on-sovereign-immunity-peremptory-norms-of-international-law-the-un-charter-and-the-application-of-modern-communications-theo/>.

114 Id. at 60–61.

Wiesinger adds:

> The ***UN Convention is not a codification of customary international law concerning enforcement measures either, since it introduces new categories of State property, which are immune from execution***. Moreover, it contains a connection requirement of property serving commercial purposes with the entity against which the claim was directed, which is a novelty in international law.[115] (Emphasis supplied)

The Philippines has neither signed nor ratified the UNCJIS. Article VII, Section 21 of the Constitution clearly provides the legal requisites to a valid and enforceable international treaty: "No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate."

Senior Associate Justice Antonio T. Carpio ably points to the UN Convention on the Law of the Sea (UNCLOS) as basis for the waiver of sovereign immunity in this case, on account of a warship entering a restricted area and causing damage to the TRNP reef system. This is based on a reading of Articles 31 and 32 of the UNCLOS, thus:

> *Article 31*
>
> *Responsibility of the flag State for damage caused by a warship or other government ship operated for non-commercial purposes*
>
> The flag State shall bear international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship or other government ship operated for non-commercial purposes with the laws and regulations of the coastal State concerning passage through the territorial sea or with the provisions of this Convention or other rules of international law.

This is, however, subject to Article 32 of the same treaty which provides:

> *Article 32*
>
> *Immunities of warships and other government ships operated for non-commercial purposes*
>
> With such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for

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[115] M. E. Wiesinger, *State Immunity from Enforcement Measures* (2006) <https://intlaw.univie.ac.at/fileadmin/user_upload/int_beziehungen/Internetpubl/wiesinger.pdf>.

non-commercial purposes.

I agree that the UNCLOS does provide an opening clarifying the "international responsibility" of the flag ship for non-compliance by a warship with the laws of a coastal State. However, because of Article 32 of the same treaty, it would seem that it should not be the only basis for this court to infer either a waiver by the United States or authority under international law for domestic courts to shape their own doctrines of sovereign jurisdictional immunity.

Other international agreements

The text of Article VII, Section 21 would seem to require Senate concurrence for treaties and "international agreements." The term "international agreements," however, for purposes of granting sovereign immunity, should not cover mere executive agreements.

We are aware of *Bayan Muna v. Romulo*[116] where the ponente for this court held:

> . . . ***International agreements may be in the form of (1) treaties that require legislative concurrence after executive ratification; or (2) executive agreements that are similar to treaties, except that they do not require legislative concurrence and are usually less formal and deal with a narrower range of subject matters than treaties.***
>
> Under international law, ***there is no difference between treaties and executive agreements in terms of their binding effects on the contracting states concerned, as long as the negotiating functionaries have remained within their powers***. Neither, on the domestic sphere, can one be held valid if it violates the Constitution. Authorities are, however, agreed that one is distinct from another for accepted reasons apart from the concurrence-requirement aspect. As has been observed by US constitutional scholars, a treaty has greater "dignity" than an executive agreement, because its constitutional efficacy is beyond doubt, a treaty having behind it the authority of the President, the Senate, and the people; a ratified treaty, unlike an executive agreement, takes precedence over any prior statutory enactment.[117] (Emphasis supplied, citations omitted)

This statement, however, should be confined only to the facts of that case. Executive agreements are not the same as treaties as a source of international law. It certainly may have a different effect in relation to our present statutes unlike a treaty that is properly ratified.

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[116] *Bayan Muna v. Romulo*, G.R. No. 159618, February 1, 2011, 641 SCRA 244 [Per J. Velasco, Jr., En Banc].

[117] Id. at 258–260.

Due to the nature of respondents' position in the United States Armed Forces, the Visiting Forces Agreement of 1998 (VFA) is relevant in this case. In particular, the question of whether the VFA, executed between the Republic of the Philippines and the United States government, may be treated as a "treaty" upon which the doctrine of foreign sovereign immunity is founded must be addressed.

In *BAYAN v. Zamora*,[118] this court tackled the issues pertaining to the constitutionality of the VFA. It was described as "consist[ing] of a Preamble and nine (9) Articles, [and it] provides for the mechanism for regulating the circumstances and conditions under which [the] US Armed Forces and defense personnel maybe present in the Philippines. . . . "[119]

As a preliminary issue, this court ruled that the Senate concurrence as required by the Constitution was achieved, thereby giving VFA a legally binding effect upon the government.[120] However, the agreement's characterization as a "treaty" was put in question. This court held that despite the non-concurrence of the United States Senate, the VFA is validly categorized as a treaty:

> This Court is of the firm view that the ***phrase "recognized as a treaty" means that the other contracting party accepts or acknowledges the agreement as a treaty***. To require the other contracting state, the United States of America in this case, to submit the VFA to the United States Senate for concurrence pursuant to its Constitution, is to accord strict meaning to the phrase.
>
> Well-entrenched is the principle that the words used in the Constitution are to be given their ordinary meaning except where technical terms are employed, in which case the significance thus attached to them prevails. Its language should be understood in the sense they have in common use.
>
> ***Moreover, it is inconsequential whether the United States treats the VFA only as an executive agreement because, under international law, an executive agreement is as binding as a treaty. To be sure, as long as the VFA possesses the elements of an agreement under international law, the said agreement is to be taken equally as a treaty.***
>
> A treaty, as defined by the Vienna Convention on the Law of Treaties, is "an international instrument concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation." There are many other terms used for a treaty or international agreement, some of which are: act, protocol, agreement, *compromis d' arbitrage*, concordat, convention, declaration, exchange of notes, pact, statute, charter and *modus vivendi*. All writers, from Hugo

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118 396 Phil. 623 (2000) [Per J. Buena, En Banc].
119 Id. at 637.
120 Id. at 656.

