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. BAUSTISTA, 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. TUPAS,** ***Petitioners*** **v. 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

SERENO, ***CJ*****:**

I concur.

Sovereign immunity serves as a bar for the foreign sovereign to be subjected to the trial process. Supported both by local jurisprudence, as well

as international law (which forms part of the Philippine legal structure), the doctrine should not be reversed in this particular case.

SOVEREIGN IMMUNITY IN PHILIPPINE LAW

Sovereign immunity in Philippine law has been lengthily discussed by the Court in *China National Machinery & Equipment Corp. v. Hon. Santamaria* in the following manner:

> This Court explained the doctrine of sovereign immunity in *Holy See v. Rosario*, to wit:
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> > There are two conflicting concepts of sovereign immunity, each wid**ely held and firmly established. According to the classical or absolute** theory, a sovereign cannot, without its consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory, the immunity of the sovereign is recognized only with regard to public acts or acts jure imperii of a state, but not with regard to private acts or acts jure gestionis.
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> > The restrictive theory came about because of the entry of sovereign states into purely commercial activities remotely connected with the discharge of governmental functions. This is particularly true with respect to the Communist states which took control of nationalized business activities and international trading.
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> > In *JUSMAG v. National Labor Relations Commission*, this Court affirmed the Philippines' adherence to the restrictive theory as follows:
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> > The doctrine of state immunity from suit has undergone further metamorphosis. The view evolved that the existence of a contract does not, per se, mean that sovereign states may, at all times, be sued in local courts. The complexity of relationships between sovereign states, brought about by their increasing commercial activities, mothered a more restrictive application of the doctrine.
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> > **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).
> >
> > Since the Philippines adheres to the restrictive theory, it is crucial to ascertain the legal nature of the act involved – **whether the entity claiming immunity performs governmental, as opposed to proprietary, functions**. As held in *United States of America v. Ruiz* –
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> > The restrictive application of State immunity is proper only when the proceedings arise out of commercial transactions of the foreign sovereign, its commercial activities or economic affairs. Stated differently, a State may be said to have descended to the level of an individual and can thus be deemed to have tacitly given its consent to

> be sued only when it enters into business contracts. It does not apply where the contract relates to the **exercise of its sovereign functions.**[1] (Emphases supplied. Citations omitted)

From the Philippine perspective, what determines its ability to impose its law upon the foreign entity would be the act of the foreign entity – on whether the act is an aspect of its sovereign function or a private act.

In this case, the two Naval Officers were acting pursuant to their function as the commanding officers of a warship, traversing Philippine waters under the authority of the Visiting Forces Agreement (VFA). While the events beg the question of what the warship was doing in that area, when it should have been headed towards Indonesia, its presence in Philippine waters is not wholly unexplainable. The VFA is a treaty, and it has been affirmed as valid by this Court in *Bayan v. Zamora*,[2] and affirmed in *Lim v. Executive Secretary*[3] and *Nicolas v. Romulo*.[4] It has, in the past, been used to justify the presence of United States Armed Forces in the Philippines. In this respect therefore, acts done pursuant to the VFA take the nature of governmental acts, since both the United States and Philippine governments recognize the VFA as a treaty with corresponding obligations, and the presence of these two Naval Officers and the warship in Philippine waters fell under this legal regime.

From this, the applicability of sovereign immunity cannot be denied as to the presence of the warship and its officers in Philippine waters. This does not, however, put an end to the discussion, because even if immunity is applicable to their presence, the specific act of hitting the Tubbataha Reef and causing damage thereto is a presumably tortuous act. Can these kinds of acts also be covered by the principle of sovereign immunity?

TORT EXCEPTION

Under the regime of international law, there is an added dimension to sovereign immunity exceptions: the tort exception. Whether this has evolved into a customary norm is still debatable; what is important to emphasize is that while some states have enacted legislation to allow the piercing of sovereign immunity in tortuous actions, the Foreign Sovereign Immunities Act of 1976 of the United States (FSIA)[5] contains such privilege. Specifically, the FSIA contains exceptions for (1) waiver;[6] (2) commercial activity;[7] (3) expropriation;[8] (4) property rights acquired through succession or donation;[9] (5) damages for personal injury or death or damage to or loss

