International Law, Foreign Policy, and the Judiciary in the Philippines

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I. UNDERSTANDING FOREIGN POLICY

Foreign policy is defined as the "general objectives that guide the activities and relationships of one [S]tate in its interactions with other [S]tates."[1] As the intersection of domestic and international politics, foreign policy is mainly influenced by two determinants: (1) *international or external*; and (2) *domestic or internal*.[2]

A. External Determinants of Foreign Policy

International and external factors play an important role in the interaction of a State with other nations.[3] As this interaction occurs at the international level, it is necessary for States to consider crucial factors that exist beyond their own domestic borders.[4]

The external determinants of foreign policy include the prevailing "international system or power structure, international law, international organizations, alliances, and military strength or arm race."[5]

1. ENCYCLOPEDIA BRITANNICA, INC., BRITANNICA CONCISE ENCYCLOPEDIA 692 (2008).
2. Alieu S. Bojang, *The Study of Foreign Policy in International Relations*, J. POL. SCI. & PUB. AFF., Volume No. 6, Issue No. 4, at 2.
3. *Id.*
4. *Id.*
5. *Id.*

1. International System or Power Structure

Foreign policy is largely "shaped by one's relative power within the international system."[6] Shifts in power structure and the dynamics of world politics at the international level impact how States formulate and execute their foreign policy.[7]

The modern state system comprises "big, middle[,] and small powers."[8] In a traditional multi-power system, States can more easily change their stance to maximize their interests from different sides.[9] In a bipolar world system, it is more difficult to switch sides, "as the ideological fault lines [between big powers are] clearly marked."[10] In a unipolar world, pronouncements of the dominant state (i.e., United States hegemony) push smaller powers to come forward from the margins and effectively support the existing power structure.[11]

2. International Law

International law is "generally defined as a set of rules that regulate relations between [S]tates."[12] States deliberately create this system of rules by expressly binding themselves and giving their consent thereto.[13] In this sense, international law regulates foreign policy, as it offers a legal framework that guides how States should interact.[14]

Based on the positivist view, international law constrains the behavior of States and the formulation of their foreign policy.[15] In particular, States are legally bound by customary law and by the treaties that they voluntarily enter

6. *Id.* at 3.

7. *Id.*

8. Bojang, *supra* note 2, at 3.

9. *Id.*

10. *Id.*

11. *Id.*

12. Paper *by* Marthe Dovienne Lafortune Sotong, *International Law and Foreign Policy: A Mutual Influence* (Jan. 2013) (on file with Author). *See also* JOAQUIN G. BERNAS, S.J., PUBLIC INTERNATIONAL LAW 1 (2009).

13. Sotong, *supra* note 12, at 2 (citing BASAK CALI, INTERNATIONAL LAW FOR INTERNATIONAL RELATIONS 74 (2010)).

14. Bojang, *supra* note 2, at 3.

15. Sotong, *supra* note 12, at 2.

into.[16] International law therefore "defines the status, [ ] rights, [ ] responsibilities, [and] obligations of [States in the area of foreign policy]."[17]

State obligations contained in international treaties and agreements influence Philippine foreign policy.[18] In several cases, such as *Vinuya v. Executive Secretary*[19] and *Pimentel v. Executive Secretary*,[20] the Court likewise accorded respect to these sources of obligation in deciding cases that involved foreign affairs.[21]

It can be observed, however, that not all States obey international norms.[22] In this regard, realism espouses the view that the national interests of States govern their behavior in formulating foreign policy.[23] Hence, States may violate international law if it is in their interest to do so.[24]

Despite the primacy of national interest in foreign policy, international law still provides limits and restrictions.[25] Some enforcement mechanisms in place make it costly for States to violate international norms.[26] The binding aspect of international law propels States to attempt to justify their actions as lawful.[27] States are aware that breaches of international law will tarnish their reputation within the international community, which will, in turn, make it difficult for them to conclude treaties with other States.[28] It has been argued

16. *Id.*

17. *Id.*

18. *See id.*

19. Vinuya, et al. v. Executive Secretary, et al., G.R. No. 162230, 619 SCRA 533 (2010).

20. Pimentel, Jr., et al. v. Office of the Executive Secretary, G.R. No. 158088, 462 SCRA 622 (2005).

21. *See Vinuya*, 619 SCRA at 562-66 & *Pimentel, Jr.*, 462 SCRA at 637.

22. Sotong, *supra* note 12, at 3.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 5 (citing Onuma Yasuaki, *International Law in and with International Politics: The Functions of International Law in International Society*, 14 EUR. J. INT'L L. 105, 117 (2003)).

27. Sotong, *supra* note 12, at 5 (citing Arthur Watts, *The Importance of International Law*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 7 (Michael Byers ed., 2000)).

28. Sotong, *supra* note 12, at 5.

that "the ultimate impetus for compliance comes from fear ... of loss of reputation."[29] Therefore, compliance with international law becomes imperative, as States would opt not to have foreign relations with those that expressly violate rules without legal justification.[30] In this sense, "obeying [international law] is [also] in the interest of [a State's] foreign policy."[31]

Constructivists and liberal scholars suggest that international law also "enables foreign policy by providing modes of communication, legitimation, and cooperation between [S]tates, within a [ ] legal framework."[32] In this framework, the United Nations (UN) plays a key role in the "promotion of peace and human rights."[33] In the area of international trade, treaties and World Trade Organization (WTO) agreements on common standards of conduct likewise facilitate international cooperation and help secure peace and security.[34]

More recently, the Philippines' withdrawal from the Rome Statute on 17 March 2018[35] brought to light different foreign policy considerations. The executive department followed the procedure under the Rome Statute on treaty withdrawal, which readily provides legal justification for its action.[36] The withdrawal, however, still has adverse effects on the reputation of the Philippine government, which refused to be subject to investigation and prosecution for alleged crimes against humanity within the jurisdiction of the International Criminal Court (ICC).[37]

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29. *Id.* at 5-6 (citing Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2639 (1997)).

30. Sotong, *supra* note 12, at 6.

31. *Id.*

32. *Id.* (citing Anne-Marie Slaughter Burley, *International Law and International Relations Theory a Dual Agenda*, 87 AM. J. INT'L L. 205, 209 (1993)).

33. Sotong, *supra* note 12 (citing PETER SUTCH & JUANITA ELIAS, INTERNATIONAL RELATIONS: THE BASICS 162 (2007)).

34. Sotong, *supra* note 12 (citing CALI, *supra* note 13, at 101).

35. United Nations, Rome Statute of the International Criminal Court (Philippines: Withdrawal, Depositary Notification), *available at* https://treaties.un.org/doc/publication/cn/2018/cn.138.2018-eng.pdf (last accessed Jan. 30, 2022) [https://perma.cc/UM7D-2TTT].

36. *See id.* & Rome Statute of the International Criminal Court art. 127 ¶ 1, *opened for signature* Oct. 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

37. *See, e.g.*, Ray Paolo J. Santiago, Reactions to Philippines Announcement to Leave ICC, *available at* https://www.coalitionfortheicc.org/news/20180316/reactions-

Notably, in the 2021 case of *Pangilinan v. Cayetano*,[38] the Court discussed the legality of the executive department's withdrawal from the Rome Statute and set definite guidelines on treaty withdrawals by the President.[39] This case will be examined in Chapter IV of this Article, together with the interplay among the executive, legislative, and judicial branches of the government as regards foreign policy.

3. International Organizations

International organizations are entities set up by agreement between States for specific purposes.[40] Their legal personalities are separate from the Member States who have created them.[41] Many international organizations serve as "active actors in the field of [international relations by facilitating] the interaction between [S]tates[.]"[42] These include the "[ ]UN[ ] and its affiliates, [as well as] international financial institutions[ ] such as [the] International Monetary Fund [ ] and the World Bank ... ."[43]

The nature and objectives of a particular organization often affect the foreign policies of member States, whether it be an "international, regional, [or] sub-regional organization[.]"[44]

4. Alliances

States utilize alliance formation as a strategy in formulating and implementing foreign policies.[45] Alliances are a product of agreements between States, entailing commitment and the allowance of increased policy activity in some

philippines-announcement-leave-icc (last accessed Jan. 30, 2022) [https://perma.cc/M8GS-5H3L].

38. Francis N. Pangilinan, et al. v. Alan Peter S. Cayetano, et al., G.R. No. 238875, Mar. 16, 2021, *available at* https://sc.judiciary.gov.ph/20238 (last accessed Jan. 30, 2022).

39. *Id.* at 50-56.

40. ALEXANDER ORAKHELASHVILI, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 111-12 (8th ed. 2019).

41. *Id.* at 112.

42. Bojang, *supra* note 2, at 3-4.

43. *Id.* at 3.

44. *Id.* at 4.

45. *Id.*

areas.[46] As a part of foreign policy, alliances may also restrict the State's activity in certain aspects.[47]

Established alliances shape foreign policy, as "member parties to the alliances have to respond to the requests and demands of their allies and refrain from formulating policies or taking actions which are offensive to the alliance partners."[48]

The international relations of the Philippines with the United States (U.S.) is an example of a military and security alliance in the context of foreign policy.[49] This alliance is formalized in the Mutual Defense Treaty, the Visiting Forces Agreement, and the Enhanced Defense Cooperation Agreement between the Philippines and the U.S.[50]

5. Military Strategy/Arm Race

States normally adopt military strategy to pursue their foreign policy objectives.[51] An arm race is a related concept that refers to competitive defense spending and building of military capability between rival States during peacetime.[52]

When a State possesses military power, it is afforded a measure of freedom of action at the international level, thereby becoming a credible State actor.[53]

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46. *Id.* (citing T. Clifton Morgan & Glenn Palmer, *To Protect and To Serve: Alliances and Foreign Policy Portfolios*, 47 J. CONFLICT RESOL. 180, 200 (2003)).

47. Bojang, *supra* note 2, at 4.

48. *Id.*

49. *See, e.g.*, Mutual Defense Treaty, Phil.-U.S., Aug. 30, 1951, 177 U.N.T.S. 133 (entered into force Aug. 27, 1952); Agreement Between the Government of the Republic of the Philippines and the Government of the United States of America Regarding the Treatment of United States Armed Forces Visiting the Philippines, Phil.-U.S., Feb. 10, 1998, 2911 U.N.T.S. 27 (entered into force May 27, 1999); & Agreement Between the Government of the Republic of the Philippines and the Government of the United States of America on Enhanced Defense Cooperation, Phil.-U.S., Apr. 28, 2014, T.I.A.S. 14-625 (entered into force June 25, 2014).

50. *See generally id.*

51. Bojang, *supra* note 2, at 4.

52. *Id.*

53. *Id.*

Military power, together with political will, is used as an "ultimate tool of international relations" to back its diplomacy when necessary.[54]

Therefore, "sufficient military strength [enables States to have] greater initiative and bargaining power" in their interactions with others.[55] The importance of military strength in regional security is highlighted not only in *In the Matter of South China Sea Arbitration Between China and the Philippines (Republic of the Philippines v. China)* before the Permanent Court of Arbitration (PCA), but also in the enforcement of the same arbitral award.[56] This PCA Case will be discussed in Chapter IV.

B. Domestic Determinants of Foreign Policy

Apart from external determinant factors, the internal environment of a State also affects the direction of its foreign policy.[57] Foreign policy is influenced not only by foreign relations, but also by domestic policies.[58]

The internal or domestic determinants of foreign policy include: culture and history; geography, size and population; economic development, natural resources and the environment; military capabilities; political system; personality and character of the leader; political parties and interest groups; press and public opinion; and science and technology.[59]

1. Culture and History

A nation's culture or pattern of thought or behavior influences foreign policy.[60] The traditional values and beliefs of the people shape the approach of a State to foreign problems.[61]

Similarly, shared historical experiences influence the foreign policy of a State.[62] States with unified culture and common history, where a majority of the people share the same perceptions of past events, generally tend to devise

54. *Id.*

55. *Id.* at 5.

56. In the Matter of the South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, Award (July 12, 2016).

57. Bojang, *supra* note 2, at 5.

58. *Id.*

59. *Id.* at 5-8.

60. *Id.* at 5.

61. *Id.*

62. *Id.*

a more effective and consistent foreign policy.[63] On the other hand, States with divergent cultures and historical experiences would find it more difficult to build a united foreign policy.[64]

Colonization is an example of a historical experience that shapes the foreign policy of States.[65] In many colonized States, their foreign policies are heavily influenced by their former colonizers.[66] This is manifest when the former colonizer becomes a strong and strategic ally internationally.[67]

For example, the U.S., a former colonizer, has become a strong international ally of the Philippines even after the latter gained independence.[68] The Philippines' Constitution, which serves as a guide to how the State intends to relate to the international community, has been heavily influenced by the U.S.[69] Chapter II of this Article will provide a history of the Philippines' constitutions.

2. Geography, Size, and Population

In terms of foreign policy implementation, the size of a State's territory, geography, and population are significant factors.[70] The geographical location of a State is undoubtedly important in its relations with other countries, including its neighbors.[71] Hence, geopolitical location has a lasting impact on the determination of foreign policies.[72]

63. Bojang, *supra* note 2, at 5.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Olli Suorsa & Mark R. Thompson, *Choosing Sides? Illiberalism and Hedging in the Philippines and Thailand*, in SECURITY ARCHITECTURES UNDER THREAT: THE STATUS OF MULTILATERAL FORA 71 (Konrad-Adenauer-Stiftung ed., 2017).

69. Wilfrido V. Villacorta, *The American Influence on Philippine Political and Constitutional Tradition*, *in* MIXED BLESSING: THE IMPACT OF THE AMERICAN COLONIAL EXPERIENCE ON POLITICS AND SOCIETY IN THE PHILIPPINES 139 (Hazel M. McFerson ed., 2002).

70. Bojang, *supra* note 2, at 5.

71. *Id.*

72. *Id.* at 6.

As for the size of a State's territory, in some cases, such may be indicative of that State's influence on international affairs.[73] For instance, States with a small territory and population generally do not bear heavy weight or responsibilities in world affairs.[74] The implication of size, however, is not absolute.[75] Small States may possess rich natural and economic resources that translate to power in world politics.[76] Further, while there are States that are active players in international law due to their huge size (e.g., U.S., Russia, and China), there are also other large countries that choose not to have an active foreign policy (e.g., Canada, Australia, and Brazil).[77]

This determinant can also be referred to as "geopolitics," which concerns the influence of geography and demography, among other factors, on a State's foreign policy.[78] The role of geopolitics in addressing territorial concerns and ensuring global security has been highlighted in the South China Sea dispute and in other cases relating to national security and defense, namely, *Bayan v. Zamora*[79] and *Saguisag v. Ochoa Jr.*[80]

3. Economic Development, Natural Resources, and the Environment

The "level of economic development of a [State] influences [its] foreign policy[.]"[81] Advanced industrialist countries formulate policies to maintain their dominant role in world politics, with some examples being the extension of financial aid and loans to seek allies.[82] As for small States with insufficient economic power, they may remain more dependent on advanced industrialist

73. *Id.* at 5-6.

74. *Id.* at 5.

75. *See id.*

76. *See* Bojang, *supra* note 2, at 5.

77. Bojang, *supra* note 2, at 5.

78. Merriam-Webster Dictionary, Definition of Geopolitics, *available at* https://www.merriam-webster.com/dictionary/geopolitics (last accessed Jan. 30, 2022) [https://perma.cc/5M27-HG5P].

79. Bayan (Bagong Alyansang Makabayan) v. Zamora, G.R. No. 138570, 342 SCRA 449 (2000).

80. Saguisag v. Ochoa, Jr., G.R. No. 212426, 779 SCRA 241 (2016).

81. Bojang, *supra* note 2, at 6.

82. *Id.*

countries by obtaining loans, among other benefits.[83] Accordingly, these dependent States "adjust [their] foreign [policies] in [such] economic terms."[84]

China is considered as "the world's largest public lender to developing countries[.]"[85] According to a study, China imposes "unique conditions on borrowing nations which could be giving Beijing undue influence over their economic and foreign policies[.]"[86] The Philippines is among the States that are participating in China's Belt and Road Initiative (BRI) and the 21st Century Maritime Silkroad, which involve the grant of loans, investments, and bank credits.[87] This close relation is against the backdrop of the maritime dispute over the West Philippine Sea, hence posing a threat of surrendering the country's sovereign maritime rights to China.[88] It is apparent that other developing and borrowing countries are placed in the same vulnerable position, considering that the potential dangers of BRI projects include "the loss of sovereignty due to long-term leases, the exclusion of the host nation and other countries from projects, and interference in a [S]tate's domestic politics."[89]

Another closely related determinant is the natural resources at the disposal of States, regardless of their territorial size, which can influence foreign policy and international politics.[90] Abundant natural resources, such as oil, can serve as powerful leverage in world politics.[91]

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83. *Id.*

84. *Id.*

85. Kristie Pladson, China's Secret Loans to Developing Nations Pose Problems, Study Finds, *available at* https://www.dw.com/en/chinas-secret-loans-to-developing-nations-pose-problems-study-finds/a-57066390 (last accessed Jan. 30, 2022) [https://perma.cc/X244-QU8B].

86. *Id.*

87. Darlene V. Estrada, *The Belt and Road Initiative and Philippine Participation in the Maritime Silk Road*, CENT. FOR INT'L REL. & STRAT. STUD., Volume No. 17, Issue No. 7, at 1.