> Grotius onward, have pointed out that the names or titles of international agreements included under the general term treaty have little or no legal significance. Certain terms are useful, but they furnish little more than mere description.
>
> ***Article 2(2) of the Vienna Convention provides that "the provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms, or to the meanings which may be given to them in the internal law of the State.***
>
> ***Thus, in international law, there is no difference between treaties and executive agreements in their binding effect upon states concerned, as long as the negotiating functionaries have remained within their powers. International law continues to make no distinction between treaties and executive agreements: they are equally binding obligations upon nations.***
>
> ***In our jurisdiction, we have recognized the binding effect of executive agreements even without the concurrence of the Senate or Congress. . . .***
>
> . . . .
>
> The records reveal that the United States Government, through Ambassador Thomas C. Hubbard, has stated that the United States government has fully committed to living up to the terms of the VFA. For as long as the United States of America accepts or acknowledges the VFA as a treaty, and binds itself further to comply with its obligations under the treaty, there is indeed marked compliance with the mandate of the Constitution.[121] (Emphasis supplied, citations omitted)

Under the US legal system, however, an executive agreement, while legally binding, may not have the same effect as a treaty. It may, under certain circumstances, be considered as inferior to US law and/or Constitution. According to Garcia:[122]

> Under the U.S. legal system, international agreements can be entered into by means of a treaty or an executive agreement. The Constitution allocates primary responsibility for entering into such agreements to the executive branch, but Congress also plays an essential role. First, in order for a treaty (but not an executive agreement) to become binding upon the United States, the Senate must provide its advice and consent to treaty ratification by a two-thirds majority. Secondly, Congress may authorize congressional-executive agreements. Thirdly, many treaties and executive agreements are not self-executing, meaning that implementing legislation is required to provide U.S. bodies with the domestic legal authority necessary to enforce and comply with an international agreement's provisions.

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[121] Id. at 657–660.

[122] M. J. Garcia (Legislative Attorney), *International Law and Agreements: their effect upon US law,* CONGRESSIONAL RESEARCH SERVICE 7-5700 RL32528 (2014), <http://fas.org/sgp/crs/misc/RL32528.pdf>.

> ***The status of an international agreement within the United States depends on a variety of factors***. Self-executing treaties have a status equal to federal statute, superior to U.S. state law, and inferior to the Constitution. ***Depending upon the nature of executive agreements, they may or may not have a status equal to federal statute. In any case, self-executing executive agreements have a status that is superior to U.S. state law and inferior to the Constitution. Treaties or executive agreements that are not self-executing have been understood by the courts to have limited status domestically; rather, the legislation or regulations implementing these agreements are controlling***.[123] (Emphasis supplied, citation omitted)

Domestic politics and constitutional guidelines also figure into the effect of an executive agreement in the United States. Garcia adds:

> ***The great majority of international agreements that the United States enters into are not treaties but executive agreements—agreements entered into by the executive branch that are not submitted to the Senate for its advice and consent***. Congress generally requires notification upon the entry of such an agreement. Although executive agreements are not specifically discussed in the Constitution, they nonetheless have been considered valid international compacts under Supreme Court jurisprudence and as a matter of historical practice.
>
> . . . .
>
> Sole executive agreements rely on neither treaty nor congressional authority to provide for their legal basis. The Constitution may confer limited authority upon the President to promulgate such agreements on the basis of his foreign affairs power. If the President enters into an executive agreement pursuant to and dealing with an area where he has clear, exclusive constitutional authority — such as an agreement to recognize a particular foreign government for diplomatic purposes — the agreement is legally permissible regardless of Congress's opinion on the matter. If, however, the President enters into an agreement and his constitutional authority over the agreement's subject matter is unclear, a reviewing court may consider Congress's position in determining whether the agreement is legitimate. If Congress has given its implicit approval to the President entering the agreement, or is silent on the matter, it is more likely that the agreement will be deemed valid. When Congress opposes the agreement and the President's constitutional authority to enter the agreement is ambiguous, it is unclear if or when such an agreement would be given effect.[124] (Emphasis supplied, citation omitted)

The recognition of the complex nature and legal consequences of an executive agreement entered into by the United States with another State must not be taken lightly. This is especially in light of the invocation of

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123 Id.
124 Id. at 4.