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[1] G.R. No. 185572, February 07, 2012
[2] G.R. No. 138570, October 10, 2000.
[3] G.R. No. 151445, April 11, 2002.
[4] G.R. No. 175888, February 11, 2009.
[5] Pub. L. 94-583, 90 Stat. 2891, 28 U.S.C. Sec. 1330, 1332(a), 1391(f) and 1601-1611.
[6] Id., sec. 1605(a)(1).
[7] Id., sec. 1605(a)(2).
[8] Id., sec. 1605(a)(3).
[9] Id., sec. 1605(a)(4).

of property;[10] (6) enforcement of an arbitration agreement;[11] (7) torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support to such an act, if the state sponsors terrorism;[12] and (8) maritime lien in a suit for admiralty based on commercial activity.[13]

Any claim under the FSIA goes through a hierarchical process between the diplomatic channels of the United States and the forum state. However, by explicitly including the tort exception in its local legislation under the 4th exception discussed above ─ with due consideration to the heavy requirements for any doctrine to attain customary status ─ it becomes plausible that the exception can be applied to the United States, if not through customary international law, then by reason of acquiescence or estoppel.

As explained by Jasper Finke,

> x x x x the current state practice may not support a rule of customary international law according to which states must deny sovereign immunity in case of tortious acts committed by another country in the forum state. Even though such an obligation is included in the ECSI and the UNCJIS, a considerable number of states do not apply this exception. But this does not answer the question whether states are prohibited from doing so. Section 1605 of the FSIA, for example, denies immunity in cases 'in which money damages are sought … for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state'. If sovereign immunity is the default rule and all exceptions must reflect customary international law, and if the tort exception has not yet evolved into custom, then states such as the US, UK, Canada, and Australia that have included the tort exception in their national immunity laws automatically violate international law – a conclusion which no commentator so far has suggested. **But if states that enact this exception as law do not violate international law, why then should a state do so if its courts apply this exception not on the basis of national law, but on the basis of how they construe and interpret the doctrine of sovereign immunity under international law?**[14] (Emphasis supplied)

What Finke suggests is that a local court need not find the tort exception concept in its national law if it can interpret the doctrine from its understanding of international law. Can the Philippines then interpret the exception as being part of its acceptance of "general principles of international law" under the Constitution?[15]

SOVEREIGN IMMUNITY AS A POLITICAL DECISION

In *Vinuya v. Romulo*, we stated that "the question whether the Philippine government should espouse claims of its nationals against a foreign government is a foreign relations matter, the authority for which is

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[10] Id., sec. 1605(a)(5).
[11] Id., sec. 1605(a)(6).
[12] Id., sec. 1605(a)(7).
[13] Id., sec. 1605(b).
[14] JASPER FINKE, SOVEREIGN IMMUNITY: RULE, COMITY OR SOMETHING ELSE?, Eur J Int Law (2010) 21(4), 863-864.
[15] Article II, Sec. 2, 1987 CONSTITUTION.

demonstrably committed by our Constitution not to the courts but to the political branches."[16] Immunity then, unlike in other jurisdictions, is determined not by the courts of law but by the executive branches. Indeed, this was extensively discussed in Chief Justice Puno's concurring opinion in *Liang v. People*, to wit:

> Petitioner's argument that a determination by the Department of Foreign Affairs that he is entitled to diplomatic immunity is a political question binding on the courts, is anchored on the ruling enunciated in the case of *WHO, et al. vs. Aquino, et al.*, viz:
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> > "**It is a recognized principle of international law and under our system of separation of powers that diplomatic immunity is essentially a political question and courts should refuse to look beyond a determination by the executive branch of the government**, and where the plea of diplomatic immunity is recognized and affirmed by the executive branch of the government as in the case at bar, it is then the duty of the courts to accept the claim of immunity upon appropriate suggestion by the principal law officer of the government, the Solicitor General in this case, or other officer acting under his direction. **Hence, in adherence to the settled principle that courts may not so exercise their jurisdiction by seizure and detention of property, as to embarrass the executive arm of the government in conducting foreign relations, it is accepted doctrine that in such cases the judicial department of the government follows the action of the political branch and will not embarrass the latter by assuming an antagonistic jurisdiction**."
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> This ruling was reiterated in the subsequent cases of International *Catholic Migration Commission vs. Calleja; The Holy See vs. Rosario, Jr; Lasco vs. UN; and DFA vs. NLRC.*
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> The case of *WHO vs. Aquino* involved the search and seizure of personal effects of petitioner Leonce Verstuyft, an official of the WHO. Verstyft was certified to be entitled to diplomatic immunity pursuant to the Host Agreement executed between the Philippines and the WHO.
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> *ICMC vs. Calleja* concerned a petition for certification election filed against ICMC and IRRI. As international organizations, ICMC and IRRI were declared to possess diplomatic immunity. It was held that they are not subject to local jurisdictions. It was ruled that the exercise of jurisdiction by the Department of Labor over the case would defeat the very purpose of immunity, which is to shield the affairs of international organizations from political pressure or control by the host country and to ensure the unhampered performance of their functions.
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> In *Holy See v. Rosario, Jr.* involved an action for annulment of sale of land against the Holy See, as represented by the Papal Nuncio. The Court upheld the petitioner's defense of sovereign immunity. It ruled that where a diplomatic envoy is granted immunity from the civil and administrative jurisdiction of the receiving state over any real action relating to private immovable property situated in the territory of the