88. Jonina O. Fernando, *China's Belt and Road Initiative in the Philippines*, ASIA PAC. BULL., Dec. 16, 2020, at 1.

89. Terry Mobley, *The Belt and Road Initiative: Insights from China's Backyard*, 13 STRAT. STUD. Q. 52, 61 (2019) (citing Interview *by* Terry Mobley *with* Mohan Malik, Professor, Asia-Pacific Center for Security Studies (Feb. 11, 2019)).

90. Bojang, *supra* note 2, at 6.

91. *Id.*

In *La Bugal-B'Laan Tribal Association, Inc. v. Ramos*,[92] the Court considered economic development in evaluating the constitutionality of the participation of foreign investors in the exploration, development, and utilization of the Philippines' natural resources.[93] In *Tañada v. Angara*,[94] the Court's interpretation of the World Trade Organization (WTO) Agreement likewise upheld and promoted economic principles and trade.[95] In Chapter IV, these cases will be further discussed.

4. Military Capabilities

The military strength of a State is also determinative of its foreign policy strategy.[96] States that are militarily capable are far more independent from external forces when formulating their foreign policy.[97] They also tend to be active and vigorous in their pursuit of their own policy objectives.[98] In contrast, States with weak or low military capabilities are more reliant on a stronger ally and international organizations for their protection.[99]

The establishment of military bases in the Philippines by the U.S. will be revisited in Chapter IV in view of this determinant and the cases of *Bayan v. Zamora* and *Saguisag v. Ochoa, Jr.*

5. Political System

The types of political organization and institutions in States influence how foreign policy is implemented.[100] In a democratic system, implementation tends to be slower and more difficult than that in an authoritarian form of government.[101] Citizens are free to express their opinions and make public

92. La Bugal-B'Laan Tribal Association, Inc. v. Ramos, G.R. No. 127882, 445 SCRA 1 (2004) (resolution of motion for reconsideration).

93. *Id.* at 237-38.

94. Tañada v. Angara, G.R. No. 118295, 272 SCRA 18 (1997).

95. *See id.*

96. Bojang, *supra* note 2, at 6.

97. *Id.*

98. *Id.*

99. *Id.* (citing Michael Tomz, Reputation and the Effect of International Law on Preferences and Beliefs, *available at* https://tomz.people.stanford.edu/sites/g/files/sbiybj4711/f/tomz-intllaw-2008-02-11a.pdf (last accessed Jan. 30, 2022) [https://perma.cc/JKQ3-VT8H]).

100. Bojang, *supra* note 2, at 6.

101. *Id.*

demands, which can affect how the democratic state formulates foreign policies.[102]

The different political structures within a democratic system also play a role in shaping foreign policy.[103] Under a presidential system of government, the principle of separation of powers between the legislature and the executive body can affect the ambiguity or continuity of foreign policy.[104] Similarly, under a multi-party system, different foreign policies may emerge.[105]

While the political branches of government are more involved in foreign policy, the role of the Judiciary cannot be overlooked. Courts in other jurisdictions have overturned state actions that are found to be in conflict with national foreign policy.[106] Moreover, the Judiciary in the Philippines[107] and in other countries can review the legality and constitutionality of executive and legislative actions, notwithstanding their relation to foreign policy and affairs.[108]

6. Personality and Character of the Leader

In foreign policy formulation, the personality of the leader and decision-maker has profound implications.[109] A leader's perception about the nature of international affairs and the objectives that should be pursued therein, as well as his or her background, competency, and personality traits, among other

102. *Id.* at 6-7.

103. *Id.* at 7.

104. *Id.* (citing Foreign Policy Association Administrator, The Impact of Technology on Foreign Affairs: Five Challenges, *available at* https://foreignpolicyblogs.com/2015/12/22/the-impact-of-technology-on-foreign-affairs-five-challenges (last accessed Jan. 30, 2022) [https://perma.cc/3D78-8ZKF]).

105. Bojang, *supra* note 2, at 7.

106. *See Federal Courts Overturn State Actions Conflicting with National Foreign Policy*, 103 AM. J. INT'L L. 743, 746 (2009).

107. *See* PHIL. CONST. art. VIII, §§ 1; 5 (1); & (2) (a).

108. *See* Thomas M. Franck, *Courts and Foreign Policy*, 83 FOREIGN POL'Y 66, 79-82 (1991).

109. Bojang, *supra* note 2, at 7.

factors, have the ability to influence the course and execution of foreign policy.[110]

There are leaders "who advocate an aggressive foreign policy based on strong military power" and those who are "conciliatory" by trying to resolve international disputes without any threat of force.[111] An aggressive leader can be described as having attributes such as the "tendency to manipulate others, high need for power, paranoia, high levels of nationalism, and a vigorous willingness to initiate on behalf of their [S]tate."[112] A conciliatory leader is the opposite of what these characteristics suggest.[113]

This determinant will be examined later in the case of President Rodrigo Roa Duterte and his foreign policy direction with respect to his response to the ICC and the enforcement of the arbitral award for the West Philippine Sea.

7. Political Parties and Interest Groups

Political parties are crucial "in shaping representative democracy in a [State]."[114] In a multi-party system, political parties tend to have conflicting views and interests, which may, in turn, change the formulation of foreign policy.[115]

Organized interest groups speak out on a diverse range of issues, which may include foreign affairs.[116] In many cases, they have put pressure on policymakers by acting as channels of communication between the State and the public.[117]

In several Supreme Court cases that will be discussed in Chapter IV, interest groups played a role in drawing attention to issues concerning foreign

110. *Id.* (citing JAMES N. ROSENAU, ET AL., WORLD POLITICS: AN INTRODUCTION 28 (1976)).

111. Bojang, *supra* note 2, at 7.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Bojang, *supra* note 2, at 7.

policy, ranging from human rights to environmental and economic concerns.[118]

8. Press and Public Opinion

The public can influence foreign policy by electing persons who match their own positions on international affairs.[119] After foreign policy leaders take office, they may likewise be persuaded by public opinion.[120]

In setting public agenda, the media can also significantly influence the policies formed by leaders by "pressur[ing] [them] to respond to [certain] foreign problems[.]"[121] In the digital age, social media also serves as an avenue where non-State actors and governments can express views on foreign policy and affect outcomes.[122]

9. Science, Technology, and the Environment

Recent technological advancements have paved the way for "new areas of communication, cooperation[,] and even conflicts among [S]tates in their pursuit" of foreign policy objectives.[123] Science and technology serve as tools in negotiating international affairs, often regarded as drivers "for both power and legitimacy in areas of foreign affairs and diplomacy."[124]

States that are most technologically advanced have enhanced military capabilities that strengthen their status in world politics.[125] On the other hand,

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118. *See generally* Akbayan Citizens Action Party ("AKBAYAN") v. Aquino, G.R. No. 170516, 558 SCRA 468 (2008); *La Bugal-B'Laan Tribal Association, Inc.*, 445 SCRA (resolution of motion for reconsideration); *Vinuya*, 619 SCRA; & Cruz v. Secretary of Environment and Natural Resources, G.R. No. 135385, 347 SCRA 128 (2000).

119. Bojang, *supra* note 2, at 7 (citing Michael Tomz, et al., Public Opinion and Decisions About Military Force in Democracies, at 1-21 (Dec. 6, 2019) (Research Note, Cambridge University) (on file with Authors)).

120. *Id.*

121. Bojang, *supra* note 2, at 8.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* (citing ROSENAU, *supra* note 110, at 24).

developing countries continue to depend on advanced States for technical knowledge and technological transfer.[126]

In addition, the need to protect the environment can influence foreign policy. In cases such as *International Service for the Acquisition of Agri-Biotech Applications, Inc., v. Greenpeace Southeast Asia (Philippines)* (*International Service v. Greenpeace*),[127] which will also be discussed in Chapter IV, the Court took the occasion to reinforce the State's policy to protect the environment and adopt principles of international environmental law, notwithstanding economic and technological considerations.[128]

C. Philippine Jurisdiction

Having identified and explained the different determinants of foreign policy, this Article will examine the interplay between the executive and judicial branches of the government in shaping foreign policy and international norms. It will also assess whether the Supreme Court has contributed to or affected Philippine foreign policy through the performance of its judicial functions.

To understand the development of Philippine foreign policy, Chapter II of this Article will provide an overview of key constitutional provisions that reveal the country's national objectives in relation to the international community.

Chapter III will offer an in-depth discussion of the role of the courts in foreign policy by looking into cases that have made an impact on the Philippine government's interaction with other States. In scrutinizing the cases, the Authors will identify the relevant foreign policy involved and assess how certain determinants of foreign policy guided the Court in its decisions.

Chapter IV will synthesize the findings of the previous Chapter and analyze the role of courts in reviewing and evaluating foreign policy. Aware of the traditional role of the three branches of government, the Authors will inquire into the relationship between the judicial and the executive departments, as well as survey the recent trend in the Court's participation in the management of foreign relations. This will involve assessing the Court's

126. Bojang, *supra* note 2, at 8.

127. International Service for the Acquisition of Agri-Biotech Applications, Inc. v. Greenpeace Southeast Asia (Philippines), G.R. No. 209271, 776 SCRA 434 (2015).

128. *See generally id.*

reliance on the political question doctrine and observing whether it has become more empowered in the area of foreign policy.

II. SURVEY OF CONSTITUTIONAL PROVISIONS ON FOREIGN POLICY

Consideration of foreign relations law begins with the study of the Constitution.[129] The Constitution is the fundamental law of the land that establishes, among others, how the Philippines intends to relate to the international community as a State.[130] The Philippines' foreign policy must be consistent with the highest law of the land.[131] Thus, it is worthy to revisit key provisions that have found their way into the country's Constitution, both then and now. This Chapter of the Article will therefore trace the progression of the Philippines' independent foreign policy by reviewing the 1899 Malolos Constitution, the 1935 Constitution, the 1973 Constitution, and finally, the 1987 Constitution.

A. Malolos Constitution

The first attempt by Filipinos at constitution-making was embodied in the Malolos Constitution.[132] Adopted in 1899, it was also "the first republican constitution in Asia[.]"[133] The historical document was drafted following four centuries of Spanish occupation and amidst insurrections against Spain.[134] It was written with the object of providing a provisional constitution, as the Philippines struggled for its independence.[135]

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129. *See* Jean Galbraith, *From Scope to Process: The Evolution of Checks on Presidential Power in U.S. Foreign Relations Law*, *in* ENCOUNTERS BETWEEN FOREIGN RELATIONS LAW AND INTERNATIONAL LAW 241 (Helmut Phillip Aust & Thomas Kleinlein eds., 2021).

130. International Commission of Jurists, Philippines – Southeast Asia Security Laws, *available at* https://www.icj.org/south-east-asia-security-laws/philippines-southeast-asia-security-laws (last accessed Jan. 30, 2022) [https://perma.cc/9SRE-F3Q3].

131. *See* PHIL. CONST. art. II, § 7.

132. George A. Malcolm, *The Malolos Constitution*, 36 POL. SCI. Q. 91, 91 (1921) [hereinafter Malcolm, *Malolos Constitution*].

133. Official Gazette, Constitution Day, *available at* https://www.officialgazette.gov.ph/constitutions/constitution-day (last accessed Jan. 30, 2022) [https://perma.cc/BK5Q-PBDB].

134. Malcolm, *Malolos Constitution*, *supra* note 132, at 91.

135. *Id.* at 92 & 103.

Prior to the Malolos Constitution, the Philippines did not benefit from the Spanish Constitution, but was instead governed only by special laws enacted by Spain.[136] The Philippines did not have adequate representation in the Spanish legislative body.[137] The struggle to be represented and to be accorded the same political and civil rights as the Spanish people directly led to a series of revolts in the country.[138] The growing sense of Filipino nationality then developed into "a common and an ardent desire for independence."[139]

The Malolos Constitution provided that "[t]he political association of all [the] Filipinos constitutes a Nation, whose State shall be [known as] the Philippine Republic."[140] This Republic was declared to be "free and independent."[141] It likewise pronounced that "[s]overeignty resides exclusively in the people."[142]

Functions relating to foreign affairs were lodged with the executive department led by the President, who was assisted by seven secretaries in the Council of the Government.[143] The President was empowered to control the Philippines' "diplomatic and commercial relations with [other States,]"[144] as well as "[p]reside over all national functions and receive ambassadors and accredited representatives of foreign powers."[145]

In addition, the President's mandate was allowed to be expanded by law to include other broad powers, such as the alienation, transfer, or exchange of

136. George A. Malcolm, *Constitutional History of Philippines*, 6 AM. BAR ASSOC. J. 109, 109-10 (1920) [hereinafter Malcolm, *Constitutional History*].

137. *Id.*

138. Malcolm, *Malolos Constitution*, *supra* note 132, at 91.

139. *Id.*

140. 1899 MALOLOS CONST. tit. I, art. 1 (superseded in 1935). The quoted provision uses the translation as provided for by the Official Gazette. The Official Gazette, The 1899 Malolos Convention, *available at* www.officialgazette.gov.ph/constitutions/the-1899-malolos-constitution (last accessed Jan. 30, 2022) [https://perma.cc/KNP3-2JF7].

141. 1899 MALOLOS CONST. tit. I, art. 2 (superseded in 1935).

142. 1899 MALOLOS CONST. tit. I, art. 3 (superseded in 1935).

143. Malcolm, *Malolos Constitution*, *supra* note 132, at 100.

144. 1899 MALOLOS CONST. tit. VIII, art. 67 (3) (superseded in 1935).

145. 1899 MALOLOS CONST. tit. VIII, art. 67 (6) (superseded in 1935).

Philippine territory;[146] incorporation of other territory;[147] and admission of stationing of foreign troops.[148] The President could also be authorized by a special law "[t]o ratify treaties of [alliance, defensive as well as offensive], special [treaties of commerce], [those which] stipulate [to grant] subsidies to a foreign power, and [those which may] compel[ ] Filipinos to [render personal service.]"[149] As a limitation to this power, open treaties or those made publicly prevailed over secret treaties.[150]

While the drafters of the Malolos Constitution included the "highest judicial talents of the country[,]"[151] most of them were said to be "inexperienced in grave constitutional problems" and had little notion of the Spanish Constitution and that of other countries.[152] Nevertheless, the document remains a representative of the "first democratic republic in the Orient" and the aspirations of Filipinos for self-government.[153]

"The Malolos Constitution was [also] short-lived," as it ceased to be effective after Spain ceded the Philippine Islands to the United States on 11 April 1899.[154] This marked the beginning of American influence in the constitutional history of the Philippines.[155]

B. 1935 Constitution

The Philippines' fervent desire for independence persisted even under American occupation.[156] Under the Jones Act of 1916, the Philippines was granted a limited degree of autonomy.[157] Later in 1934, the American Congress granted commonwealth status to the Philippines under the

146. 1899 MALOLOS CONST. tit. VIII, art. 68 (1) (superseded in 1935).

147. 1899 MALOLOS CONST. tit. VIII, art. 68 (2) (superseded in 1935).

148. 1899 MALOLOS CONST. tit. VIII, art. 68 (3) (superseded in 1935).

149. 1899 MALOLOS CONST. tit. VIII, art. 68 (4) (superseded in 1935).

150. 1899 MALOLOS CONST. tit. VIII, art. 68 (4) (superseded in 1935).

151. Malcolm, *Constitutional History*, *supra* note 136, at 111.

152. *Id.* & Malcolm, *Malolos Constitution*, *supra* note 132, at 102.

153. Malcolm, *Malolos Constitution*, *supra* note 132, at 103.

154. Irene R. Cortes, *The Framing of the 1973 Constitution in Historical Perspective*, 48 PHIL. L.J. 460, 461 (1973).

155. Malcolm, *Constitutional History*, *supra* note 136, at 110.

156. Eric Daenecke, *Constitutional Law in the Philippines*, 52 AM. BAR ASSOC. J. 161, 161 (1966).

157. *Id.*

Philippine Independence Act of the Tydings-McDuffie Law.[158] The term "commonwealth," which can be traced back to Anglo-American historical roots, connotes self-government or autonomy.[159]

The Tydings-McDuffie Law assured full independence after the lapse of 10 years and authorized the Philippines to adopt its own constitution.[160] Thereafter, the Philippine Commonwealth operated under the 1935 Constitution.[161] However, in 1943, during World War II and under the Japanese occupation, the Japanese-sponsored republic replaced the Constitution.[162] Following the liberation of the Philippines in 1945, the 1935 Constitution was again made effective.[163] On 4 July 1946, "the Philippines [was finally] proclaimed an independent republic[, [which continued to operate] under the same [C]onstitution."[164]

1. National Territory

Unlike the Malolos Constitution, the 1935 Constitution defined what comprises the Philippine territory, thus —

> ARTICLE I
>
> The National Territory
>
> SECTION 1. The Philippines comprises all the territory ceded to the United States by the [T]reaty of Paris concluded between the United States and Spain on the tenth day of December, eighteen hundred and ninety-eight, the limits of which are set forth in Article III of said treaty, together with all the islands embraced in the treaty concluded at Washington[ ] between the United States and Spain on the seventh day of November, nineteen hundred, and [ ] the treaty concluded between the United States and Great Britain on the second day of January, nineteen hundred and thirty, and all territory over which the present Government of the Philippine Islands exercises jurisdiction.[165]

158. *Id.*

159. Maximo M. Kalaw, *The New Constitution of the Philippine Commonwealth*, 13 FOREIGN AFF. 687, 687 (1935).

160. Daenecke, *supra* note 156, at 161.

161. *Id.*

162. Official Gazette, *supra* note 133.

163. *Id.*

164. Daenecke, *supra* note 156, at 161.

165. 1935 PHIL. CONST. art. I, § 1 (superseded in 1973).