"international comity", which loosely refers to "applying foreign law or limiting domestic jurisdiction out of respect for foreign sovereignty."[125]

As it stands, international comity is by itself no longer a simple matter. In quoting an 1895 US case, *Hilton v. Guyot*,[126] Paul argues that at the beginning of the 20th century, the underlying principle of international comity was the respect afforded by one sovereign to another. At present, however, Paul posits:

> ***For all these reasons, international comity would seem to be too vague, incoherent, illusory, and ephemeral*** to serve as a foundation for U.S. private international law. Yet, it is precisely these qualities that have allowed the ***doctrine of international comity to mutate over time in ways that respond to different geopolitical circumstances***. Specifically, international comity has shifted in three distinct respects. First, the ***meaning of comity has shifted over time***. Originally, international comity was a discretionary doctrine that empowered courts to decide when to defer to foreign law out of respect for foreign sovereigns. Comity has become a rule that obligates courts to apply foreign law in certain circumstances. Second, ***the object of comity has changed***. Whereas once courts justified applying foreign law out of deference to foreign sovereigns, courts later justified their decisions out of deference to the autonomy of private parties or to the political branches. Most recently, courts have justified limits on domestic law out of deference to the global market. Third, ***the function of comity has changed***. Comity is no longer merely a doctrine for deciding when to apply foreign law; it has become a justification for deference in a wide range of cases concerning prescriptive, adjudicatory, and enforcement jurisdiction. (Emphasis supplied, citation omitted)

On a substantive note, another issue raised in *BAYAN v. Zamora* is whether the VFA amounted to an abdication of Philippine sovereignty insofar as the jurisdiction of local courts "to hear and try offenses committed by US military personnel"[127] was concerned. Upon finding at the outset that the VFA did not amount to grave abuse of discretion, this court no longer proceeded to rule on this matter:

> In fine, ***absent any clear showing of grave abuse of discretion on the part of respondents, this Court — as the final arbiter of legal controversies and staunch sentinel of the rights of the people — is then without power to conduct an incursion and meddle with such affairs purely executive and legislative in character and nature***. For the Constitution no less, maps out the distinct boundaries and limits the metes and bounds within which each of the three political branches of government may exercise the powers exclusively and essentially conferred to it by law.[128] (Emphasis supplied)

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125 J. Paul, *The Transformation of International Comity* (2008) <http://www.law.duke.edu/journals/lcp>.
126 Id. at 27.
127 396 Phil. 623, 646 (2000) [Per J. Buena, En Banc].
128 Id. at 666.

In sum, the extent of the VFA's categorization as between the Philippine and United States government — either as a "treaty"/"executive agreement" or as a matter subject to international comity — remains vague. Nevertheless, it is certain that the United States have made a political commitment to recognize the provisions and execute their obligations under the VFA. This includes respecting jurisdictional issues in cases involving an offense committed by a US military personnel.

Sovereign immunity as customary international law

Customary international law traditionally pertains to:

> . . . the ***collection of international behavioral regularities that nations over time come to view as binding on them as a matter of law.*** This standard definition contain ***two elements.*** There ***must be a widespread and uniform practice of nations.*** And ***nations must engage in the practice out of a sense of legal obligation.*** This second requirement, often referred to as opinio juris, is the central concept of CIL. Because opinio juris refers to the reason why a nation acts in accordance with a behavioral regularity, it is often described as the "psychological" element of CIL. It is what distinguishes a national act done voluntarily or out of comity from one that a nation follows because required to do so by law. Courts and scholars say that a longstanding practice among nations "ripens" or "hardens" into a rule of CIL when it becomes accepted by nations as legally binding.[129] (Emphasis supplied, citation omitted)

Nagan and Root[130] categorize the doctrine of sovereign immunity as a customary rule of international law. They argue that the doctrine, which is also referred to as jurisdictional immunity, "has its roots in treaties, domestic statutes, state practice, and the writings of juris consults".[131] Quoting United States law,[132] Nagan and Root state:

> . . . ***The doctrine of jurisdictional immunity takes the abstract concept of sovereignty and applies it to facts on the ground***. As the Restatement notes, "Under international law, a state or state instrumentality is immune from the jurisdiction of the courts of another state . . . ." The Restatement further states unambiguously that the rule of sovereign immunity is "an undisputed principle of international law." . . .

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129 E. Posner and J. L. Goldsmith, *A Theory of Customary International Law* (John M. Olin Program in Law and Economics Working Paper No. 63) 5 (1998).

130 W. P. Nagan and J. L. Root, *The Emerging Restrictions on Foreign Immunity: Peremptory Norms of International Law, the UN Charter, and the Application of Modern Communications Theory*, 38 N.C. J. INT'L L. & COMM. REG. 375 (2013) <http://www.law.unc.edu/journals/ncilj/issues/volume38/issue-2-winter-2013/the-emerging-restrictions-on-sovereign-immunity-peremptory-norms-of-international-law-the-un-charter-and-the-application-of-modern-communications-theo/>.

131 Id. at 4.

132 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW.

> The ***doctrine of sovereign immunity is one of the older concepts in customary international law***. . . .[133] (Emphasis supplied, citation omitted)

While the doctrine in itself is recognized by states, they do so only in abstraction.[134]

There appears to be a general recognition that foreign states are to be afforded immunity on account of equality of states, but the "practice" lacks uniformity. Finke points out that the doctrine as exercised by different states suffers from "substantial disagreement on detail and substance."[135] The inconsistencies in state practice render the possibility of invoking international comity even more problematic.

The legislation of other states highlight the differences in specific treatment of sovereign immunity. For instance, the United States Foreign Sovereign Immunities Act (FSIA) of 1978 was enacted in order to render uniform determinations in cases involving sovereign immunity.[136] While it recognizes sovereign immunity, it provides the following exceptions:

> . . . the ***general principle that a foreign state is immune from the jurisdiction of the courts of the United States,*** but sets forth several limited exceptions. The ***primary exceptions*** are
>
> 1. ***waiver*** ("the foreign state has waived its immunity either expressly or by implication"),
>
> 2. ***commercial activity*** ("the action is based upon a commercial activity carried on in the United States by the foreign state"),and
>
> 3. ***torts committed by a foreign official within the United States*** (the "suit is brought against a foreign State for ***personal injury or death, or damage to property occurring in the United States as a result of the tortious act of an official or employee of that State acting within the scope of his office or employment***").(Emphasis supplied, citation omitted)

The United Kingdom State Immunity Act of 1978 also recognizes general immunity from jurisdiction, subject to the following exceptions: a) submission to jurisdiction;[137] b) commercial transactions and contracts to be

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133 Id. at 38.