[16] G.R. No. 162230, April 28, 2010.

> receiving state, which the envoy holds on behalf of the sending state for the purposes of the mission, with all the more reason should immunity be recognized as regards the sovereign itself, which in that case is the Holy See.
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> In *Lasco vs. United Nations*, the United Nations Revolving Fund for Natural Resources Exploration was sued before the NLRC for illegal dismissal. The Court again upheld the doctrine of diplomatic immunity invoked by the Fund.
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> Finally, *DFA v. NLRC* involved an illegal dismissal case filed against the Asian Development Bank. Pursuant to its Charter and the Headquarters Agreement, the diplomatic immunity of the Asian Development Bank was recognized by the Court.
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> Clearly, the most important immunity to an international official, in the discharge of his international functions, is immunity from local jurisdiction. There is no argument in doctrine or practice with the principle that an international official is independent of the jurisdiction of the local authorities for his official acts. Those acts are not his, but are imputed to the organization, and without waiver the local courts cannot hold him liable for them. In strict law, it would seem that even the organization itself could have no right to waive an official's immunity for his official acts. This permits local authorities to assume jurisdiction over and individual for an act which is not, in the wider sense of the term, his act at all. It is the organization itself, as a juristic person, which should waive its own immunity and appear in court, not the individual, except insofar as he appears in the name of the organization. Provisions for immunity from jurisdiction for official acts appear, aside from the aforementioned treatises, in the constitution of most modern international organizations. The acceptance of the principle is sufficiently widespread to be regarded as declaratory of international law.[17] (Emphasis supplied)

In this view, the prudent interpretation of the tort exception would be to allow the executive branch to first determine whether diplomatic or sovereign immunity can be invoked by the foreign officials involved. If it can be invoked, then the next analysis should be whether this invoked immunity is absolute, as in the treatment of diplomatic envoys. If it is not absolute, then and only then can the Court weave the tort exception into the law of sovereign immunity and thus attain jurisdiction over the Naval Officers involved. This is important because the practice has been to afford the foreign entity absolute immunity, but withdraw the same from its personnel when they commit private acts.

SOVEREIGN IMMUNITY UNDER INTERNATIONAL LAW

The basic concept of state immunity is that no state may be subjected to the jurisdiction of another state without its consent.[18] According to Professor Ian Brownlie, it is "a procedural bar (not a substantive defence) based on the status and functions of the state or official in question."[19]

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[17] G.R. No. 125865, 26 March 2001.
[18] J-MAURICE ARBOUR & GENEVIEVE PARENTS, DROIT INTERNATIONAL PUBLIC, 5th Ed., 331 (2006).
[19] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 8th Ed., 487 (2012).

Furthermore, its applicability depends on the law and procedural rules of the forum state.[20] In the recent judgment of the International Court of Justice (ICJ) in the *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)* case,[21] the doctrine of sovereign immunity was applied in the following context:

In 1995, successors in title of the victims of the Distomo massacre, committed by the German armed forces in a Greek village in June 1944, brought proceedings for compensation against Germany before the Greek courts. The Greek court ordered Germany to pay compensation to the claimants. The appeal by Germany against that judgment was dismissed by a decision of the Hellenic Supreme Court, which ordered Germany to pay the costs of the appeal proceedings. The successful Greek claimants under the first-instance and Supreme Court judgments applied to the Italian courts for *exequatur* of those judgments, so as to be able to have them enforced in Italy. This was allowed by the Florence Court of Appeal and confirmed by the Italian Court of Cassation.