In defining national territory, the above article referred to four points:

(1) "The Treaty of Paris on [10 December] 1898;"

(2) "The Treaty of Washington on [7 November] 1900;"

(3) "The Treaty between Great Britain and the United States on [2 January] 1930; [and]"

(4) "[A]ll territory over which the present Government of the Philippine Islands exercises jurisdiction."[166]

For the legitimate exercise of sovereignty, a State should know the actual extent of its territory.[167] In international law, territorial claims and the delimitation of the sea are not dependent on the municipal law of the coastal state, but rather rest on a recognized principle of international law.[168] Notwithstanding this principle, the 1935 Constitutional Convention ultimately included an article on national territory to serve as an international document binding on the U.S.[169] The Constitutional Convention found it necessary to include the provision, out of fear that the U.S. would segregate and claim portions of the Philippine territory.[170] It was foreseen that the specific provision will bind the U.S. to respect the territorial limits of the Philippines upon the American President's acceptance of the Commonwealth's Constitution.[171]

2. Declaration of Policies

Consistent with the object of independence and democratic ideals, the 1935 Constitution also declared that the Philippines is "a republican state" — a

166. JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 7 (2009) (citing 1935 PHIL. CONST. art. I, § 1 (superseded in 1973)) [hereinafter BERNAS, COMMENTARY].

167. JOAQUIN G. BERNAS, S.J., FOREIGN RELATIONS IN CONSTITUTIONAL LAW 36 (1995) [hereinafter BERNAS, FOREIGN RELATIONS].

168. *Id.* (citing Anglo-Norwegian Fisheries (U.K. v. Norway), Merits, Judgment, 1951 I.C.J. 117, 133 (Dec. 18)).

169. BERNAS, FOREIGN RELATIONS, *supra* note 167, at 37 & An Act to Provide for the Complete Independence of the Philippine Islands, to Provide for the Adoption of a Constitution and a Form of Government for the Philippine Islands, and for Other Purposes [Tydings-McDuffie Act], § 1 (1934).

170. 1 LORENZO M. TAÑADA & ENRIQUE M. FERNANDO, CONSTITUTION OF THE PHILIPPINES 35 (1952) [hereinafter 1 TAÑADA & FERNANDO, CONSTITUTION].

171. *Id.*

system where "[s]overeignty reside[d] in the people and all government authority emanate[d] from them."[172] Sovereignty is the "supreme, absolute, uncontrollable power by which any [S]tate is governed. It has an internal as well as an external aspect."[173]

"Th[e] capacity to conduct international relations is an [external] aspect of sovereignty[.]"[174] While the Philippines' sovereignty was already asserted in Section 1, Article II of the 1935 Constitution, it is worthy to note that the conduct of foreign relations only began after it gained independence from the U.S. in 1946.[175]

In addition to the assertion of sovereignty, Section 3, Article II of the 1935 Constitution provided that "[t]he Philippines renounces war as an instrument of national policy, and adopts the generally accepted principles of international law as part of the law of the [n]ation."[176] This provision first recognized that any policy of the State should be pursued by peaceful means rather than by force of arms.[177] This was, however, without prejudice to the Philippines' exercise of self-defense in the face of attack or aggression.[178] The second part of the same section affirmed that principles of international law can be used by judicial tribunals in appropriate cases.[179] During the Japanese and American occupation, the adoption of the general principles of international law as part of domestic law proved useful in deciding cases that involved the acts of the Japanese government and its authorities,[180] as well as the presence of American forces in the Philippines.[181] It was also used as basis in upholding the validity of the Military Bases Agreement concluded between the Philippines and the U.S. on 14 March 1947.[182]

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172. 1935 PHIL. CONST. art. II, § 1 (superseded in 1973).

173. 1 TAÑADA & FERNANDO, CONSTITUTION, *supra* note 170, at 45.

174. BERNAS, FOREIGN RELATIONS, *supra* note 167, at 5.

175. *Id.*

176. 1935 PHIL. CONST. art. II, § 3 (superseded in 1973).

177. 1 TAÑADA & FERNANDO, CONSTITUTION, *supra* note 170, at 57.

178. *Id.*

179. *Id.*

180. *Id.* (citing Haw Pia v. China Banking Corporation, 80 Phil. 604 (1948)).

181. 1 TAÑADA & FERNANDO, CONSTITUTION, *supra* note 170, at 57 (citing Tubb and Tedrow v. Griess, 78 Phil. 249 (1947)).

182. 1 TAÑADA & FERNANDO, CONSTITUTION, *supra* note 170, at 58.

In general, however, the declaration of policies is not self-executing and enforceable before the courts.[183] Constitutional provisions pertaining to such policies were intended instead to serve as directives to the executive and legislative in the performance of their functions.[184] These policies are significant directives as well in the conduct of foreign relations.

3. Executive, Legislative, and Judicial Departments

It can be observed that the three branches of government all have constitutional mandates that relate to foreign relations. Under the 1935 Constitution, the legislative department was involved in the formulation of foreign policy in a variety of ways. For instance, it had the "sole power to declare war" upon "the concurrence of two-thirds of all the Members of each House."[185] Further, "[i]n times of war and other national emergency[,] the Congress may[,] by law[,] authorize the President, for a limited period, and subject to such restrictions as it may prescribe, to promulgate rules and regulations to carry out a declared national policy."[186] The legislative department also participated in the making of treaties by sharing this function with the executive department, thus — "[t]he President shall have the power, with the concurrence of two-thirds of all the Members of the Senate to make treaties[.]"[187]

The President continued to have a dominant role in the field of foreign relations. He or she has the "power to speak or to listen on behalf of the nation."[188] Further, considering that the Philippines became a member of the UN even before it gained independence, the President has the duty to exercise his or her power over foreign affairs in such a way that works toward maintaining "international peace and security," achieving "international cooperation in solving international problems of an economic, social, cultural, or humanitarian problems of an economic, social, cultural[,] or humanitarian

183. BERNAS, COMMENTARY, *supra* note 166, at 36.

184. *Id.*

185. 1935 PHIL. CONST. art. VI, § 25 (superseded in 1973).

186. 1935 PHIL. CONST. art. VI, § 26 (superseded in 1973).

187. 1935 PHIL. CONST. art. VII, § 10 (7) (superseded in 1973).

188. 2 LORENZO M. TAÑADA & ENRIQUE M. FERNANDO, CONSTITUTION OF THE PHILIPPINES 1052 (1952) [hereinafter 2 TAÑADA & FERNANDO, CONSTITUTION].

character" and encouraging "respect for human rights and fundamental freedoms."[189]

To achieve any or all of these objectives,[190] the President, "with the consent of the Commission on Appointments," was also granted the power to "appoint ambassadors, other public ministers, and consuls."[191] Moreover, the President was mandated to "receive ambassadors and other public ministers duly accredited to the Government of the Philippines."[192]

As for the judicial department, the Supreme Court exercised original jurisdiction over "cases affecting ambassadors, other public ministers, and consuls,"[193] as well as jurisdiction to review the final judgments and decrees of inferior courts over cases that questioned the constitutionality or validity of a treaty.[194]

The Supreme Court was granted the power to override actions of the legislative and executive in case the treaty entered into by the State was unconstitutional or invalid.[195] As will be discussed later, this was retained through counterpart provisions in both the 1973 and the 1987 Constitutions.

Under the power of judicial review, the Supreme Court can annul executive or legislative actions.[196] Therefore, notwithstanding the separation of powers among the three branches of government, the practical effect of the power of judicial review may be judicial supremacy.[197] This power, however, is not without limits. Chapter III of this Article will delve into the power and extent of judicial review.

4. Conservation and Utilization of Natural Resources

The Constitution is a supreme law that can provide general economic policies to guide public officials in the conduct of foreign relations.[198] For example, the 1935 Constitution first contained the "constitutional prohibition of

189. *Id.* at 1053-54.

190. *Id.* at 1054.

191. 1935 PHIL. CONST. art. VII, § 10 (7) (superseded in 1973).

192. 1935 PHIL. CONST. art. VII, § 10 (7) (superseded in 1973).

193. 1935 PHIL. CONST. art. VIII, § 2 (superseded in 1973).

194. 1935 PHIL. CONST. art. VIII, § 2 (1) (superseded in 1973).

195. 1935 PHIL. CONST. art. VIII, § 2 (1) (superseded in 1973).

196. 2 TAÑADA & FERNANDO, CONSTITUTION, *supra* note 188, at 722.

197. *Id.*

198. *See* BERNAS, FOREIGN RELATIONS, *supra* note 167, at 69-70.

alienation of natural resources with the exception of agricultural lands[.]"[199] As for private agricultural lands, they could only be transferred or assigned to Filipino citizens, corporations, or associations with at least 60% capital owned by such citizens, as they were the only persons qualified to acquire and hold lands of the public domain.[200]

The foundation of Philippine law on natural resources can be traced to the theory of *jura regalia*, under which the ownership of all lands is vested in the State.[201] Several arguments support the inclusion of the prohibition against the alienation of natural resources,[202] one of which is that natural resources — specifically, mineral resources — should be conserved, as these constitute a great source of wealth that belongs to the present and future generations.[203] The leasehold system is likewise aimed at assuring that there will be no "ownership or control of foreigners to the prejudice of Filipino posterity[.]"[204]

5. Transitory Provisions

During the American occupation, the 1935 Constitution initially granted partial sovereignty to the Philippines,[205] as can be gleaned from its transitory provisions.[206] The Constitution established a government denominated as "the Commonwealth of the Philippines."[207] It was only after the "complete withdrawal of the sovereignty of the [U.S.] and the proclamation of Philippine independence[that] the Commonwealth ... shall [be thereafter] known as the Republic of the Philippines."[208]

The transitory provisions and the original ordinance appended to the Constitution ceased to be effective upon the proclamation of Philippine

199. *Id.* at 73 (citing 1935 PHIL. CONST. art. XIII, § 1 (superseded in 1973)).

200. 1935 PHIL. CONST. art. XIII, § 1 (superseded in 1973).

201. BERNAS, FOREIGN RELATIONS, *supra* note 167, at 73 (citing Lee Hong Hok v. David, G.R. No. L-30389, 48 SCRA 372, 377 (1972)).

202. *Id.* at 74.

203. *Id.* (citing 2 JOSÉ M. ARUEGO, THE FRAMING OF THE PHILIPPINE CONSTITUTION 603 (2d ed. 1949)).

204. BERNAS, FOREIGN RELATIONS, *supra* note 167, at 74 (citing 2 ARUEGO, *supra* note 203, at 603).

205. Kalaw, *supra* note 159, at 688.

206. 1935 PHIL. CONST. art. XVIII, §§ 1-6 (superseded in 1973).

207. 1935 PHIL. CONST. art. XVIII, § 1 (superseded in 1973).

208. 1935 PHIL. CONST. art. XVIII, § 1 (superseded in 1973).

independence on 4 July 1946.[209] A new ordinance, however, granted to American citizens and to all forms of business enterprise owned or controlled by such citizens the same rights enjoyed by Filipinos and corporations or associations with at least 60% Filipino equity "concerning the disposition, exploitation, development, and utilization of natural resources and the operation of public utilities" until July 1947.[210]

C. 1973 Constitution

In the early 1960s, there was a clamor to revise the 1935 Constitution due to its perceived inadequacy in addressing socio-economic problems.[211] In the late 60s, a sense of urgency grew, as former President Ferdinand Marcos, Sr. publicly identified different threats to the Republic.[212] According to the late dictator, the declaration of Martial Law was justified by threats pertaining to "national decline and demoralization, social and economic deterioration, anarchy[,] and rebellion[.]"[213]

The recognized need to adopt a new constitution led to the calling of the 1971 Constitutional Convention.[214] While some delegates did not want to use the 1935 Constitution as working basis for the new constitution, they were "reminded that unlike the Congress at Malolos, they were not a revolutionary convention that could start from a blank page."[215]

1. National Territory

After much contention,[216] the Constitutional Convention decided to retain the provision on national territory and transformed it to read as follows[217] —

209. Daenecke, *supra* note 156, at 161 n. 6.

210. 1 TAÑADA & FERNANDO, CONSTITUTION, *supra* note 170, at 6.

211. ENRIQUE M. FERNANDO, THE CONSTITUTION OF THE PHILIPPINES 5 (2d ed. 1977).

212. *Id.* at 6 & 15.

213. *Id.* at 15.

214. *Id.*

215. Cortes, *supra* note 154, at 468.

216. *See generally* BERNAS, FOREIGN RELATIONS, *supra* note 167, at 37-41.

217. *Id.* at 73.

ARTICLE I

The National Territory

> SECTION 1. The national territory comprises the Philippine archipelago, with all the islands and waters embraced therein, and all the other territories belonging to the Philippines by historic right or legal title, including the territorial sea, the air space, the subsoil, the sea-bed, the insular shelves, and the other submarine areas over which the Philippines has sovereignty or jurisdiction. The waters around, between, and connecting the islands of the archipelago, irrespective of their breadth and dimensions, form part of the internal waters of the Philippines.[218]

The 1973 Constitution achieved "'decolonization' on paper" by removing the mention of the Treaty of Paris concluded between the U.S. and Spain.[219] The Philippine territory can be classified into three groups:

(1) the Philippine archipelago;

(2) other territories belonging to the Philippines; and

(3) Philippine waters, air-space, and submarine areas."[220]

Significantly, "the last sentence of the [article] [asserts the Philippines'] adherence to the 'archipelagic principle.'"[221] Meanwhile, the catch-all phrase "all the other territories" belonging to the Philippines was used to cover Batanes and Sabah, among other territories.[222] Batanes was not covered by the Treaty of Paris, but nonetheless undisputedly belongs to the Philippines.[223] Sabah is not under the effective control of the Philippines, but it is a territory over which a formal claim had been filed.[224] The provision also encompasses other claims under investigation and other territories that the Philippines might acquire in the future under international law.[225]

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218. 1973 PHIL. CONST. art. 1, § 1 (superseded in 1987).

219. BERNAS, COMMENTARY, *supra* note 166, at 34.

220. *Id.* at 11.

221. *Id.*

222. *Id.* at 16.

223. *Id.*

224. *Id.*

225. BERNAS, COMMENTARY, *supra* note 166, at 16.

2. Declaration of Principles and State Policies

The 1973 Constitution reproduced the State policies found in the 1935 Constitution that were relevant in the conduct of foreign affairs. Article II, Section 1 of the 1973 Constitution likewise declared the Philippines as a republican State whose "[s]overeignty resides in the people."[226] Article II, Section 3 of the 1973 Constitution similarly contained the "renunc[iation of] war as an instrument of national policy" and the adoption of "generally accepted principles of international law as part of the law of the land," further adding adherence "to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations."[227]

3. Executive, Legislative, and Judicial Departments

The decisive role of the President in foreign affairs was retained in the 1973 Constitution.[228] This principle was reflected in the President's authority to "contract and guarantee foreign and domestic loans on behalf of the Republic of the Philippines, subject to such limitations as may be provided by law."[229] The President's vast authority was likewise evident in the constitutional grant of authority to "enter into international treaties or agreements as the national welfare and interest may require."[230]

In terms of the treaty-making process, the 1973 Constitution provided more extensive power than the 1935 Constitution. While the validity and effectivity of the treaty required concurrence "by a majority of all the Members of the Batasang Pambansa[,]"[231] an exception to this requisite approval was the aforementioned power of the President to enter into treaties and agreements to promote national welfare and interest.[232]

As for the Batasang Pambansa, it still had the "sole power to declare the existence of a state of war[ ]" after obtaining the "vote of two-thirds of all its Members[.]"[233] As for the judiciary, Article X, Section 2, of the 1973

226. 1973 PHIL. CONST. art. II, § 1 (superseded in 1987).

227. 1973 PHIL. CONST. art. II, § 3 (superseded in 1987).

228. FERNANDO, *supra* note 211, at 278.

229. 1973 PHIL. CONST. art. VII, § 14 (superseded in 1987).

230. 1973 PHIL. CONST. art. XIV, § 16 (superseded in 1987) & FERNANDO, *supra* note 211, at 278.

231. 1973 PHIL. CONST. art. VIII, § 14 (1) (superseded in 1987).

232. 1973 PHIL. CONST. art. XIV, § 16 (superseded in 1987) & FERNANDO, *supra* note 211, at 282-83.

233. 1973 PHIL. CONST. art. VIII, § 14 (2) (superseded in 1987).

Constitution provided that "the constitutionality of a treaty[or] executive agreement shall be heard and decided [only] by the Supreme Court [sitting] *en banc*[.]"[234] For a treaty or executive agreement to be declared unconstitutional, the concurrence of at least 10 members of the Supreme Court was required.[235]

The relevant jurisdiction of the Supreme Court in matters relating to foreign affairs was found in Section 5 of the same article.[236] It had original jurisdiction over "cases affecting ambassadors, other public ministers[,] and consuls" and involving the "constitutionality or validity of [a] treaty[or] executive agreement"[237] and the power to review cases involving the constitutionality or validity of a treaty or executive agreement.[238]

4. The National Economy and the Patrimony of the Nation

A new economic policy was introduced in Article XIV of the 1973 Constitution, Section 1 of which provided that the National Assembly or "[t]he Batasang Pambansa shall establish a National Economic and Development Authority, to be headed by the President[.]"[239] Part of its mandate was to recommend the "reserv[ation] to citizens of the Philippines or to corporations or associations wholly owned by such citizens, certain traditional areas of investments when the national interest so dictates."[240] This economic policy emphasized the importance of effective social and economic development planning.[241]

The 1973 Constitution also retained the provision on the preservation of national patrimony as the heritage of Filipinos, but added the distinction of agricultural lands from industrial or commercial and residential or resettlement lands.[242] Article XV, Section 9 of the 1973 Constitution further reserved to Filipino citizens and to corporations or associations with at least 60% capital owned by such citizens the "disposition, exploration, development,

234. 1973 PHIL. CONST. art. X, § 2 (2) (superseded in 1987).