134 J. Finke, *Sovereign Immunity: Rule, Comity or Something Else*?, 21 (4) EUR J INT LAW 853-881, 856 (2011) <http://www.ejil.org/pdfs/21/4/2112.pdf>.

135 J. Finke, *Sovereign Immunity: Rule, Comity or Something Else*?, 21 (4) EUR J INT LAW 853-881, 871 (2011) <http://www.ejil.org/pdfs/21/4/2112.pdf>.

136 J. K. Elsea and S. V. Yousef, *The Foreign Sovereign Immunities Act (FSIA) and Foreign Officials*, CONGRESSIONAL RESEARCH SERVICE 7-5700 (2013).

137 UNITED KINGDOM STATE IMMUNITY ACT OF 1978, part I, 2--(1) provides: "A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United

performed in the United Kingdom;[138] c) contracts of employment;[139] d) personal injuries and damage to property;[140] e) ownership, possession, and use of property;[141] f) patents, trademarks, etc.;[142] g) membership of bodies corporate, etc.;[143] h) arbitration;[144] i) ships used for commercial purposes;[145] and value-added tax, customs duties, etc.[146]

The Australian Foreign States Immunities Act of 1985 provides for exceptions similar to the ones found in the United Kingdom law.[147]

Aside from the variations in foreign laws, rulings in domestic cases have also remained on a theoretical level. There appears to be a general refusal by international bodies to set particular rules and guidelines for the disposition of actual cases involving sovereign immunity.

Two cases are relevant for the purpose of discussing sovereign immunity as an international customary norm: the International Court of Justice's decision in *Germany v. Italy*, and the International Tribunal for the

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Kingdom."

138 UNITED KINGDOM STATE IMMUNITY ACT OF 1978, part I, 3--(1) provides: " A State is not immune as respects proceedings relating to—(a) a commercial transaction entered into by the State; or (b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom.

139 UNITED KINGDOM STATE IMMUNITY ACT OF 1978, part I, 4--(1) provides: " A State is not immune as respects proceedings relating to a contract of employment between the State and an individual where the contract was made in the United Kingdom or the work is to be wholly or partly performed there."

140 UNITED KINGDOM STATE IMMUNITY ACT OF 1978, part I, 5--(1) provides: "A State is not immune as respects proceedings in respect of—(a) death or personal injury; or (b) damage to or loss of tangible property,caused by an act or omission in the United Kingdom."

141 UNITED KINGDOM STATE IMMUNITY ACT OF 1978, part I, 6--(1) provides: "A State is not immune as respects proceedings relating to—(a) any interest of the State in, or its possession or use of, immovable property in the United Kingdom; or (b)any obligation of the State arising out of its interest in, or its possession or use of, any such property.

142 UNITED KINGDOM STATE IMMUNITY ACT OF 1978, part I, 7--(1) provides: A State is not immune as respects proceedings relating to—(a) any patent, trade-mark, design or plant breeders' rights belonging to the State and registered or protected in the United Kingdom or for which the State has applied in the United Kingdom; (b)an alleged infringement by the State in the United Kingdom of any patent, trade-mark, design, plant breeders' rights or copyright; or (c)the right to use a trade or business name in the United Kingdom.

143 UNITED KINGDOM STATE IMMUNITY ACT OF 1978, part I, 8--(1) provides: A State is not immune as respects proceedings relating to its membership of a body corporate, an unincorporated body or a partnership which— (a) has members other than States; and (b) is incorporated or constituted under the law of the United Kingdom or is controlled from or has its principal place of business in the United Kingdom,being proceedings arising between the State and the body or its other members or, as the case may be, between the State and the other partners.

144 UNITED KINGDOM STATE IMMUNITY ACT OF 1978, part I, 9--(1) provides: Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.

145 UNITED KINGDOM STATE IMMUNITY ACT OF 1978, part I, 10--(2) provides: A State is not immune as respects— (a) an action in rem against a ship belonging to that State; or (b) an action in personam for enforcing a claim in connection with such a ship

146 UNITED KINGDOM STATE IMMUNITY ACT OF 1978, part I, 11--(1) provides: A State is not immune as respects proceedings relating to its liability for—(a) value added tax, any duty of customs or excise or any agricultural levy; or (b)rates in respect of premises occupied by it for commercial purposes.

147 Part II of the law provides for the following exceptions: (a) submission to jurisdiction; (b) commercial transactions; (c) contracts of employment; (d) personal injury and damage to property; (e) ownership, possession, and use of property, etc.; (f) copyright, patents, trade marks, etc., (g) membership of bodies corporate etc.; (h) arbitrations; (i) actions in rem; (j) bills of exchange; and (k) taxes.

Law of the Sea's procedural order on the Ara Libertad case. While *stare decisis* does not apply, these are nevertheless instructive in understanding the status of sovereign immunity in international law.