Germany raised the dispute before the ICJ, claiming these decisions constituted violations of its jurisdictional immunity.

The ICJ analyzed the case from the vantage point of immunity, such that the jurisdictional immunity of states refers primarily to an immunity from the trial process and is thus preliminary in character, as stated in the following manner:

> 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 deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skilful construction of the claim.[22] (Emphasis supplied)

The ICJ continued dissecting national law in order to determine whether jurisdictional immunity could be defeated by reason of serious violations of human rights law or the law of armed conflict. In this, the ICJ clearly saw that there was no customary international law norm that led to the defeat of immunity by reason of these violations, including the tort exception, *viz*:

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[20] Id. at 488.
[21] JURISDICTIONAL IMMUNITIES OF THE STATE (*Germany v. Italy*), Judgment (Feb 3, 2012).
[22] Id. at 82.

> 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. Although the Hellenic Supreme Court in the Distomo case adopted a form of that proposition, the Special Supreme Court in Margellos repudiated that approach two years later. As the Court has noted in paragraph 76 above, under Greek law it is the stance adopted in Margellos which must be followed in later cases unless the Greek courts find that there has been a change in customary international law since 2002, which they have not done. **As with the territorial tort principle, the Court considers that Greek practice, taken as a whole, tends to deny that the proposition advanced by Italy has become part of customary international law.**
>
> **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.**[23] (Emphasis supplied)

As things stand in the international sphere, the immunity of the state (and by extension, its agents, in the performance of their governmental functions *jure imperii*) **must stand against even serious violations of international law**, including breaches of international environmental law (which is an aspect of human rights law as well). The ICJ concluded that

> x x x[U]nder customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict. In reaching that conclusion, the Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case.[24]

This does not mean that the act of the state is to be considered lawful. However, this also does not mean that state immunity is waived in the context of an international breach of even a *jus cogens* norm, as explained in this manner:

> 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 contemporary 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

[23] Id. at 83-84.
[24] Id. at 91.

> 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.[25]

CONCLUSION OF JURISDICTIONAL ARGUMENTS AND IMMUNITY

What the Court is left to work with is a process by which jurisdiction and immunity can be determined by answering several questions, summated thusly:

1. Is the act of the foreign national or entity an act *jure imperii*, such that it can be considered an act of state entitled to immunity, or an act *jure gestionis*, in which case it is to be considered a private act?

2. In respect of the above question, has the executive branch, in the exercise of its political power, determined whether absolute diplomatic immunity is applicable?

3. If it is an act *jure imperii* and thus entitled to sovereign immunity, does an exception apply to withdraw the immunity privilege of such acts?

In this case, it is apparent that the act of the *U.S.S. Guardian* and its officers in entering Philippine waters is allowed by the VFA, and as a treaty privilege should be considered an act *jure imperii*. Its deviation into the waters of Tubbataha, and whether this can be considered a private act, is a factual issue that should be determined by the proper body. Indeed, while Philippine authorities may not have authorized the deviation, if the United States government affirms that it gave the *Guardian* sufficient discretion to determine its course, then the act is not necessarily robbed of its *jure imperii* character and is thus entitled to immunity. The course of action of the Philippine government would be to engage in diplomatic negotiations for potential treaty breach liability.

As of this moment, the executive branch has not made a determination of the applicable immunity. No correspondence has been sent to the Court as to the issue. Thus, the Court must act in deference to the executive prerogative to first make this determination under the presumption of regularity of performance of duties, before it can exercise its judicial power.

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[25] Id. at 93.

Finally, no exception exists in Philippine or international law that would remove the immunity of the United States in order to place it under the jurisdiction of Philippine courts. The Writ of *Kalikasan* is a compulsory writ, and its issuance initiates a legal process that would circumvent the internationally established rules of immunity. Should the Court issue the Writ, it could possibly entail international responsibility for breaching the jurisdictional immunity of a sovereign state.

I therefore vote to dismiss the Petition.

MARIA LOURDES P. A. SERENO
Chief Justice