235. 1973 PHIL. CONST. art. X, § 2 (2) (superseded in 1987).

236. 1973 PHIL. CONST. art. X, § 5 (superseded in 1987).

237. 1973 PHIL. CONST. art. X, § 5 (1) & (2) (a) (superseded in 1987).

238. 1973 PHIL. CONST. art. X, § 5 (2) (a) (superseded in 1987).

239. 1973 PHIL. CONST. art. XIV, § 1 (superseded in 1987).

240. 1973 PHIL. CONST. art. XIV, § 3 (superseded in 1987).

241. FERNANDO, *supra* note 211, at 474.

242. FERNANDO, *supra* note 211, at 475 (citing 1973 PHIL. CONST. art. XIV, § 8 (superseded in 1987)).

exploitation, or utilization of any of the natural resources of the Philippines[.]"[243] However, pursuant to national interest, the Batasang Pambansa was allowed to authorize such citizens, corporations, or associations "to enter into service contracts for financial, technical, management, or other forms of assistance with any foreign person or entity for the exploration, development, exploitation, or utilization of any of the natural resources."[244] As for private agricultural lands, similar to the 1935 Constitution, they could only be transferred or assigned to Filipino citizens or corporations, or associations with at least 60% capital owned by such citizens, except in cases of hereditary succession.[245]

5. Transitory Provisions

As part of the transitory provisions, the 1973 Constitution provided for the termination of the "rights and privileges granted to [American] citizens ... or to corporations or associations owned or controlled by such citizens [in] the ordinance appended to the [1935] Constitution."[246] Their titles to private lands acquired before 3 July 1974 were only valid against private persons.[247]

D. 1987 Constitution

The 1987 Constitution substantially preserved the Philippine territory as defined in the 1973 Constitution,[248] to wit —

> ARTICLE I
>
> National Territory
>
> The national territory comprises the Philippine archipelago, with all the islands and waters embraced therein, and all other territories over which the Philippines has sovereignty or jurisdiction, consisting of its terrestrial, fluvial, and aerial domains, including its territorial sea, the seabed, the subsoil, the insular shelves, and other submarine areas. The waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the internal waters of the Philippines.[249]

243. 1973 PHIL. CONST. art. XIV, § 9 (superseded in 1987).

244. 1973 PHIL. CONST. art. XIV, § 9 (superseded in 1987).

245. 1973 PHIL. CONST. art. XIV, § 14 (superseded in 1987).

246. 1973 PHIL. CONST. art. XVII, § 11 (superseded in 1987).

247. 1973 PHIL. CONST. art. XVII, § 11 (superseded in 1987).

248. BERNAS, COMMENTARY, *supra* note 166, at 34.

249. PHIL. CONST. art. 1, § 1.

The above article added a new phrase — "and all other territories over which the Philippines has sovereignty or jurisdiction[.]"[250] The use of the word "has" rather than "exercises" assigns a broader meaning to account for a situation where an invading force temporarily seizes control over a portion of Philippine territory.[251] It also covers territories "over which the Philippines might [have] sovereignty or jurisdiction in the future."[252]

The 1987 Constitution includes the archipelagic principle in the last sentence of the provision.[253] It is also important to note that the 1987 Constitution was crafted and promulgated when the Philippines was already a State Party to the 1982 United Nations Convention on the Law of the Sea (UNCLOS III).[254] The Philippine territory should be viewed with the demarcation of the maritime zones as defined under Republic Act No. 9522, which amended Republic Act No. 3046.[255] This was enacted to comply with the provisions of the UNCLOS III.[256]

2. Declaration of Principles and State Policies

Similar to the 1935 and 1973 Constitutions, the 1987 Constitution provides that "[t]he Philippines is a democratic and republican State. Sovereignty resides in the people and all government authority emanates from them."[257] It also reproduces the Philippines' renunciation of war, adoption of the generally accepted principles of international law found in the 1935 and 1973 Constitutions, and the "adherence to a policy of peace, freedom, and amity with all nations" introduced by the 1973 Constitution.[258]

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250. PHIL. CONST. art. I, § 1.

251. BERNAS, COMMENTARY, *supra* note 166, at 30.

252. *Id.* at 31.

253. PHIL. CONST. art. I, § 1.

254. *See* MARIA ELA L. ATIENZA, CHRONOLOGY OF THE 1987 PHILIPPINE CONSTITUTION 22 (2019) (citing An Act to Amend Certain Provisions of Republic Act No. 3046, as Amended by Republic Act No. 5446, to Define the Archipelagic Baseline of the Philippines and for Other Purposes, Republic Act No. 9522 (2009) & An Act Define the Baselines of the Territorial Sea of the Philippines, Republic Act No. 3046 (1961)).

255. *Id.*

256. *Id.* & Magallona v. Ermita, G.R No. 187167, 655 SCRA 476, 483 (2011).

257. PHIL. CONST. art. II, § 1.

258. BERNAS, COMMENTARY, *supra* note 166, at 59.

Article II, Section 3 of the 1987 Constitution is related to the earlier provision on national territory.[259] Apart from recognizing the supremacy of civilian authority over the military at all times, it enshrines the positive duty of the Armed Forces of the Philippines to be "the protector of the people and the State[,]" as well as "[i]ts goal [ ] to secure the sovereignty of the State and the integrity of the national territory."[260]

Moreover, an important provision on foreign relations is found in Article II, Section 7 of the 1987 Constitution, which affirms that "[t]he State shall pursue an independent foreign policy. In its relations with other [S]tates[,] the paramount consideration shall be national sovereignty, territorial integrity, national interest, and the right to self-determination."[261]

Foreign relations, as described above, "covers the whole gamut of treaties and international agreements and other kinds of intercourse."[262] The framers included this in the Constitution, as they were wary of the Philippines' apparent dependence on the U.S.[263] and aware of the presence "of the military bases in Clark and Subic."[264]

Article II also contains a nationalist approach to economic development. According to Section 19, "[t]he State shall develop a self-reliant and independent national economy effectively controlled by Filipinos."[265] This is read with Section 20, which provides that "[t]he State recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments."[266] Notwithstanding these principles, the Legislature has sufficient power to fix the country's degree of independence or self-reliance, while duly considering the national interest in establishing economic relations with other States.[267]

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259. PHIL. CONST. art. II, § 3.

260. PHIL. CONST. art. II, § 3.

261. PHIL. CONST. art. II, § 7.

262. BERNAS, COMMENTARY, *supra* note 166, at 71.

263. BERNAS, FOREIGN RELATIONS, *supra* note 167, at 25.

264. *Id.* & BERNAS, COMMENTARY, *supra* note 166, at 71.

265. PHIL. CONST. art. II, § 19.

266. PHIL. CONST. art. II, § 20.

267. *See* BERNAS, COMMENTARY, *supra* note 166, at 679 (citing JEAN LOUISE DE LOLME, THE CONSTITUTION OF ENGLAND 102 (1853) (citing BERNARD SCHWARTZ, THE POWERS OF GOVERNMENT 88 (1963))).

On human rights, the Constitution includes a policy of "valu[ing] the dignity of every human person and guarantee[ing] full respect for human rights."[268] More concrete provisions to this end are found in the provisions under Article III (the Bill of Rights) and Article XIII (Social Justice and Human Rights).[269]

3. Legislative Department

Similar to the previous constitutions, the 1987 Constitution empowers only the Congress "to declare the existence of a state of war" upon the affirmative "vote of two-thirds of both Houses in joint session assembled, voting separately[.]"[270] Moreover, should there be a war or other national emergency,

> the Congress may, by law, authorize the President, for a limited period and subject to such restrictions as it may prescribe, to exercise powers necessary and proper to carry out a declared national policy. Unless sooner withdrawn by resolution of the Congress, such powers shall cease upon the next adjournment thereof.[271]

Treaty-making is still a shared function between the legislative and the executive. Section 21, Article VII requires the concurrence by "at least two-thirds of all the Members of the Senate" before a treaty or international agreement shall be valid and effective.[272]

4. Executive Department

The power of the President to contract or guarantee foreign loans was already established in the 1973 Constitution.[273] Although this was subject to limitations provided by law, that did not stop former President Marcos from practically burying succeeding generations of Filipinos in debt to foreign banks.[274] As a deterrent to potentially similar abuse in the future, the 1987 Constitution now requires the concurrence of the Monetary Board before the

268. PHIL. CONST. art. II, § 11.

269. BERNAS, FOREIGN RELATIONS, *supra* note 167, at 29.

270. PHIL. CONST. art. VI, § 23 (1).

271. PHIL. CONST. art. VI, § 23 (2).

272. PHIL. CONST. art. VII, § 21.

273. 1973 PHIL. CONST. art. VII, § 14 (superseded in 1987).

274. BERNAS, FOREIGN RELATIONS, *supra* note 167, at 117.

President can contract or guarantee foreign loans, subject to other limitations under special laws.[275]

Further, in the spirit of transparency and accountability, "[f]oreign loans may only be incurred in accordance with law and the regulation of the monetary authority. Information on foreign loans obtained or guaranteed by the Government shall be made available to the public."[276]

5. Judicial Department

The 1987 Constitution retains the irreducible jurisdiction of the Supreme Court over cases that would touch upon foreign relations.[277] Article VIII, Section 5 provides for the Supreme Court's original jurisdiction "over cases affecting ambassadors, other public ministers[,] and consuls" [278] and its power to rule on the "constitutionality or validity of any treaty, international[,] or executive agreement[.]"[279]

As mentioned earlier, since the courts can rule upon the validity of treaties or executive agreements, in effect, they can overturn the actions of the legislative and the executive branches in case the latter violate the Constitution.[280]

6. National Economy and Patrimony

Under Article XII, Section 2 of the 1987 Constitution, natural resources can be explored, developed, and utilized directly by the State or through "co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations[,] or associations [with] at least [60% of their capital] owned by such citizens."[281] At all times, these activities should be "under the full control and supervision of the State."[282] The Constitution limits the duration of the agreements to a period not exceeding 25 years, but they are renewable for not more than 25 years.[283]

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275. PHIL. CONST. art. VII, § 20.

276. PHIL. CONST. art. XII, § 21.

277. *See* PHIL. CONST. art. VIII, § 5 (1).

278. PHIL. CONST. art. VIII, § 5 (1).

279. PHIL. CONST. art. VIII, § 5 (2) (a).

280. BERNAS, COMMENTARY, *supra* note 166, at 968.

281. PHIL. CONST. art. XII, § 2, para. 1.

282. PHIL. CONST. art. XII, § 2, para. 1.

283. PHIL. CONST. art. XII, § 2, para. 1.

With regard to marine resources, "[t]he State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens."[284] This provision is not found in the 1935 and 1973 Constitutions.[285] From its wording, it categorically reserves marine wealth for Filipino citizens only — "clearly exclud[ing] foreigners and foreign corporations[,] even [in cases where there is offer] to pay rent or fees for fishing rights."[286]

Moreover, unlike the previous constitutions, Article XII, Section 2 of the 1987 Constitution empowers the President to

> enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources.
>
> The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution.[287]

Only the President can enter into agreements with foreign-owned corporations, but this must be "according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country."[288] The agreements must only concern "either technical or financial assistance[,]" and the subject matter is limited to "large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils[.]"[289] The scope of the allowable agreements do not include the development and utilization of other natural resources such as "timberlands, forests, marine resources, fauna and flora wildlife[,] and national parks."[290]

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284. PHIL. CONST. art. XII, § 2, para. 2.

285. *See* 1973 PHIL. CONST. art. XIV (superseded in 1987) & 1935 PHIL. CONST. art. XIII (superseded in 1973).

286. BERNAS, FOREIGN RELATIONS, *supra* note 167, at 76-77 (3 RECORD OF THE CONSTITUTIONAL COMMISSION, NO. 65, at 686).

287. PHIL. CONST. art. XII, § 2, paras. 4 & 5.

288. PHIL. CONST. art. XII, § 2, para. 4.

289. PHIL. CONST. art. XII, § 2, para. 4.

290. BERNAS, FOREIGN RELATIONS, *supra* note 167, at 79. (citing 3 RECORD, PHIL. CONST., No. 65, at 355-56)

The rule on private lands remains unchanged. They can only be transferred or conveyed to those who are qualified to acquire and hold lands of the public domain, namely, Filipino citizens and corporations or associations with at least 60% Filipino equity.[291] Article XII, Section 8 of the 1987 Constitution, however, adds that "a natural-born citizen of the Philippines who has lost his Philippine citizenship may be a transferee of private lands, subject to limitations provided by law."[292]

In the areas of investment and trade, Congress can reserve particular industries or businesses to Filipino citizens or to corporations or associations with at least 60% capital owned by such citizens.[293] A higher percentage may be provided by Congress in specific areas of investments.[294] As for the grant of rights, privileges, and concessions, the State is mandated to give preference to qualified Filipinos in areas of national economy and patrimony.[295] The State shall also regulate foreign investments in accordance with "national goals and priorities."[296]

As an extension of the nationalism espoused in the 1935 Constitution, the *Filipinization* of public utilities was likewise retained in the present Constitution.[297] The Constitution also adopts a Filipino-first policy in terms of labor, products, and materials.[298] Section 12, Article XII of the 1987 Constitution specifically provides that "[t]he State shall promote the preferential use of Filipino labor, domestic materials and locally produced goods, and adopt measures that help make them competitive."[299]

In effect, alongside the Filipino-first policy is the trade policy respecting different forms and arrangements in economic exchange, which include multi-country arrangements and countertrade.[300] According to Section 13, Article XII of the 1987 Constitution, these arrangements must serve the

291. PHIL. CONST. art. XII, § 7.

292. PHIL. CONST. art. XII, § 8.

293. PHIL. CONST. art. XII, § 10, para. 1.

294. PHIL. CONST. art. XII, § 10, para. 1.

295. PHIL. CONST. art. XII, § 10, para. 2.

296. PHIL. CONST. art. XII, § 10, para. 3.

297. PHIL. CONST. art. XII, § 11. *See also* 1935 PHIL. CONST. art. XIV, § 8 (superseded in 1973).

298. PHIL. CONST. art. XII, § 12.

299. PHIL. CONST. art. XII, § 12.

300. BERNAS, COMMENTARY, *supra* note 166, at 1226.

general welfare and be founded on reciprocity and equality or mutual benefit.[301]

7. Transitory Provisions

In the transitory provisions of the 1987 Constitution, the framers decided to include the matter of foreign military bases in the country.[302] The military bases agreement between the U.S. and the Philippines had a specific expiration date; thus, the existence of the bases was seen as only transitory in character.[303] Section 25 pertains to the expiration of the RP-U.S. Bases Agreement in 1991, thus —

ARTICLE XVIII

Transitory Provisions

> SECTION 25. After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases, foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State.[304]

In 1991, however, the Senate rejected the new treaty negotiated by the executive department.[305] Thereafter, a Visiting Forces Agreement (VFA) was drafted to supplement the 1952 Mutual Defense Pact of the Philippines with the U.S.[306] The VFA allowed American military troops or personnel to enter and train in the country on a temporary basis.[307] In *Bayan v. Zamora*, the Court ruled that a treaty is necessary for the VFA to be effective in accordance with Section 25, Article XVIII of the Constitution.[308]

The following Chapter will be a review of cases that show the recent trend in judicial rulings concerning foreign relations.

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301. *Id.* & PHIL. CONST. art. XII, § 13.

302. PHIL. CONST. art. XVIII, § 25.

303. BERNAS, COMMENTARY, *supra* note 166, at 1400.

304. PHIL. CONST. art. XVIII, § 25.

305. BERNAS, COMMENTARY, *supra* note 166, at 1400.

306. *Id.*

307. *Id.*

308. *Bayan (Bagong Alyansang Makabayan)*, 342 SCRA at 486 (2000) (citing PHIL. CONST. art. XVIII, § 25).

III. THE COURTS AND FOREIGN POLICY IN THE PRESENT SETTING

The changes in the normative relationship between law and foreign relations are dictated by both constitutional and international law.[309] It is therefore important to review the concepts of judicial power and judicial review, as the courts are in the ultimate position to apply constitutional, legislative, and international norms when deciding cases relating to foreign policy and relations.[310]

A. Judicial Power

Judicial power is vested in the courts, namely, the "Supreme Court and [ ] such lower courts ... established by law."[311] It "includes the duty ... to settle actual controversies involving rights which are legally demandable and enforceable" before the courts[312] and the redress of wrongs for violating such rights.[313]

In the 1987 Constitution, this power has been expanded to include the duty "to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the [g]overnment."[314] This was added because of the frequent invocation of the political question doctrine during martial law to justify state actions.[315] Nevertheless, the political question doctrine per se has not been abandoned, and it remains to be a limitation on judicial power.[316] This will be further discussed in the later parts of this Article.