The issue of sovereign immunity as invoked between two States was dealt with in the 2012 case of *Jurisdictional Immunities of the State (Germany v. Italy*).[148] This arose out of a civil case brought before Italian domestic courts, seeking reparations from Germany for grave breaches of international humanitarian law during World War II.[149] The Italian Court of Cassation held that it had jurisdiction over the claims on the ground that state immunity was untenable if the act complained of was an international crime.[150] Thereafter, an Italian real estate owned by Germany was attached for execution.[151] As a result, Germany brought the case before the International Court of Justice, questioning the legality of the judgment rendered by the Italian court. It based its claim on state immunity.[152]

The International Court of Justice ruled that Italy had violated customary international law when it took cognizance of the claim against Germany before its local courts.[153] It held that:

> In the present context***, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention***. ***Opinio juris in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that inter- national law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States.*** While it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for present purposes, the point is that the grant of immunity in such a case is not accompanied by the requisite *opinio juris* and therefore sheds no light upon the issue currently under consideration by the Court.
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> 56. Although there has been much debate regarding the origins of State immunity and the identification of the principles underlying that

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148 *Jurisdictional Immunities of the State (Germany v. Italy)* (2012) <http://www.icj-cij.org/docket/files/143/16883.pdf.>; *See also* P. B. Stephan, *Sovereign Immunity and the International Court of Justice: The State System Triumphant*, VIRGINIA PUBLIC LAW AND LEGAL THEORY RESEARCH PAPER NO. 2012-47 (2012) <http://ssrn.com/abstract=2137805>.

149 Id. at pars. 27–29.

150 Id.

151 Id. at par. 37.

152 Id.

153 Id. at par. 79.

> immunity in the past, ***the International Law Commission concluded in 1980 that the rule of State immunity had been "adopted as a general rule of customary international law solidly rooted in the current practice of States"*** (*Yearbook of the International Law Commission*, 1980, Vol. II (2), p. 147, para. 26). ***That conclusion was based upon an extensive survey of State practice and, in the opinion of the Court, is confirmed by the record of national legislation, judicial decisions, assertions of a right to immunity and the comments of States on what became the United Nations Convention.*** That practice shows that, whether in claiming immunity for themselves or according it to others, ***States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity.***
>
> 57. ***The Court considers that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order.***
>
> ***This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory***. ***Exceptions to the immunity of the State represent a departure from the principle of sovereign equality***. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it. (Emphasis supplied)[154]

The International Court of Justice deemed it unnecessary to discuss the difference between the application of sovereign immunity in sovereign acts (*jus imperii)* and non-sovereign activities (*jus gestionis*) of a State.[155] As to the argument that a serious violation of international law or peremptory norms (*jus cogens)* is an exception to sovereign immunity, the International Court of Justice held that:

> 82. At the outset, however, the Court must observe that the proposition that the availability of immunity will be to some extent dependent upon the gravity of the unlawful act presents a logical problem. ***Immunity from jurisdiction is an immunity not merely from being subjected to an adverse judgment but from being subjected to the trial process. It is, therefore, necessarily preliminary in nature. Consequently, a national court is required to determine whether or not a foreign State is entitled to immunity as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established***. ***If immunity were to be dependent upon the State actually having committed a serious violation of international human rights law or the law of armed conflict, then it would become necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction. If, on the other hand, the mere allegation that the State had committed such wrongful acts were to be sufficient to***

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154 Id. at pars. 55–57.
155 Id. at par. 60.

deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skilful construction of the claim.

83. That said, the Court must nevertheless inquire whether customary international law has developed to the point where a State is not entitled to immunity in the case of serious violations of human rights law or the law of armed conflict. Apart from the decisions of the Italian courts which are the subject of the present proceedings, there is almost no State practice which might be considered to support the proposition that a State is deprived of its entitlement to immunity in such a case. . . .

84. In addition, there is a substantial body of State practice from other countries which demonstrates that ***customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated***.

85. ***That practice is particularly evident in the judgments of national courts. Arguments to the effect that international law no longer required State immunity in cases of allegations of serious violations of international human rights law, war crimes or crimes against humanity have been rejected*** by the courts in Canada (*Bouzari* v. *Islamic Republic of Iran*, Court of Appeal of Ontario, [2004] *Dominion Law Reports (DLR)*, 4th Series, Vol. 243, p. 406; *ILR*, Vol. 128, p. 586; allegations of torture), France (judgment of the Court of Appeal of Paris, 9 September 2002, and *Cour de cassation*, No. 02-45961, 16 December 2003, *Bulletin civil de la Cour de cassation (Bull. civ.)*, 2003, I, No. 258, p. 206 (the *Bucheron* case); *Cour de cassation*, No. 03-41851, 2 June 2004, *Bull. civ.*, 2004, I, No. 158, p. 132 (the *X* case) and *Cour de cassation*, No. 04-47504, 3 January 2006 (the *Grosz* case); allegations of crimes against humanity), Slovenia (case No. Up-13/99, Constitutional Court of Slovenia; allegations of war crimes and crimes against humanity), New Zealand (*Fang* v. *Jiang*, High Court, [2007] *New Zealand Administrative Reports (NZAR)*, p. 420; *ILR*, Vol. 141, p. 702; allegations of torture), Poland (*Natoniewski*, Supreme Court, 2010, *Polish Yearbook of International Law*, Vol. XXX, 2010, p. 299; allegations of war crimes and crimes against humanity) and the United Kingdom (*Jones* v. *Saudi Arabia*, House of Lords, [2007] 1 *Appeal Cases (AC)* 270; *ILR*, Vol. 129, p. 629; allegations of torture).