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309. Angelo Jr. Golia, *Judicial Review, Foreign Relations and Global Administrative Law: The Administrative Function of Courts in Foreign Relations*, *in* ENCOUNTERS BETWEEN FOREIGN RELATIONS LAW AND INTERNATIONAL LAW 133 (Helmut Phillip Aust & Thomas Kleinlein eds., 2021) (citing Thomas Poole, *The Constitution and Foreign Affairs*, 69 CURRENT LEGAL PROBS 143, 148 (2016) & JEAN-BERNARD AUBY, GLOBALISATION, LAW AND THE STATE 80 (2017)).

310. *See* PHIL. CONST. art. VIII, § 1.

311. PHIL. CONST. art. VIII, § 1.

312. PHIL. CONST. art. VIII, § 1.

313. BERNAS, COMMENTARY, *supra* note 166, at 951–54.

314. PHIL. CONST. art. VIII, § 1.

315. BERNAS, COMMENTARY, *supra* note 166, at 952.

316. *Id.*

The scope of the judiciary's action is confined to the allowable exercise of its judicial power.[317] Pursuant to the principle of separation of powers, it cannot assume and perform non-judicial functions.[318]

B. Judicial Review

Among the aspects of judicial power is the power of judicial review.[319] Under Article VIII, Section 5 of the 1987 Constitution, the power of judicial review is lodged with the Supreme Court.[320] Particularly, it has the power to declare the unconstitutionality of a "treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation[,]"[321] as well as the "application[ ] or operation of presidential decrees, proclamations, orders, instructions, ordinances, and other regulations[.]"[322]

The Court checks several requisites for the exercise of judicial power.[323] *First*, there must be an actual case or controversy.[324] Hence, the Court does not issue advisory opinions, and it does not, as a general rule, pass upon issues that have already become moot.[325] The first requirement is closely related to the requirement that "the question should be 'ripe' for adjudication."[326] In other words, the assailed governmental act should directly and adversely affect the individual challenging it.[327]

Second, the party bringing the case before the Court should "hav[e] the requisite 'standing'" to raise the constitutional question.[328] A party possesses standing when he or she has "a personal and substantial interest in the case such that he has sustained, or will sustain, direct injury as

317. *Id.* at 946.

318. *Id.* at 948.

319. *Id.* at 970.

320. PHIL CONST. art. VIII, § 5 (2).

321. PHIL CONST. art. VIII, § 5 (2) (a).

322. BERNAS, COMMENTARY, *supra* note 166, at 968 (citing PHIL CONST. art. VIII, § 4 (2)).

323. BERNAS, COMMENTARY, *supra* note 166, at 970.

324. *Id.*

325. *Id.* at 970–71.

326. *Id.* at 971.

327. *Id.*

328. *Id.* at 972.

a result of [the] enforcement" of the challenged governmental act.[329]

Third, "as a general rule, the question of constitutionality must be raised at the earliest opportunity[.]"[330] The issue should be raised in the pleadings before it can be raised at the trial.[331] In the same manner, the issue should be raised before the trial court before it can be considered on appeal.[332] By way of exception, the Court can exercise its sound discretion in determining when the question of constitutionality should be presented.[333]

Fourth, the Court will only rule on the issue of constitutionality when it is the very *lis mota*, or when it is unavoidable in the resolution of the case.[334]

C. Prohibited Engagements of Courts

As limitations on the exercise of judicial power, the courts are prohibited from engaging in judicial legislation and purely policy decisions.[335] These prohibited engagements are rooted in the well-settled doctrine of separation of powers among the co-equal branches of government.[336]

1. Judicial Legislation

Prior to the legislative amendment of the penalties under the Revised Penal Code,[337] in the 2014 case of *Corpuz v. People*,[338] the Court was confronted with the perceived injustice of imposing penalties for crimes against property

329. BERNAS, COMMENTARY, *supra* note 166, at 972 (citing People v. Vera, 65 Phil. 56, 89 (1937) & Macasiano v. National Housing Authority, G.R. No. 107921, 224 SCRA 236 (1993)).

330. BERNAS, COMMENTARY, *supra* note 166, at 984 (citing *Vera*, 65 Phil. at 88).

331. *Id.*

332. *Id.*

333. *Id.*

334. BERNAS, COMMENTARY, *supra* note 166, at 984-85.

335. Tañada v. Yulo, G.R. No. 43575, 61 Phil. 515, 519 (1935) & Betoy v. The Board of Directors, National Power Corporation, G.R. Nos. 156556-57, 658 SCRA 420, 468 (2011).

336. *Id.*

337. An Act Revising the Penal Code and Other Penal Laws [REV. PENAL CODE], Act No. 3815 (1930).

338. Corpuz v. People, G.R. No. 180016, 724 SCRA 1 (2014).

based on the value of money in 1932.[339] Still, the Court meted out the applicable penalty for the crime of estafa to avoid both breaching the doctrine of separation of powers through judicial legislation and encroaching on the power of Congress as a co-equal branch of government to enact laws.[340] It emphasized that

> the primordial duty of the Court is merely to apply the law in such a way that it shall not usurp legislative powers by *judicial legislation* and ... it should not make or supervise legislation, or under the guise of interpretation, modify, revise, amend, distort, remodel, or rewrite the law, or give the law a construction which is repugnant to its terms.[341]

In line with the prohibition against judicial legislation, Justice Antonio T. Carpio expressed his dissent from the main opinion in *Navarro v. Ermita*,[342] which held that the Dinagat Islands constituted a province even though it did not meet the minimum income requirement, minimum land area, or minimum population stated in the Local Government Code.[343] He maintained that based on the letter of the law, "[t]he Dinagat Islands province [ ] does not [pass] the criteria for the creation of a province."[344] Thus, it was grossly erroneous for the Court to resort to the "legislative construction" of the congressional oversight committee that added an exception to the requirements after the law's enactment.[345]

2. Purely Policy Decision

Similarly, the courts are duty-bound to refrain from deciding on policy questions made by the political branches of government.[346] In *Provincial Bus Operators Association of the Philippines (PBOAP) v. Department of Labor and Employment (DOLE)*,[347] the Court refused to decide on the policy question

339. *Id.* at 61.

340. *Id.* at 67.

341. *Id.* at 57 (citing People v. Quijada, G.R. Nos. 115008-09, 259 SCRA 191, 227-28 (1996)).

342. Navarro v. Ermita, G.R. No. 180050, 648 SCRA 400, 461 (2011) (J. Carpio, dissenting opinion).

343. *Id.* at 459-60.

344. *Id.* at 462.

345. *Id.* at 464.

346. BERNAS, COMMENTARY, *supra* note 166, at 952.

347. Provincial Bus Operators Association of the Philippines (PBOAP) v. Department of Labor and Employment (DOLE), G.R. No. 202275, 872 SCRA 50 (2018).

regarding the mandated wage system and economic and social welfare benefits of bus drivers and conductors.[348] In finding that the assailed department order and memorandum circular were constitutional, the Court emphasized that it could not stand in the way of policy choices of the DOLE and the Land Transportation Franchising and Regulatory Board (LTFRB), thus —

> This Court is not a forum to appeal political and policy choices made by the Executive, Legislative, and other constitutional agencies and organs. This Court dilutes its role in a democracy if it is asked to substitute its political wisdom for the wisdom of accountable and representative bodies where there is no unmistakable democratic deficit.[349]

The foregoing prohibitions generally guide the courts as to the bounds of their decisions when faced with issues that relate to foreign policy.

D. Foreign Policy and the Court

It is inevitable for courts to decide on foreign relations issues.[350] Through the court's exercise of its review functions, "judicial rulings ... implement or develop [norms] in the context of [foreign relations]."[351] These norms may be classified as review norms and interaction norms.[352] Review norms cover the "conduct of the political branches" of government within the court's jurisdiction, while interaction norms are the "standards implemented or developed [in the management of] interactions with other jurisdictions or legal systems[.]"[353] In foreign relations law, courts have been progressively conditioned by the foreseeable effect or result of their decisions.[354]

Given the result-oriented norms produced by judicial review mechanisms, writer Angelo Jr. Golia adopts a global administrative law approach to conceptualize the function of courts in applying foreign relations law.[355] This is viewed in the context of globalization and interdependence among nations.[356] He observes that in different jurisdictions, courts are no longer merely external reviewers, as they increasingly participate in administrative

348. *Id.* at 114.

349. *Id.* at 112.

350. Golia, *supra* note 309, at 136.

351. *Id.* at 135.

352. *Id.*

353. *Id.*

354. *Id.* at 134.

355. *Id.* at 134-35.

356. Golia, *supra* note 309, at 135.

functions by ruling on foreign relations issues.[357] From a global perspective, they are placed "in the broader set of global regulators," thereby contributing to the development of norms in foreign relations.[358]

With this, the following Section will provide a review of cases that confronted the Philippine Supreme Court in more recent years. In these cases, the Court ruled on issues which involved foreign policy and consequently impacted the conduct of foreign relations. In general, the cases can be classified as those relating to national security, economic relations, global health, civil and political rights, rights of cultural or religious minorities, and heritage. In discussing these cases, the Authors will also identify the internal and/or external determinants that appear to have influenced the Court in its decisions.

1. Impact Cases

a. National Security

i. On Insurgency

In *Ocampo v. Abando*,[359] the Court ruled on the applicability of the rule on the absorption of common crimes in a rebellion case filed against the petitioner as a communist insurgent.[360] In a separate opinion, Justice Marvic M.V.F. Leonen concurred in the majority's decision to remand the case to the trial court to examine further evidence.[361] More importantly, he discussed the application of the "Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law (CARHRIHL) executed by the Government of the Republic of the Philippines (GRP) and the [Communist Party of the Philippines/New People's Army/National Democratic Front of the Philippines, or the] CPP/NPA/NDF[,]" as well as the relevance of "Republic Act No. 9851, otherwise known as the Philippine Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against

357. *Id.*

358. *Id.* at 134 (citing SABINO CASSESE, THE GLOBAL POLITY: GLOBAL DIMENSIONS OF DEMOCRACY AND THE RULE OF LAW 162 (2012); Elisa D'Alterio, *Judicial Regulation in the Global Space*, *in* RESEARCH HANDBOOK ON GLOBAL ADMINISTRATIVE LAW 314 (Sabino Cassesse ed., 2016); & ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 51-61 (2004)).

359. Ocampo v. Abando, G.R. No. 176830, 715 SCRA 673 (2014).

360. *Id.* at 689-90 & 104 (citing People v. Lovedioro, G.R. No. 112235, 250 SCRA 389, 395 (1995)).

361. *Ocampo*, 715 SCRA at 709 (J. Leonen, concurring opinion).

Humanity,"[362] in implementing principles of international humanitarian law (IHL) in the Philippines.[363]

Justice Leonen opined that acts in violation of Republic Act No. 9851 cannot be absorbed by the crime of rebellion due to applicable principles of IHL.[364] It should be noted that the Philippines enacted Republic Act No. 9851 to implement its policy in Section 2, Article II of the Constitution[365] and to ensure that the most serious crimes of international concern do not go unpunished at the national level.[366] Republic Act No. 9851 "defines and provides for the penalties [and non-prescription] of crimes against humanity, serious violations of IHL, genocide, and other crimes against humanity."[367] Therefore, these crimes should be separately punished from rebellion, and perpetrators cannot "hide behind a doctrine crafted to recognize the different nature of armed uprisings as a result of political dissent."[368]

Moreover, the CPP/NPA/NDF are bound by international humanitarian laws, consistent with their Declarations and the CARHRIHL, which invoke the Geneva Conventions and its 1977 Additional Protocols —

> The CARHRIHL has provided a clear list of rights and duties that the parties must observe in recognizing the application of human rights and international humanitarian laws. The CPP/NPA/NDF, parties to an ongoing armed conflict and to which petitioners allegedly belong, are

362. *Id.* at 709 & 732.

363. *Id.* at 737-38.

364. *Id.* at 709.

365. Article II, Section 2 of the Constitution provides that "[t]he Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations." PHIL. CONST. art. II, § 2.

366. *Ocampo*, 715 SCRA at 718 (J. Leonen, concurring opinion) (citing An Act Defining and Penalizing Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, Organizing Jurisdiction, Designating Special Courts, and for Related Purposes [Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity], Republic Act No. 9851 (2009), § 2 (a) & (e) (2009)).

367. *Id.* at 729 (citing Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, § 4 (b)).

368. *Ocampo*, 715 SCRA at 738 (J. Leonen, concurring opinion).

> required to observe, at the minimum, the humane treatment of persons involved in the conflict, whether *hors de combat* or a civilian.[369]

Justice Leonen's exposition affirms laws on state responsibility, particularly the duty of the State to undertake measures with regard to rebellious activities and to prevent any harm to both nationals and foreign nationals within the jurisdiction of a State.[370] This responsibility extends to the implementation of the principles of international humanitarian law and international criminal law.[371]

Justice Leonen also referenced international law in discussing the duties of the State, and those of the CPP/NPA/NDF as rebels, in an armed conflict.[372] It can also be inferred that the rebels, if pursued by the State, can be held responsible for violation of the CARHRIHL and Republic Act No. 9851.[373] The rejection of the principle of absorption in crimes against humanity or serious violations of international humanitarian law[374] supports the policy and campaign to end local communism.[375]

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369. *Id.* at 735.

370. *See id.* at 718–19 (citing Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, § 2 (a) & (e)).

371. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

372. *See Ocampo*, 715 SCRA at 730–36 (J. Leonen, concurring opinion).

373. *Id.* at 710 & 737–38.

374. *Id.* at 709 (J. Leonen, concurring opinion).

375. *See, e.g.*, Office of the President, Institutionalizing the Whole-of-Nation Approach in Attaining Inclusive and Sustainable Peace, Creating a National Task Force to End Local Communist Armed Conflict, and Directing the Adoption of a National Peace Framework, Executive Order No. 70, Series of 2018 [E.O. No. 70, s. 2018] (Dec. 4, 2018) & Department of National Defense-Office of Civil Defense, Statement of Support to the National Task Force to End Local Communist Armed Conflict (NTF ELCAC), *available at* https://www.ocd.gov.ph/index.php/news/636-statement-of-support-to-the-national-task-force-to-end-local-communist-armed-conflict-ntf-elcac (last accessed Jan. 30, 2022) [https://perma.cc/JU6N-MJ4Q].

ii. On Peace Agreements

In resolving foreign relations issues, courts may in effect co-determine, albeit indirectly, the implementation of the country's international obligations.[376] For instance, the judgment of the South African Constitutional Court (SADC) in *Law Society of South Africa and Others v. President of the Republic of South Africa and Others* greatly restricted the discretion of the executive by ordering the President to withdraw his signature from the 2014 Protocol, which was judicially found "to be unconstitutional, unlawful[,] and irrational."[377] Likewise, in the judgment of the Colombian constitutional court in Case No. C-252/19, it evaluated the compatibility of a bilateral investment treaty with the domestic constitution.[378] The court in that case not only reviewed the legality of the executive act, but also imposed specific measures in the renegotiation of several clauses in the treaty.[379]

The assessment by the Philippine Supreme Court of the constitutionality of peace agreements similarly shows how the Judiciary can indirectly co-determine the management of foreign relations.

In *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP)*,[380] the Court's decision had an impact on the decision of the executive department to renegotiate the terms of the

376. *See* Golia, *supra* note 309, at 146.

377. *Id.* at 146-47 (citing Law Society of South Africa and Others v. President of the Republic of South Africa and Others, CCT67/18, ¶ 97 (2018) (S. Afr.); RIAAN EKSTEEN, THE ROLE OF THE HIGHEST COURTS OF THE UNITED STATES OF AMERICA AND SOUTH AFRICA, AND THE EUROPEAN COURT OF JUSTICE IN FOREIGN AFFAIRS 305-311 (2019); & Dire Tladi, *A Constitution Made for Mandela, a Constitutional Jurisprudence Developed for Zuma: The Erosion of Discretion of the Executive in Foreign Relations*, in ENCOUNTERS BETWEEN FOREIGN RELATIONS LAW AND INTERNATIONAL LAW 215-38 (Helmut Phillip Aust & Thomas Kleinlein eds., 2021)).

378. Golia, *supra* note 309, at 147 (citing Judgment C-252/19 (2019) (Colom.)) & Gustavo Prieto, The Colombian Constitutional Court Judgment C-252/19: A New Frontier for Reform in International Investment Law, *available at* www.ejiltalk.org/the-colombian-constitutional-court-judgment-c-252-19-a-new-frontier-for reform-in-international-investment-law (last accessed Jan. 30, 2022) [https://perma.cc/95JC-CUPP]).

379. Golia, *supra* note 309, at 147.

380. Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP), G.R. No. 183591, 568 SCRA 402 (2008).

Moro-Islamic Liberation Front-Government of the Philippines (MILF-GRP) Agreement on Peace in order to conform to the government's position on the matter of self-determination.[381] The controversy involved the Memorandum of Agreement on the Ancestral Domain (MOA-AD), which described the relationship of the Central Government and the Bangsamoro Juridical Entity as "associative."[382]

The Court clarified that the right to self-determination should not be interpreted to include "a unilateral right [to] secession."[383] The distinction between internal and external self-determination is instructive. According to sources of international law,

> the right to self-determination of a people is normally fulfilled through *internal* self-determination — [the] pursuit of [ ] political, economic, social and cultural development within the framework of an existing [S]tate. A right to *external* self-determination (which ... potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and ... under carefully defined circumstances.[384]

As opposed to internal self-determination, *external* self-determination is defined as

> [t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a *people* constitute modes of implementing the right of self-determination by *that people*.[385]

The Court found that external self-determination could not be reconciled with the present Constitution.[386] Hence, the associative relationship envisioned by the MOA-AD between the government and the Bangsamoro Juridical Entity was unconstitutional, as the said concept implied that the latter was transitioning to become an independent State.[387]

In sum, as a matter of foreign policy, the Philippines only recognizes external self-determination in favor of full-fledged States, but not the internal

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381. *Id.* at 463.

382. *Id.* at 449.

383. *Id.* at 490.

384. *Id.* (emphasis omitted) (citing Reference Re Secession of Quebec, 2 S.C.R. 217 (1998) (Can.)).

385. *Province of North Cotabato*, 568 SCRA at 490 (emphasis omitted).

386. *See id.* at 521.

387. *Province of North Cotabato*, 568 SCRA at 521.

self-determination of indigenous peoples within the territory.[388] Ultimately, the Court struck down the MOA-AD as unconstitutional based on its interpretation of the constitutional provisions on autonomous regions and the related international norms on the right to self-determination.[389] The Court's ruling compelled the executive to renegotiate the terms of the peace agreement[390] and indirectly co-determined the implementation of the Philippines' international obligations on the right to internal self-determination of indigenous peoples.[391]

In the earlier case of *Abbas v. COMELEC*,[392] the Court already had the occasion to rule on whether Republic Act No. 6734, otherwise known as "An Act Providing for an Organic Act for the Autonomous Region in Muslim Mindanao" (Organic Act),[393] violated the Constitution, and on whether certain provisions of the same law contravened the "Agreement Between the Government of the Republic of the Philippines and Moro National Liberation Front with the Participation of the Quadripartite Ministerial Commission Members of the Islamic Conference and the Secretary General of the Organization of Islamic Conference" (Tripoli Agreement).[394] The Tripoli Agreement established "[a]utonomy in the Southern Philippines within the realm of the sovereignty and territorial integrity of the Republic of the Philippines[ ] and enumerated the [13] provinces comprising the 'areas of autonomy.'"[395] The Court held that

> [it is not] necessary ... to rule on the ... binding effect [of the Tripoli Agreement] whether under public international or internal [ ] law. ... [I]t is

388. *See id*.

389. *Province of North Cotabato*, 568 SCRA at 521-22.

390. Steven Rood, A Year On, Prospects for Mindanao Peace Talks Brighten Again, *available at* https://asiafoundation.org/2009/08/19/a-year-on-prospects-for-mindanao-peace-talks-brighten-again (last accessed Jan. 30, 2022) [https://perma.cc/PVV9-JYZ2].

391. *See Province of North Cotabato*, 568 SCRA at 494-97.

392. Abbas v. Commission on Elections, G.R. No. 89651, 179 SCRA 287 (1989).

393. An Act Providing for an Organic Act for the Autonomous Region in Muslim Mindanao, Republic Act No. 6734 (1989).

394. Agreement Between the Government of the Republic of the Philippines and Moro National Liberation Front with the Participation of the Quadripartite Ministerial Commission Members of the Islamic Conference and the Secretary General of the Organization of Islamic Conference [Tripoli Agreement] (1976).

395. *Abbas*, 179 SCRA at 292 (citing Tripoli Agreement, para. 15).

> now the Constitution itself that provides for the creation of an autonomous region in Muslim Mindanao. The standard for any inquiry into the validity of R.A. No. 6734 would therefore be what is so provided in the Constitution.[396]

In assessing the legality of the law, the Court did not deem it necessary to resort to international law because there already existed a constitutional provision on the creation of autonomous regions.[397] The Court relied on the domestic Constitution instead of going into the status and binding force of the Tripoli Agreement as a treaty.[398]

In other cases, the Court used constitutional principles to evaluate the validity of international treaties and executive agreements on the establishment of military bases and presence of foreign troops in the country.[399]

iii. Defense and Military Presence

Even in other jurisdictions, the legality of the use of military bases can be the subject of judicial scrutiny using constitutional principles. Specifically, in Germany, the High Administrative Court for the State of North Rhine-Westphalia found that the use of a Ramstein military air base to facilitate drone strikes by the U.S. in Yemen violated the German government's constitutional obligation to protect the right to life.[400] The judgment of the highest court influenced the way the German government interacted with the U.S., which differed from the foreign policy originally intended on the use of military bases.[401] In this way, the court indirectly co-determined the State's foreign affairs through the use of constitutional precepts.

The potential influence of the Judiciary in implementing or developing norms in foreign relations can likewise be observed in the manner by which the Philippine Supreme Court has reviewed agreements regarding the presence of military bases and troops in the Philippines.

As previously mentioned, in *Bayan v. Zamora*, the Court ruled on whether Senate concurrence was necessary for the effectivity of the VFA concluded

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396. *Abbas*, 179 SCRA at 294.

397. *Id.*

398. *Id.*

399. *Id.*

400. Bin Ali Jaber v. Germany, 4A1361/15, ¶ 190 (2019) (Ger.).

401. Golia, *supra* note 309, at 131.

between the U.S. and the Philippines.[402] This bilateral agreement was entered into in light of the expiration of the Military Bases Agreement between the two States in 1991.[403] Notably, the VFA entails the presence of foreign troops in the country, albeit on a temporary basis.[404]

The Court first assessed the applicability of Section 21, Article VII of the Constitution or the provision that pertains to the ratification of treaties or international agreements in general.[405] It then concluded that Article XVIII, Section 25 as a special provision, is more applicable to the VFA, as it

> specifically deals with treaties involving foreign military bases, troops, or facilities ... . To a certain extent and in a limited sense, however, the provisions of Section 21, Article VII will find applicability with regard to the issue and for the sole purpose of determining the number of votes required to obtain the valid concurrence of the Senate[.][406]

In the context of agreements like the VFA, Article XVIII, Section 25, additionally

> requires that 'foreign military bases, troops, or facilities' may only be allowed in the Philippines by virtue of a treaty duly concurred in by the Senate, ratified by a majority of the votes cast in a national referendum held for that purpose if so required by Congress, and recognized as such by the other contracting state.[407]

The Court's ruling compared the meaning and application of relevant constitutional provisions (i.e., Article VII, Section 21 and Article XVIII, Section 25) to assess the legality of the VFA and the need for Senate concurrence for its effectivity.[408] This is another illustration of the Court's ability to influence foreign policy when using constitutional precepts as a guide in its rulings.

Also in relation to the VFA, and as part of the international anti-terrorism campaign of the U.S., the U.S. and Philippine armed forces sought to conduct mutual anti-terrorism exercises in the Philippines in 2002.[409] The Abu Sayyaf

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402. *Bayan (Bagong Alyansang Makabayan)*, 342 SCRA at 481-82.

403. *Id.* at 464-65.

404. BERNAS, COMMENTARY, *supra* note 166, at 1400.

405. *Id.* at 481-93.

406. *Bayan (Bagong Alyansang Makabayan)*, 342 SCRA at 483.

407. *Id.* at 482 (citing PHIL. CONST. art. XVIII, § 25).

408. *Bayan (Bagong Alyansang Makabayan)*, 342 SCRA at 481-93.

409. Lim v. Executive Secretary, G.R. No. 151445, 380 SCRA 739, 744-45 (2002).

Group in Basilan was linked to the Al-Qaeda network led by Osama Bin Laden, who was behind the attacks in New York City on 11 September 2001.[410] Later, in *Lim v. Executive Secretary*,[411] the Court had to rule on whether the terms of reference of the "Balikatan 02-1" exercises fell within the ambit of the VFA.[412] In holding that the VFA gives legitimacy to the "Balikatan 02-1," the Court interpreted the scope of the activities authorized by the VFA as wide enough to cover the joint exercises, thus —

> [T]he VFA gives legitimacy to ... 'Balikatan 02-1,' a 'mutual anti-terrorism advising, assisting[,] and training exercise,' [as it] falls under the umbrella of sanctioned or allowable activities in the context of the agreement. Both the history and intent of the Mutual Defense Treaty and the VFA support the conclusion that combat-related activities ... are indeed authorized.[413]

The Court further examined whether American troops could engage in armed combat in the Philippines.[414] The terms of reference provided that they could not engage in combat, "except in self-defense."[415] Moreover, the Mutual Defense Treaty, the VFA, the Charter of the United Nations, and the 1987 Constitution supported the conclusion that U.S. forces were not allowed to take part in an offensive war in Philippine territory.[416]

While the Mutual Defense Treaty was concluded before the adoption of the Charter of the United Nations, the Court still identified it as a valid source of obligation.[417] It provided that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the [p]urposes of the [UN]."[418]

The Court also cited Article II, Sections 2, 7, and 8 of the Constitution in determining the extent of the presence of military troops in the Philippines.[419] The Constitution likewise regulates the entry of foreign troops into the

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410. *Id.* at 762.

411. Lim v. Executive Secretary, G.R. No. 151445, 380 SCRA 739 (2002).

412. *Id.* at 752.

413. *Id.* at 755 (emphasis omitted).

414. *Id.*

415. *Id.*

416. *Id.*

417. *Lim*, 380 SCRA at 756.

418. *Id.* at 756 (citing U.N. CHARTER art. 2, ¶ 4).

419. *Lim*, 380 SCRA at 756-57 (citing PHIL. CONST. art. II, §§ 2, 7, & 8).

country through Article XIII, Section 25, as well as the powers of the Chief Executive in dictating foreign relations in Article VII, Section 21.[420] It can therefore be deduced that there is generally antipathy against foreign military presence and foreign influence.[421] The entry of foreign troops is allowed only as an exception.[422]

In *Saguisag v. Ochoa, Jr.*, the Court once again ruled in favor of the constitutionality of an agreement between the U.S. and the Philippines when the Enhanced Defense Cooperation Agreement (EDCA) became the subject of judicial scrutiny relating to the VFA.[423] The EDCA authorized the U.S. military forces to have access to and conduct activities within certain "Agreed Locations" in the country.[424] The activities included training, refueling of aircraft, bunkering vessels, temporary accommodation, preposition of equipment, and deploying of forces and materials by the American military, civilian personnel, and contractors.[425] The petitioners assailing the constitutionality of the EDCA argued that the agreement should be in the form of a treaty concurred in by the Senate instead of an executive agreement.[426]

As in *Bayan v. Zamora*, the Court affirmed specific limits to the President's central role in foreign relations, i.e., the requirements of a treaty and Senate concurrence when it comes to the entry and presence of foreign military bases, troops, or facilities in the Philippines.[427] In *Saguisag*, the Court further clarified that the requirement of a treaty under Article XVIII, Section 25 of the Constitution "refers solely to the initial entry of the foreign military bases, troops, or facilities."[428]

For the purpose of applying constitutional precepts, the Court distinguished treaties from executive agreements, thus —

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420. PHIL. CONST. art. XVIII, § 25 & art. VII, § 21.

421. *Lim*, 380 SCRA at 757.

422. *Id.*

423. *Saguisag*, 779 SCRA at 475.

424. *Id.* at 605.

425. *Id.* at 400 (citing Enhanced Defense Cooperation Agreement Between the Philippines and the United States [Enhanced Defense Cooperation Agreement (EDCA)], art. III (1) (2014)).

426. *Saguisag*, 779 SCRA at 319.

427. *Id.* at 357.

428. *Id.* at 354.

> (a) Treaties are formal contracts between the Philippines and other States-parties, which are in the nature of international agreements, and also of municipal laws in the sense of their binding nature.
>
> ...
>
> (c) Executive agreements are generally intended to implement a treaty already enforced or to determine the details of the implementation thereof ... .[429]

The Court noted that the troops were already permitted entry by virtue of a treaty (i.e., the VFA).[430] Hence, it opted to give deference to the executive's prerogative to later enter into an executive agreement, thus —

> If the agreement is not covered by [Section 25, Article XVIII of the Constitution], then the President may choose the form of the agreement (i.e., either an executive agreement or a treaty), provided that the agreement dealing with foreign military bases, troops, or facilities is not the principal agreement that first allows their entry or presence in the Philippines.[431]

As affirmed in the cases of *Bayan v. Zamora*, *Lim v. Executive Secretary*, and *Saguisag v. Ochoa, Jr.*, the U.S. has been a traditional ally in strengthening the Philippines' military capability.[432] In upholding the validity of the VFA, Balikatan 02-01 exercises, and the EDCA, the Court not only looked at the Constitution and existing treaties and agreements, but also considered the executive department's decision to hone a strategic alliance with the U.S. in enhancing the country's national security.[433] In relation to geopolitics as a foreign policy determinant, this military and security alliance may play a crucial role in defending the country's maritime zones from foreign intrusion and establishing friendly relations in the region.

iv. On Terrorism

The fight against terrorism is another area of foreign policy where the jurisdiction of courts has been invoked in ruling on issues relating to constitutional principles and international legal norms. To illustrate, in a series

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429. *Id.* at 372 (citing 2 RECORD OF THE CONSTITUTIONAL COMMISSION, NO. 44, at 544-45 (1986)).

430. *Saguisag*, 779 SCRA at 388-89.

431. *Id.* at 377.

432. *Bayan (Bagong Alyansang Makabayan)*, 342 SCRA at 464; *Lim*, 380 SCRA at 752; & *Saguisag*, 779 SCRA at 711 (J. Leonen, dissenting opinion).

433. *Bayan (Bagong Alyansang Makabayan)*, 342 SCRA at 497; *Lim*, 380 SCRA at 760; & *Saguisag*, 779 SCRA at 473-75.

of cases[434] decided by the U.S. Supreme Court involving prisoners detained in Guantanamo Bay, Cuba, there was a judicial trend of using constitutional rights and IHL as standards in the treatment of individuals accused of terrorism.[435] The factual backdrop of these cases was the aftermath of the attacks by the Al-Qaeda terrorist organization on 11 September 2001 at the World Trade Center in New York City.[436] Under the authority granted by the U.S. Congress, the President sent armed forces into Afghanistan "to use 'all necessary and appropriate force against those ... he determines planned, authorized, committed, or aided the [said] terrorist attacks[.]'"[437] This involved engaging in "a military campaign against Al-Qaeda and the Taliban regime that [was known to have] supported it."[438]

In *Hamdan v. Rumsfeld*,[439] the petitioner was one of the individuals captured in Afghanistan and detained at Guantanamo Bay by the U.S. Armed Forces.[440] The Court applied customary international law and found that Common Article 3 of the Geneva Conventions was applicable to Hamdan because the conflict between the U.S. and Al-Qaeda was not of an international character or a conflict between nations.[441] Hence, Hamdan should have been tried by "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[442] The Court also held that in trying and punishing Hamdan, the executive was bound to afford Hamdan the basic guarantees of Article 75 of

434. Rasul v. Bush, 542 U.S. 466 (2004); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); & Boumediene v. Bush, 553 U.S. 723 (2008).

435. *Id.*

436. *Rasul*, 542 U.S. at 470; *Hamdi*, 542 U.S. at 510; *Hamdan*, 548 U.S. at 567-68; & *Boumediene*, 553 U.S. at 510.

437. *Rasul*, 542 U.S. at 470 (citing Authorization for Use of Military Force, 115 Stat. 224, § 2 (a) (2001)).

438. *Id.*

439. Hamdi v. Rumsfeld, 542 U.S. 507 (2004)

440. *Id.* at 566.

441. *Id.* at 630.

442. *Id.* at 630 (citing III Geneva Convention Relative to the Treatment of Prisoners of War of 1949 art. 3 (1) (d), *opened for signature* Apr. 21, 1949, 75 U.N.T.S. 135) [hereinafter Geneva Convention III].

Protocol I to the Geneva Conventions of 1949, which forms part of customary international law.[443]

The concurring opinion of Justice Leonen in *Ocampo v. Abando* draws similarities to *Hamdan v. Rumsfeld* in its reliance on IHL in defining the treatment of combatants and detainees in non-international armed conflict.[444]

In another Guantanamo case, *Hamdi v. Rumsfeld*,[445] the Court referred to principles of IHL when it acknowledged that the capture and detention of combatants are necessary incidents of war[446] and that the duration of detention should end when the active hostilities have ceased.[447] Moreover, it held that a citizen identified as an enemy-combatant can dispute his or her status pursuant to his or her constitutionally guaranteed right to due process.[448] The Court likewise turned to constitutional principles such as the availability of the privilege of the writ of *habeas corpus* to individuals detained in the U.S., except only when it is suspended by Congress in cases of rebellion or invasion and when public safety requires it.[449] The courts also have the constitutionally mandated role to review and resolve controversies that involve the factual claims of the military and the executive's discretion when the constitutional

443. *Ocampo*, 715 SCRA at 735 (J. Leonen, concurring opinion) & *Hamdan*, 548 U.S. at 633-35.

444. *Hamdan*, 548 U.S. at 628-31.

445. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

446. *Id.* at 518.

447. *Id.* at 520 (citing Geneva Convention III, *supra* note 442, art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.")). *See also* Hague Convention (II) with Respect to the Laws and Customs of War on Land art. 20, *signed* July 29, 1899, 32 Stat. 1817 (as soon as possible after "conclusion of peace"); Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 20, *signed* Oct. 18, 1907, 36 Stat. 2277 ("conclusion of peace") [hereinafter Hague Convention IV]; Geneva Convention III, *supra* note 442, art. 75 ("repatriation should be accomplished with the least possible delay after conclusion of peace"); & Jordan J. Praust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 510-11 (2003) (Prisoners of war "can be detained during an armed conflict, but the detaining country must release and repatriate them 'without delay after the cessation of active hostilities,' unless they are being lawfully prosecuted or have been lawfully convicted of crimes and are serving sentences.") (citing Geneva Convention III, *supra* note 442, arts. 85, 99, 118, 119, & 129 & United States v. Noriega, 746 F.Supp. 1506, 1524-28 (S.D. Fla. 1990) (U.S.)).