. . . .

93. This argument therefore depends upon the existence of a conflict between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one State to accord immunity to another. In the opinion of the Court, however, no such conflict exists. Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*, there is no conflict between those rules and the rules on State immunity. ***The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.*** That is why the application of the con- temporary law of State immunity to proceedings

> concerning events which occurred in 1943-1945 does not infringe the principle that law should not be applied retrospectively to determine matters of legality and responsibility (as the Court has explained in paragraph 58 above). ***For the same reason, recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a jus cogens rule, or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission's Articles on State Responsibility.***
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> 95. ***To the extent that it is argued that no rule which is not of the status of jus cogens may be applied if to do so would hinder the enforcement of a jus cogens rule, even in the absence of a direct conflict, the Court sees no basis for such a proposition***. A *jus cogens* rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application. The Court has taken that approach in two cases, notwithstanding that the effect was that a means by which a *jus cogens* rule might be enforced was rendered unavailable. ***In Armed Activities, it held that the fact that a rule has the status of jus cogens does not confer upon the Court a jurisdiction which it would not otherwise possess*** (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 32, para. 64, and p. 52, para. 125). In *Arrest Warrant*, the Court held, albeit without express reference to the concept of *jus cogens*, that the fact that a Minister for Foreign Affairs was accused of criminal violations of rules which undoubtedly possess the character of *jus cogens* did not deprive the Democratic Republic of the Congo of the entitlement which it possessed as a matter of customary international law to demand immunity on his behalf (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 24, para. 58, and p. 33, para. 78). The Court considers that the same reasoning is applicable to the application of the customary international law regarding the immunity of one State from proceedings in the courts of another.[156]

Though pertaining to provisional measures, another case that involved the issue of sovereign immunity is the "Ara Libertad" case (*Argentina v. Ghana*). Lodged before the International Tribunal for the Law of the Sea (ITLOS), the case arose after "ARA Fragata Libertad," an Argentinian warship, was alleged to have been detained and subjected to several judicial measures by the Republic of Ghana.[157] In doing so, Argentina alleged that Ghana violated the immunities from jurisdiction and execution extended to the warship by its flag.[158]

Ghana countered:

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156 Id. at pars. 82–95.
157 Id. at par. 26.
158 Id.

> . . . that the coastal State [Ghana] ***enjoys full territorial sovereignty over internal waters, and that any foreign vessel located in internal waters is subject to the legislative, administrative, judicial and jurisdictional powers*** of the coastal State."[159] (Emphasis supplied)

The order dated December 15, 2012 ruled the following:

> . . . that a warship is an expression of the sovereignty of the State whose flag it flies;[160]
>
> . . . in accordance with general international law, a warship enjoys immunity, including in internal waters. . . .[161]
>
> . . . .
>
> Ghana shall forthwith and unconditionally release the frigate *ARA Libertad*, shall ensure that the frigate *ARA Libertad*, its Commander and crew are able to leave the port of Tema and the maritime areas under the jurisdiction of Ghana, and shall ensure that the frigate *ARA Libertad* is resupplied to that end.[162] (Citation supplied)

In sum, the International Court of Justice's position that sovereign immunity remains applicable even if the action is based upon violations of international law should be limited only to acts during armed conflict. *Jurisdictional Immunities of the State (Germany v. Italy*) also referred to actions commited during World War II and especially referred to the situation of international law at that time. The majority reflected the attitude that sovereign immunity is a customary norm. It, however, recognizes that uniformity in state practice is far from the consensus required to articulate specific rules pertaining to other circumstances — such as transgressions of foreign warships of domestic legislation while granted innocent passage. It impliedly accepted that states enjoyed wide latitude to specify their own norms.

The provisional order in the ITLOS Ara Libertad case should also be read within its factual ambient. That is, that the warship was the subject of seizure to enforce a commercial obligation of its flag state. In this case, the foreign warship enjoys sovereign immunity. The case, however, did not interpret Sections 31 and 32 of the UNCLOS.

On this note, it is my opinion that there would be no violation of customary international law or existing treaty law if this court further refines the limits of the doctrine of sovereign immunity's application when

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159 Id. at par. 56.
160 Id. at par. 94.
161 Id. at par. 95.
162 Id. at par. 108.

determining jurisdictional immunities of foreign warships specifically when it violates domestic laws implementing international obligations even while on innocent passage.

Sovereign immunity as general principle of law

There are indications from international legal scholars that sovereign immunity might make more sense if it is understood as *a general principle of international law* rather than as international obligation arising out of treaty or customary norm.

Finke suggests that this provides the better platform. Whereas a rule is more precise and consistent in both its application and legal consequences, a principle "allows for a broader spectrum of possible behaviour."[163] Principles recognize a general idea and serve as a guide in policy determinations, rather than prescribe *a particular mode of action*, which is what rules do. This distinction is significant, as principles provide the leeway to accommodate legal and factual circumstances surrounding each case that customary rules generally do not.[164]

General principles of international law are said to be:

> . . . an autonomous, created by general consensus, systematically fundamental part of International Law, that consists of different normative notions, in which judges refer to, through a creative process, in order to promote the consistency of International Law.[165]

Clearly, sovereign immunity is a doctrine recognized by states under the international law system. However, its characterization as a principle is more appropriate in that "the extent to which foreign states are awarded immunity differs from state to state."[166] This appears to be an accepted arrangement in light of the different state immunity laws all over the world.