448. *Hamdi*, 542 U.S. at 509.

449. *Id.* at 525 (citing U.S. CONST. art. I, § 9, para. 2).

rights of an individual are alleged to have been violated.[450] Thus, a citizen-detainee should have the opportunity to question the factual basis for his or her classification as enemy-combatant and other factual assertions of the government.[451]

The abovementioned Guantanamo cases not only highlight the use of constitutional principles and IHL in cases involving terrorism, but also show how the judiciary's review power can indirectly co-determine the State's foreign policy of combatting terrorism.

Similarly, the Philippines adopts the policy of countering terrorism in whatever form pursuant to binding UN resolutions, such as Resolution No. 1373 issued by the UN Security Council pursuant to Article 41 of the Charter of the UN.[452]

Consistent with this policy, the Court upheld the constitutionality of the Human Security Act or Republic Act No. 9372 in *Southern Hemisphere v. Anti-Terrorism Council*[453] by rejecting the applicability of the void-for-vagueness and overbreadth doctrines to criminal statutes.[454] A facial challenge is allowed in free speech cases to deter the "chilling effect" on free speech.[455] However, "this rationale is inapplicable to plain penal statutes that generally bear an '*in terrorem* effect' in deterring socially harmful conduct."[456]

Subsequently, in *Calleja v. Executive Secretary*,[457] the Court assessed the constitutionality of the Anti-Terrorism Act of 2020 or Republic Act No. 11479.[458] While the law was enacted pursuant to the state policy to combat and penalize terrorism, the Court permitted a facial challenge against

450. *Hamdi*, 542 U.S. at 535 (citing Korematsu v. United States, 323 U.S. 214, 234 (1944)).

451. *Hamdi*, 542 U.S. at 533.

452. S.C. Res. 1373, U.N. Doc. S/RES/1372 (2001) (Sept. 28, 2001).

453. Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council, G.R. No. 178552, 632 SCRA 146 (2010).

454. *Id.* at 185-87.

455. *Id.* at 186 (citing PHIL. CONST. art. III, § 4).

456. *Southern Hemisphere Engagement Network, Inc.*, 632 SCRA at 186.

457. Calleja, et al. v. Executive Secretary, et al., G.R. No. 252578, Dec. 7, 2021, *available at* https://sc.judiciary.gov.ph/24370 (last accessed Jan. 30, 2022).

458. An Act to Prevent, Prohibit and Penalize Terrorism, Thereby Repealing Republic Act No. 9372, Otherwise Known as the "Human Security Act of 2007" [The Anti-Terrorism Act of 2020], Republic Act No. 11479 (2020).

provisions that gave rise to concerns on "freedom of speech, expression, and its cognate rights."[459]

For instance, the proviso of Section 4 or the "Not Intended Clause" was held to be a proper subject of a facial challenge for "innately affect[ing] speech and expression [by] directly pertain[ing] to 'advocacy, protest, dissent, stoppage of work, industrial or mass action, and other similar exercises of civil and political rights.'"[460] The assailed provision suffered from unconstitutionality, as it shifted the burden on the accused to prove as a defense that the exercises of his or her civil and political rights "are not intended to cause death or serious physical harm to a person, to endanger a person's life, or to create a serious risk to public safety."[461] The Court found that this proviso is void for vagueness and overbreadth, and it failed to meet the test of strict scrutiny.[462]

The second mode of designation of terrorist individual, groups of persons, and organizations or associations in Section 25, namely, the requests for designation by other jurisdictions, was declared unconstitutional for not passing the strict scrutiny test and for being overbroad.[463]

Although two provisions were struck down as unconstitutional, the majority was convinced that other counterterrorism measures in the law overcame the facial challenge,[464] without prejudice to future as-applied challenges against any of the provisions.[465] Thus, the Court upheld the constitutionality of: (1) the phrase "organized for the purpose of engaging in terrorism" in the last paragraph of Section 10, referring to the third kind of prohibited membership in a terrorist organization;[466] (2) the automatic adoption by the Anti-Terrorism Council (ATC) of the "UN Security Council Consolidate List of designated individuals, groups of persons, organizations, or associations designated and/or identified as a terrorist, one who finances terrorism, or a terrorist organization or group" (the first mode of designation)

459. *Calleja, et al.*, G.R. No. 252578, at 61.

460. *Id.* at 105 (citing The Anti-Terrorism Act of 2020, § 4).

461. *Calleja, et al.*, G.R. No. 252578, at 108-09.

462. *Id.* at 111, 112, & 114.

463. *Id.* at 168 (citing The Anti-Terrorism Act of 2020, § 25, para. 2).

464. *Calleja, et al.*, G.R. No. 252578, at 228-31.

465. *Id.* at 229. *See also id.* at 70-71.

466. *Calleja, et al.*, G.R. No. 252578, at 229-30 (citing The Anti-Terrorism Act of 2020, § 10).

in the first paragraph of Section 25;[467] (3) the designation of a terrorist individual, groups of persons, organizations or associations by the ATC upon a finding of probable cause (third mode of designation) under Section 25;[468] (4) the proscription of terrorist organizations, associations, or group of persons under Section 26;[469] (5) the preliminary order of proscription under Section 27;[470] (6) the requests to proscribe from foreign jurisdictions and supranational jurisdictions under Section 28;[471] and (7) the detention without warrant of arrest under Section 29.[472]

In another case related to the state policy against terrorism, *Lagman v. Medialdea*,[473] the Court held that the existence of terrorism is not inconsistent with the declaration of martial law, although the latter requires actual rebellion.[474] In assailing the extension of martial law in Mindanao, the Lagman petition alleged there was no proof that the acts of terrorism by the Maute group, which declared allegiance to the Islamic State of Iraq and Syria (ISIS), were perpetrated to attain the purpose of rebellion, specifically, to remove Mindanao or any part thereof from allegiance to the Philippines, its laws, or its territory.[475] In relation to this, the Court ruled that rebellion and terrorism can co-exist together, "[t]hus[—] as long as the President complies with all the requirements of Article VII, Section 18, the existence of terrorism cannot prevent him from exercising his extraordinary power of proclaiming martial law or suspending the privilege of the writ of *habeas corpus*."[476]

The Court emphasized that the existence of actual rebellion and the need for public safety allow the President to exercise his extraordinary power to declare martial law, and this was not precluded by the operation of the Human Security Act, which is a special law countering terrorism.[477] Further, rebellion

467. *Id.* at 156 (citing The Anti-Terrorism Act of 2020, § 25, para. 1).

468. *Id.* at 171-72 (citing The Anti-Terrorism Act of 2020, § 25, para. 3).

469. *Id.* at 182-84 (citing The Anti-Terrorism Act of 2020, § 26).

470. *Id.* at 182-84 (citing The Anti-Terrorism Act of 2020, § 27).

471. *Id.* at 185 (citing The Anti-Terrorism Act of 2020, § 28).

472. *Id.* at 211 (citing The Anti-Terrorism Act of 2020, § 29).

473. Lagman v. Medialdea, G.R. No. 231658, 829 SCRA 1 (2017).

474. *Id.* at 215.

475. *Id.* at 133.

476. *Id.* at 215.

477. *Id.*

and terrorism cannot absorb one another.[478] This supports the global anti-terrorism campaign, as expressed in UN resolutions.[479]

Moreover, as provided in Article VII, Section 18 of the Constitution, the Court is empowered to independently determine whether there are sufficient factual bases for the President's decision to declare martial law and/or to suspend the privilege of the writ of *habeas corpus*.[480] In this regard, the Court should assess the totality of factual basis presented to the President and the constitutionality of the decision, "i.e[.], whether the facts in his possession prior to and at the time of the declaration or suspension are sufficient for him to declare martial law or suspend the privilege of the writ of *habeas corpus*."[481] Thus, the Court's review power can potentially co-determine the continuity of the executive measures taken to counter rebellion or invasion.[482]

v. On Geopolitics and Territorial Concerns

Another relevant area affecting national security is the protection of the Philippines' national territory, which is inevitably affected by geopolitics.[483] The ruling of the Permanent Court of Arbitration on 29 October 2015 in *Republic of the Philippines v. People's Republic of China* is monumental in establishing the maritime rights of the Philippines over the West Philippine Sea. [484] The Philippines made 15 claims before the Tribunal.[485]

Preliminarily, the Tribunal ruled that China's non-participation did not deprive it of its jurisdiction, considering that the matters submitted to arbitration by the Philippines did not involve sovereignty.[486] The issues did not concern sea boundary delimitation and, therefore, were not subject to the exception to the dispute settlement provisions of the UNCLOS.[487] The

478. *Id.*

479. *See, e.g.*, The United Nations Global Counter-Terrorism Strategy Review, G.A. Res. 72/284, U.N. Doc. A/RES/72/284 (July 2, 2018).

480. *Lagman*, 829 SCRA at 178 & PHIL. CONST. art. VII, § 18.

481. *Id.* at 182.

482. *See* PHIL. CONST. art. VII, § 18.

483. *See generally* Andrew Rhodes, *Thinking in Space: The Role of Geography in National Security Decision-Making*, 2 TEXAS NAT'L SEC. REV. 90, 96 (2019).

484. *See* In the Matter of South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, Award, ¶ 761 (July 12, 2016).

485. *Id.* ¶ 18.

486. *Id.* ¶ 60.

487. *Id.* ¶ 61.

Tribunal also ruled that the existing instruments that provide for other means of dispute settlement between the Philippines and China did not prevent the Philippines from bringing the present claims to arbitration.[488]

As regards China's claim to historic rights to living and non-living resources within the nine-dash line, the Tribunal concluded that it is "incompatible with the [UNCLOS] to the extent ... exceed[ing its prescribed] maritime zones [thereunder]."[489] Hence, there was no legal basis for any Chinese historic rights or sovereign rights and jurisdiction in the waters of the West Philippine Sea encompassed by the "nine-dash line" insofar as they go beyond those provided in the UNCLOS.[490] When China ratified the UNCLOS, it relinquished the freedoms of the high seas that it previously enjoyed, as the international community had already agreed to place certain sea areas within the exclusive economic zone (EEZ) of other States.[491] Any of China's historic rights within the nine-dash line were already superseded by the maritime zones provided in the UNCLOS.[492] Moreover, the tribunal noted that there was no evidence that China historically exercised exclusive control over the waters of the West Philippine Sea or their resources.[493]

The Tribunal's Award also made significant pronouncements regarding the territories covered by the Philippines' EEZ. On the geologic features in the Spratly Islands (Spratlys), i.e., rocks and islands, the Tribunal ruled that none were capable of human habitation or economic life of their own so as to be entitled to a 200 nautical-mile (NM) EEZ.[494]

Mischief Reef and Second Thomas Shoal were found to be located within 200 NM of the Philippines' coast on the island of Palawan and are located in an area not overlapped by the entitlements generated by any maritime feature

488. *Id.* ¶ 159.

489. *Id.* ¶ 261.

490. *In the Matter of South China Sea Arbitration*, ¶ 261.

491. *Id.* ¶ 257.

492. *Id.* ¶¶ 261-62.

493. *Id.* ¶ 270.

494. *Id.* ¶ 280.

claimed by China.[495] Hence, these maritime features form part of the EEZ and continental shelf of the Philippines.[496]

The Tribunal found that the Spratlys could not be taken as a single unit to determine capability to sustain human habitation or economic life.[497] On geologic features in Spratlys occupied by China that consist of high-tide elevations, they are entitled to their own 12 NM of territorial sea.[498] These are Fiery Cross Reef, Johnson South Reef, Gaven Reef, Cuarteron Reef, and McKennan Reef.[499]

As regards low-tide elevations, they have no territorial sea.[500] Thus, since Mischief Reef is within the Philippine EEZ and part of its continental shelf, only the Philippines can erect structures or artificial islands on this maritime feature.[501] China's existing structures are, therefore, illegal.[502]

Although not stated in the arbitral award, Subi Reef is also within the Philippines' extended continental shelf.[503] Moreover, Reed Bank or Recto Bank, which is totally submerged, is part of the Philippine EEZ.[504] Ayungin Shoal or Second Thomas Shoal, which is occupied by the Philippines, is also a low-tide elevation within the Philippine EEZ.[505]

As regards Scarborough Shoal, the Tribunal considered it a high-tide elevation entitled to a 12 NM territorial sea only.[506] Moreover, Scarborough

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495. *Id.* ¶ 290.

496. *In the Matter of South China Sea Arbitration*, ¶ 399.

497. *Id.* ¶ 407.

498. *Id.* ¶ 382.

499. *Id.*

500. *Id.* ¶ 303 (citing United Nations Convention on the Law of the Sea art. 13, ¶ 2, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS] (entered into force Nov. 16, 1994)).

501. *In the Matter of South China Sea Arbitration*, ¶ 1035.

502. *Id.* ¶¶ 1038-39.

503. *See id.* ¶ 373.

504. *Id.* ¶ 1203.

505. *In the Matter of South China Sea Arbitration*, ¶¶ 1153 & 1203.

506. *Id.* ¶ 555.

Shoal is a traditional fishing ground of various fishermen from the region.[507] Thus, China cannot prevent Filipino fishermen from fishing in this area.[508]

In addition, the Tribunal held that China has harmed the maritime environment and violated its obligations under UNCLOS for having dredged and built islands on reefs, as well as for having failed to prevent its fishermen from harvesting endangered species like sea turtles, corals, and giant clams in the Spratlys and in Scarborough Shoal.[509] These acts have caused "permanent and irreparable harm to the coral reef system."[510]

While this Award has provided binding international recognition of the maritime rights of the Philippines, the enforcement of the Award has proven to be a challenge.[511] As a matter of enforcement, the coastal State should constantly conduct naval and aerial patrols in the EEZ and exercise its exclusive right to exploit its resources.[512] As for other States, they have the freedom of navigation and overflight in the high seas and in EEZs.[513]

However, under the prevailing international power structure, China is considered a global force that is capable of encroaching on the Philippines' sovereign rights and exerting force and intimidation on local fishermen in order to exploit natural resources in the West Philippine Sea.[514] It possesses superior military strength that enables it to resist the enforcement of the Tribunal Award — an adjudication it still refuses to recognize today.[515]

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507. *Id.* ¶ 805.

508. *Id.* ¶ 814.

509. *Id.* ¶ 960.

510. IRUS BRAVERMAN & ELIZABETH R. JOHNSON, BLUE LEGALITIES: THE LIFE AND LAWS OF THE SEA 111 (2020).

511. *See* Pratik Jakhar, Whatever Happened to the South China Sea Ruling?, *available at* https://www.lowyinstitute.org/the-interpreter/whatever-happened-south-china-sea-ruling (last accessed Jan. 30, 2022) [https://perma.cc/37ZA-3FCF].

512. UNCLOS, *supra* note 500, art. 73, ¶ 1.

513. *Id.* art. 90.

514. Sofia Tomacruz, *TIMELINE: China's Vessels Swarming Julian Felipe Reef, West PH Sea*, RAPPLER, Apr. 30, 2021, *available at* https://www.rappler.com/newsbreak/iq/timeline-china-vessels-julian-felipe-reef-west-philippine-sea-2021 (last accessed Jan. 30, 2022) [https://perma.cc/KS9L-B4YT].

515. *Id.*

In the 2021 case of *Esmero v. Duterte*,[516] the Court ruled on a petition for *mandamus* that was filed to compel President Duterte to defend the country's national territory and EEZ, including the West Philippine Sea, from Chinese incursions.[517] The petitioner argued that it was the President's ministerial duty to go before the UN Security Council and invoke the Uniting for Peace Resolution of 1950 to seek the protection of Filipino fishermen, as well as to "sue China before the International Court of Justice and demand for payment of damages for taking the Kalayaan Islands."[518] To the petitioner, these were within the mandate of the President to enforce laws and ensure their faithful execution.[519]

The Court, however, held that the petition should be dismissed because the President is immune from suit.[520] Moreover, even without the fatal flaw of naming the President as the sole respondent, the writ of *mandamus* was still unavailing, in the absence of any law specifically enjoining the President to perform the acts mentioned by the petitioner.[521] The Court also noted the diplomatic implications of the arbitral award in favor of the Philippines, thus — "Taking China to binding arbitration was risky, as it could potentially damage relations with a major trading partner. On 12 July 2016, the arbitral tribunal issued an Award overwhelmingly in favor of claims by the Philippines and ultimately bringing some clarity to the overlapping claims in the area."[522]

With the foregoing consideration in mind, the Court found that

> [i]f President Duterte now sees fit to: take a *different* approach with China despite said ruling, this does not by itself mean that he has, as petitioner suggests, unlawfully abdicated his duty to protect and defend our national territory, correctible with the issuance by this Court of the extraordinary writ of *mandamus*.[523]

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516. Atty. Romeo M. Esmero v. His Excellency, Honorable President Rodrigo Roa Duterte, G.R. No. 256288, June 29, 2021, *available at* https://sc.judiciary.gov.ph/22551 (last accessed Jan. 30, 2022).

517. *Id.* at 1-2.

518. *Id.* at 2-3.

519. *Id.* at 5.