As it stands, states are allowed to draw the line in the application of sovereign immunity in cases involving foreign states and their agents. As a principle of international law, it is deemed automatically incorporated in our domestic legal system as per Article II, Section 2 of the Constitution.

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163 J. Finke, *Sovereign Immunity: Rule, Comity or Something Else*?, 21 (4) EUR J INT LAW 853-881, 872 (2011) <http://www.ejil.org/pdfs/21/4/2112.pdf>.

164 J. Finke, *Sovereign Immunity: Rule, Comity or Something Else*?, 21 (4) EUR J INT LAW 853-881, 872 (2011) <http://www.ejil.org/pdfs/21/4/2112.pdf>.

165 M. Panezi, *Sources of Law in Transition: Re-visiting general principles of International Law,* Ancilla Juris 71 (2007) <http://www.anci.ch/_media/beitrag/ancilla2007_66_panezi_sources.pdf>.

166 J. Finke, *Sovereign Immunity: Rule, Comity or Something Else*?, 21 (4) EUR J INT LAW 853-881, 874 (2011) <http://www.ejil.org/pdfs/21/4/2112.pdf>.

Considering this leeway, along with the urgency and importance of the case at hand, the Philippines is, therefore, free to provide guidelines consistent with international law, domestic legislation, and existing jurisprudence.

Exceptions to sovereign immunity

Our own jurisprudence is consistent with the pronouncement that the doctrine of sovereign immunity is not an absolute rule. Thus, the doctrine should take the form of *relative sovereign jurisdictional immunity.*[167]

The tendency in our jurisprudence moved along with the development in other states.

States began to veer away from absolute sovereign immunity when "international trade increased and governments expanded into what had previously been private spheres."[168] The relative theory of sovereign immunity distinguishes a state's official (*acta jure imperii*) from private (*acta jure gestionis*) conduct.[169] The distinction is founded on the premise "[that] once the sovereign has descended from his throne and entered the marketplace[,] he has divested himself of his sovereign status and is therefore no longer immune to the domestic jurisdiction of the courts of other countries."[170]

In the 2003 case of *Republic of Indonesia v. Vinzon*, this court enunciated that in cases involving foreign states, the basis of sovereign immunity is the maxim *par in parem non habet imperium*. Founded on sovereign equality, a state cannot assert its jurisdiction over another.[171] To do so otherwise would "unduly vex the peace of nations."[172] However, it also underscored that the doctrine only applies to public acts or acts *jure imperii*, thus, referring to the relative theory. *JUSMAG Philippines v. NLRC*[173] discussed the restrictive application:

> In this jurisdiction, we recognize and adopt the generally accepted principles of international law as part of the law of the land. ***Immunity of State from suit is one of these universally recognized principles. In international law, "immunity" is commonly understood as an exemption***

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167 J. Finke, *Sovereign Immunity: Rule, Comity or Something Else*?, 21 (4) EUR J INT LAW 853-881, 853 (2011) <http://www.ejil.org/pdfs/21/4/2112.pdf>.

168 N. J. Shmalo, *Is the Restrictive Theory of Sovereign Immunity Workable? Government Immunity and Liability*, 17 (3) INTERNATIONAL STANFORD LAW REVIEW (1965) 501-507.

169 J. Finke, *Sovereign Immunity: Rule, Comity or Something Else*?, 21 (4) EUR J INT LAW 853-881, 858 (2011) <http://www.ejil.org/pdfs/21/4/2112.pdf>.

170 J. Finke, *Sovereign Immunity: Rule, Comity or Something Else*?, 21 (4) EUR J INT LAW 853-881, 859 (2011) <http://www.ejil.org/pdfs/21/4/2112.pdf>.

171 452 Phil. 1100, 1107 (2003) [Per J. Azcuna, En Banc].

172 Id.

173 G.R. No. 108813, December 15, 1994, 239 SCRA 224 [Per J. Puno, Second Division].

> ***of the state and its organs from the judicial jurisdiction of another state.*** This is anchored on the principle of the sovereign equality of states under which one state cannot assert jurisdiction over another in violation of the maxim *par in parem non habet imperium* (an equal has no power over an equal).
>
> . . . .
>
> ***As it stands now, the application of the doctrine of immunity from suit has been restricted to sovereign or governmental activities (jure imperii).*** The ***mantle of state immunity cannot be extended to commercial, private and proprietary acts (jure gestionis***).[174] (Emphasis supplied, citations omitted)

In *United States of America v. Ruiz*,[175] which dealt with a contract involving the repair of wharves in Subic Bay's US naval installation, this court further adds that:

> . . . the ***correct test for the application of State immunity*** is not the conclusion of a contract by a State but ***the legal nature of the act***. . . .[176] (Emphasis supplied)

In *JUSMAG*, this court stated:

> . . . ***if the contract was entered into in the discharge of its governmental functions, the sovereign state cannot be deemed to have waived its immunity from suit***.[177] (Emphasis supplied, citation omitted)

These cases involved contracts. This made the determination of whether there was waiver on the part of the state simpler.

Further in *Municipality of San Fernando, La Union v. Firme*,[178] this court stated that two exceptions are a) when the State gives its consent to be sued and b) when it enters into a business contract.[179] It ruled that:

> ***Express consent may be embodied in a general law or a special law.***
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> . . . .
>
> ***Consent is implied when the government enters into business contracts***, thereby descending to the level of the other contracting party, ***and also when the State files a complaint***, thus opening itself to a

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174 Id. at 230–232.
175 221 Phil. 179 (1985) [Per J. Abad Santos, En Banc].
176 Id. at 184.
177 G.R. No. 108813, December 15, 1994, 239 SCRA 224, 233 [Per J. Puno, Second Division].
178 273 Phil. 56 (1991) [Per J. Medialdea, First Division].
179 Id. at 62.

counterclaim.[180] (Emphasis supplied, citations omitted)

Other exceptions are cases involving acts unauthorized by the State, and violation of rights by the impleaded government official. In the 1970 case of *Director of Bureau of Telecommunications, et al. v. Aligaen, et al.*,[181] this court held that:

> Inasmuch as the State authorizes only legal acts by its officers, ***unauthorized acts of government officials or officers are not acts of the State***, ***and an action against the officials or officers by one whose rights have been invaded or violated by such acts, for the protection of his rights, is not a suit against the State within the rule of immunity of the State from suit***. In the same tenor, it has been said that an ***action at law or suit in equity against a State officer or the director of a State department on the ground that, while claiming to act for the State, he violates or invades the personal and property rights of the plaintiff, under an unconstitutional act or under an assumption of authority which he does not have, is not a suit against the State within the constitutional provision that the State may not be sued without its consent***.[182] (Emphasis supplied, citations omitted)

Shauf v. Court of Appeals[183] evolved the doctrine further as it stated that "[the] rational for this ruling is that the doctrine of state immunity cannot be used as an instrument for perpetrating an injustice."[184]

Tortious acts or crimes committed while discharging official functions are also not covered by sovereign immunity. Quoting the ruling in *Chavez v. Sandiganbayan*,[185] this court held American naval officers personally liable for damages in *Wylie v. Rarang*,[186] to wit:

> . . . The petitioners, however, were negligent because under their direction they issued the publication without deleting the name "Auring." Such act or omission is *ultra vires* and cannot be part of official duty. It was a tortious act which ridiculed the private respondent.[187]

We note that the American naval officers were held to be accountable in their personal capacities.[188]

As it stands, the Philippines has no law on the application of sovereign immunity in cases of damages and/or violations of domestic law

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180 Id.
181 144 Phil. 257 (1970) [Per J. Zaldivar, En Banc].
182 Id. at 267–268.
183 G.R. No. 90314, November 27, 1990, 191 SCRA 713 [Per J. Regalado, Second Division].
184 Id. at 727.
185 271 Phil. 293 (1991) [Per J. Gutierrez, Jr., En Banc].
186 G.R. No. 74135, May 28, 1992, 209 SCRA 357 [Per J. Gutierrez, Jr., Third Division].
187 Id. at 370.
188 Id.

involving agents of a foreign state. But our jurisprudence does have openings to hold those who have committed an act ultra vires responsible in our domestic courts.

As previously discussed, it was held in *Germany v. Italy* that the issue of implied waiver of sovereign immunity and a State's commission of a serious violation of a peremptory norm (*jus cogens*) are two independent areas. This reflects one of the positions taken by scholars in the jurisdiction-immunity discourse:

> Jurisdiction and its limits have developed differently depending on the subject matter. The jurisdiction to adjudicate in civil matters has, for example, developed mainly in the context of private international law, even though it is not unrelated to public international law. ***Immunity, on the other hand, is linked to official acts of a state (if we accept the principal distinction between private and public acts) and is therefore more sensitive to the sovereignty of the foreign state***. Linking immunity to the limits of jurisdiction to adjudicate in civil matters would therefore mean disregarding the official character of the foreign state's conduct.[189] (Emphasis supplied, citation omitted)

This ruling holds no value as a precedent, and, therefore, does not preclude the Philippines to make a determination that may be different from the International Court of Justice's ruling. Its value must only be to elucidate on the concept of sovereign immunity, in the context of that case, as the general rule with the possibility of other exceptions.

Furthermore, if we consider the doctrine of sovereign immunity as a binding general principle of international law rather than an international customary norm, the particular rules and guidelines in its application and invocation may be determined on a domestic level either through statute or by jurisprudence.

It is difficult to imagine that the recognition of equality among nations is still, in these modern times, as absolute as we have held it to be in the past or only has commercial acts as an exception. International law has conceded jus cogens rules of international law and other obligations erga omnes. It is time that our domestic jurisprudence adopts correspondingly.

Considering the flexibility in international law and the doctrines that we have evolved so far, ***I am of the view that immunity does not necessarily apply to all the foreign respondents should the case have been brought in a timely manner, with the proper remedy, and in the proper court. Those who have directly and actually committed culpable acts or acts resulting***

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[189] J. Finke, *Sovereign Immunity: Rule, Comity or Something Else*?, 21 (4) EUR J INT LAW 853-881, 878 (2011) <http://www.ejil.org/pdfs/21/4/2112.pdf>.

from gross negligence resulting in the grounding of a foreign warship in violation of our laws defining a tortious act or one that protects the environment which implement binding international obligations cannot claim sovereign immunity.

Certainly, this petition being moot and not brought by the proper parties, I agree that it is not the proper case where we can lay down this doctrine. I, therefore, can only concur in the result.

ACCORDINGLY, I vote to DISMISS the petition.

MARVIC M.V.F. LEONEN
Associate Justice