520. *Id.* at 3 (citing Leila M. De Lima v. President Rodrigo R. Duterte, G.R. No. 227635, Oct. 15, 2019, at 23, *available at* https://sc.judiciary.gov.ph/9975 (last accessed Jan. 30, 2022)).

521. *Atty. Romeo M. Esmero*, G.R. No. 256288, at 6.

522. *Id.*

523. *Id.*

Hence, the Court respected the political discretion of the President in addressing maritime and territorial disputes with China.[524] It held that the President could not be compelled by *mandamus* to file a case against China, considering the absence of constitutional or statutory provisions that dictate the manner by which the President should defend the national territory.[525] Significantly, the Court further pointed out that the filing of an arbitration case was a risky endeavor, as it could affect the diplomatic relations of the Philippines with China as a trading partner.[526] While this particular consideration was not determinative of the outcome of the case, it nevertheless affirmed that foreign policy implications are within the consciousness of the Court.

vii. Recognition of States

Domestic courts, especially in the U.S., have expressly or impliedly decided cases in view of the objective to avoid diplomatic friction.[527] In different cases involving the Alien Tort Statute, U.S. courts have assessed the dimensions of foreign policy or interaction with other States.[528]

Similarly, the Supreme Court indirectly considered the Philippines' foreign relation with China and the latter's influence as a superpower in *Funa v. Manila Economic and Cultural Office (MECO)*.[529] The Court took cognizance of the Philippine government's foreign policy to commit to the One China Policy of the People's Republic of China (PROC) and, consequently, to regard Taiwan as part of Chinese territory.[530] This policy, however, "did not preclude the country from keeping unofficial relations with Taiwan on a 'people-to-people' basis. Maintaining ties with Taiwan ... , however,

524. *Id.*

525. *Id.*

526. *Id.*

527. Golia, *supra* note 309, at 151 (citing STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 89-164 (2015)).

528. Golia, *supra* note 309, at 151 (citing Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013); & Jesner v. Arab Bank, PLC, 138 S.Ct. 1386 (2018) (U.S.)).

529. Funa v. Manila Economic and Cultural Office, G.R. No. 193462, 715 SCRA 247 (2014).

530. *Id.* at 256.

necessarily required the Philippines, and Taiwan, to course any such relations [through] offices outside of the official or governmental organs."[531]

The Court notably gave credence to the One China Policy in determining MECO's juridical personality as a *sui generis* private entity.[532] According to the Court,

> it is easy enough ... to understand the *rationale*, or necessity even, of the executive branch placing the MECO under the *policy supervision* of one of its agencies.
>
> ...
>
> Despite its private origins, ... the MECO was '*entrusted*' by the government with the '*delicate and precarious*' responsibility of pursuing '*unofficial*' relations with the people of a foreign land whose government the Philippines is bound not to recognize.[533]

From the foregoing, MECO was identified to be a class of its own — an entity that is different from government-owned and controlled corporations, governmental instrumentalities, and even private corporations,[534] and thus completely outside the jurisdiction of the Commission on Audit.[535] This ruling by the Supreme Court deliberately aligned with the objective of

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531. *Id.* (emphases omitted) (citing Amending Sections 3, 4, and 5 of Executive Order No. 490 Otherwise Known as "Establishing the Principal Office in Manila of the Manila Economic and Cultural Office and Transferring the Supervision Over Its Operations and Activities to the Department of Foreign Affairs," Executive Order No. 4, Series of 1998 [E.O. No. 4, s. 1998], whereas cl. para. 3 (July 17, 1998); Establishing the Principal Office in Manila of the Manila Economic and Cultural Office and Transferring the Supervision Over Its Operations and Activities to the Department of Foreign Affairs, Executive Order No. 490, Series of 1998 [E.O. No. 490, s. 1998], whereas cl. para. 3 (June 26, 1998); & Authorizing the Manila Economic and Cultural Office, Inc. ("MECO") to Perform Certain Functions Relating to Trade, Economic Cooperation, Investment, and Cultural, Scientific and Educational Exchanges, Executive Order No. 15, Series of 2001 [E.O. No. 15, s. 2001], whereas cl. para. 3 (May 16, 2001)).

532. *Funa*, 715 SCRA at 285.

533. *Id.* at 286 (citing Placing the Asian Exchange Center, Inc., Including Its Branch Office in Taipei, Under the Office of the President, Executive Order No. 931, Series of 1984 [E.O. No. 931, s. 1984], whereas cl. paras. 6 & 7 (Jan. 16, 1984); & E.O. No. 490, s. 1998, whereas cl. para. 6; & E.O. No. 15, s. 2001, whereas cl. para. 5 (emphasis supplied)).

534. *Funa*, 715 SCRA at 275.

535. *Id.* at 291.

preserving the country's official alliance with China in the prevailing international system, while maintaining unofficial relations with Taiwan.[536]

It can be said that the ruling gave deference to the executive department's foreign policy to conform to the One China Policy and recognize only the PROC as a State.[537] Moreover, externally, the Court chose to affirm the prevailing power structure where the PROC continues to assert that Taiwan is part of China.

b. Economic Relations

i. On Foreign Economic Relations

Affirming the policy of the State to promote fair trade and sound economic relations, the Court upheld the constitutionality of the World Trade Organization (WTO) agreement in *Tañada v. Angara.*[538] In the case, the petitioners raised the argument that provisions of the WTO agreement, as well as three annexes, violated the Filipino First Policy or economic nationalism enshrined in Article II, Section 19 and Article XII, Sections 10 and 12 of the Constitution.[539]

In rejecting this argument, the Court emphasized that the policy of self-reliance and economic nationalism found in the Constitution does not equate to an isolationist policy.[540] In fact,

> the Constitution takes into account the realities of the outside world as it requires the pursuit of 'a trade policy that serves the general welfare and utilizes all forms and arrangements of exchange on the basis of equality and reciprocity[;'] and speaks of industries 'which are competitive in both domestic and *foreign* markets' as well as of the protection of 'Filipino enterprises against *unfair foreign competition and trade practices*.'[541]

536. *See id.* "[MECO] is a *sui generis* private entity especially entrusted by the government with the facilitation of unofficial relations with the people in Taiwan without jeopardizing the country's faithful commitment to the *One China* policy of the PROC." *Funa*, 715 SCRA at 291.

537. *Id.*

538. Tañada v. Angara, G.R. No. 118295, 272 SCRA 18 (1997).

539. *Id.* at 53.

540. *Id.* at 59.

541. *Id.* at 58 (citing PHIL. CONST. art. XII, § 13) (emphasis supplied).

The Court also found that the WTO offered a sound trade policy for a developing country like the Philippines.[542] As to the question of the actual efficacy of the WTO in promoting economic prosperity, the Court chose not to delve into the exercise of discretion by policymakers and held that this was outside the scope of judicial review.[543] It left the question of the economic soundness of entering into the WTO to the executive and legislative branches.[544] Nonetheless, the Court considered the determinant of economic development in interpreting the constitutional provisions on self-reliance and economic nationalism.[545] It also appreciated the WTO's conformity with the country's policy on fair foreign competition and trade practices.[546]

ii. On Economic and Environmental Considerations

Economic development and the environment are among the determinants of foreign policy.[547] The Court itself is not a stranger to assessing the economic and/or environmental impact of executive and legislative acts in cases involving foreign relations.[548] These considerations are viewed by the Court in light of constitutional principles, international law, and other relevant interests.

Akbayan v. Aquino[549] presents the interplay and balance between the privileged nature of treaty negotiations and matters of public concern such as adverse environmental impact.[550] The Court upheld the claim of executive privilege with regard to the full text of and offers for the Japan-Philippines Economic Partnership Agreement (JPEPA), denying the demand for copies of the Philippine and Japanese offers during JPEPA negotiations.[551]

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542. *Tañada*, 272 SCRA at 61.

543. *Id.* at 81.

544. *Id.*

545. *Id.* at 57.

546. *Id.* at 61.

547. Bojang, *supra* note 2, at 6.

548. *See, e.g.*, Akbayan Citizens Action Party ("AKBAYAN") v. Aquino, G.R. No. 170516, 558 SCRA 468 (2008).

549. Akbayan Citizens Action Party ("AKBAYAN") v. Aquino, G.R. No. 170516, 558 SCRA 468 (2008).

550. *Id.* at 517.

551. *Id.* at 553.

In his dissenting opinion, Chief Justice Reynato S. Puno highlighted that

> [t]here is *no dispute that the subject JPEPA documents are matters of public concern* that come within the purview of Article III, Section 7 of the Bill of Rights. *The thorny issue is whether these documents, despite being of public concern, are exempt* from being disclosed to petitioner private citizens on the ground that they are covered by executive privilege.[552]

In determining that the negotiations were of public concern, Chief Justice Puno turned to the environmental effects of the treaty, among other factors —

> *Environmental concerns* have [ ] been raised in relation to several provisions of the JPEPA[.]
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> ...
>
> There are allegations ... that the [ ] provisions on *trade of toxic and hazardous wastes* were *deleted* in the working draft text of the JPEPA ... . If true, it would be in the public's interest to know why said provisions were put back, as they affect the public welfare[.][553]

Different interest groups, among other petitioners, established their right to information on matters of public concern and public interest,[554] considering the environmental objections would have been consonant with the policy of the State in fulfilling its duty to promote the right to a balanced and healthful ecology and in line with the provisions of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes, to which the Philippines is a party.[555]

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552. *Id.* at 652-53 (J. Puno, dissenting opinion) (citing Legaspi v. Civil Service Commission, G.R. No. L-72119, 150 SCRA 530, 541 (1987)).

553. *Akbayan*, 558 SCRA at 679-80 (citing Position Paper *from* Magkaisa Junk JPEPA for the Hearing of the Senate Joint Committee on Foreign Relations and Committee on Trade and Commerce, annex A (2007) (on file with Author) (citing provisions of the working draft text of the JPEPA as of 21 April 2003 (accessed through the Philippine Institute for Development Studies, the government research institution tasked to study the JPEPA) & Philippines-Japan Economic Partnership Agreement (PJEPA), Phil.-China, art. 29, Sept. 9, 2006).

554. *Akbayan*, 558 SCRA at 511 (citing PHIL. CONST. art. III, § 7).

555. *See generally* Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *opened for signature* Mar. 22, 1989, 1637 U.N.T.S. 9.

Nonetheless, the Court ultimately found that these interests were overridden by the valid claim of executive privilege.[556]

In other jurisdictions, courts have played a role in indirectly co-determining the concrete implementation of international environmental obligations.[557] For example, in the series of *Urgenda* cases, Dutch courts reviewed the legality of the measures taken by the political branches of the government in light of the State's duty of care to its citizens in protecting the latter from the effects of climate change.[558] The courts also ordered the Dutch government to adjust its policies to achieve the goal of reduced carbon dioxide emissions based on the reinterpretation of UN and European Union climate agreements and on "result-oriented domestic and international norms[,]" namely the duty of care and the reduction of greenhouse gas emissions.[559] Notably, the order of the Dutch courts went beyond the originally planned commitment of the State in relation to the Paris Agreement.[560]

In the Philippines, the Court has likewise had the occasion to refer to principles of international environmental law (IEL), i.e., intergenerational responsibility and the precautionary principle in the cases of *Oposa v. Factoran, Jr.*[561] and *International Service v. Greenpeace*,[562] respectively. It evaluated the conduct of political actors and incidentally prescribed how to implement these international environmental principles.[563]

In *Oposa v. Factoran*, the petitioners in the class suit were minors seeking to "represent their generation as well as generations yet unborn."[564] They were praying for the cancellation of all existing timber license agreements

556. *Akbayan*, 558 SCRA at 553.

557. Golia, *supra* note 309, at 146.

558. *Id.* (citing Urgenda Foundation v. The State of the of the Netherlands, No. C/09/456689/HA ZA 13-1396, Hague Ct. Rep. (Scott) (D.C. 2015); Urgenda v. The State of the Netherlands, No. 200.178.245/01, Hague Ct. Rep. (Scott) (Ct. App. 2018); & Urgenda v. The State of the Netherlands, No. 19/00135 (2019) (Neth.)).

559. Golia, *supra* note 309, at 146.

560. *Id.*

561. Oposa v. Factoran, Jr., G.R. 101083, 224 SCRA 792, 802-03 (1993).

562. *International Service for the Acquisition of Agri-Biotech Applications, Inc.*, 776 SCRA at 606-07.

563. *See generally Oposa*, 224 SCRA & *International Service for the Acquisition of Agri-Biotech Applications, Inc.*, 776 SCRA.

564. *Oposa*, 224 SCRA at 796.

granted by the DENR on account of the serious environmental degradation of Philippine rainforests.[565] The Court affirmed their legal standing based on the concept of intergenerational responsibility in connection with the constitutional right to a balanced and healthful ecology, thus —

> We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned.[566]

The Court's recognition of the legal standing of present and future generations in enforcing their right to a balanced and healthful ecology[567] was a concrete means of implementing the IEL principle of intergenerational responsibility. While the decision did not result in the outright cancellation of timber licenses,[568] the Court's reasoning appears to have been driven by result-oriented constitutional and international principles, which are potential determinants of foreign policy.

Similarly, in *International Service v. Greenpeace*, the field trials for a bioengineered eggplant known as "*Bt talong*" were alleged to be violative of the right to a balanced and healthful ecology.[569] In the main decision, the Court discussed the applicability of the precautionary principle and cited different international agreements that "show widespread recognition of risks posed by [genetically modified] foods and crops."[570] The recognition of risks is based on the precautionary principle, which provides that "that lack of scientific certainty is no reason to postpone action to avoid potentially serious or irreversible harm to the environment."[571] This principle was codified in the Rio Declaration on Environment and Development and

565. *Id.* at 796-97.

566. *Id.* at 802-03.

567. *Id.* at 807.

568. Ma. Socorro Z. Manguiat & Vicente B. Yu III, *Maximizing the Value of Oposa v. Factoran*, 15 GEO. INT'L ENVTL. L. REV. 487, 488 (2003).

569. *International Service for the Acquisition of Agri-Biotech Applications, Inc.*, 776 SCRA at 461.

570. *Id.* at 580.

571. *Id.* at 603.

thereafter incorporated in other international instruments.[572] While the precautionary principle is a principle of last resort for the purposes of evidence,

> [whenever] (a) ... the risks of harm are uncertain; (b) ... [the] harm might be irreversible and what is lost is irreplaceable; and (c) ... the harm that might result would be serious ... , the case for the precautionary principle is strongest. *When in doubt, cases must be resolved in favor of the constitutional right to a balanced and healthful ecology*.[573]

The Court found that the three conditions of "uncertainty, the possibility of irreversible harm, and the possibility of serious harm" were present in the case.[574] Moreover, the Court found that the non-implementation of the National Biosafety Framework during the risk assessment and public consultation stages further called for the application of the precautionary principle.[575]

The foregoing discussion is consistent with the constitutional right to a balanced and healthful ecology and the policy to adopt the precautionary principle based on international law. The Court, however, later granted the petitioners' motions for reconsideration on the ground of mootness.[576] The Court noted, among others, that the *writ of kalikasan* was belatedly filed after the expiration of the biosafety permits and the field-testing activities.[577] Be that as it may, the Court's pronouncements in the main decision show that the executive's discretion can be judicially limited in terms of the concrete implementation of constitutional rights as well as international norms.

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572. *Id.* (citing The Global Development Resource Center, The Rio Declaration: Principle 15 – The Precautionary Approach, *available at* http://www.gdrc.org/u-gov/precaution-7.html (last accessed Jan. 30, 2022) [https://perma.cc/Q6C3-LR3K]).

573. *International Service for the Acquisition of Agri-Biotech Applications, Inc.*, 776 SCRA at 606 (emphasis supplied and omitted).

574. *Id.* 606-07 (emphasis omitted).

575. *Id.* at 607.

576. International Service for the Acquisition of Agri-Biotech Applications, Inc. v. Greenpeace Southeast Asia (Philippines), G.R. No. 209271, 798 SCRA 250, 290 (2015) (resolution of motion for reconsideration).

577. *Id.* at 287.

c. Global Health in Relation to the Pandemic

The importance of rules of procedure for environmental cases was again seen in *Nepomuceno, et al. v. Duterte, et al.*,[578] where the petitioner challenged the legality of the designation of Nayong Filipino Compound as a vaccination center. The decision by the Inter-Agency Task Force (IATF) for the Management of Emerging Infectious Diseases to construct a vaccination center in the area[579] was in keeping with the national government's policy on global health in relation to the COVID-19 pandemic. The Nayong Pilipino vaccination center has the capacity to accommodate at least 15,000 people in one day.[580]

The construction of the vaccination site was met by opposition from the Nayong Pilipino Foundation, as the project would allegedly result in cutting down nearly 500 trees.[581] The petitioner eventually filed for a petition for writ of *kalikasan* and writ of continuing *mandamus* against the IATF, but the Supreme Court dismissed the case due to the petition's formal defects and failure to meet the substantive requirements under the Rules of Procedure on Environmental Cases[582] —

> Anent the substantive requirements, ... [the petitioner's] invocation of the State's responsibilities to protect and advance the people's right to a balanced and healthful ecology and preserve and protect the environment, without identifying the respondents' unlawful act or omission, is insufficient to justify the issuance of the writs prayed for.[583]

The novel challenges brought by the pandemic presented tension between the claimed violation of the right to a balanced and healthful ecology and the State's policy on global and national health. In the end, the Court dismissed the petition for failure to identify the unlawful act or omission and the magnitude of environmental damage, the lack of evidence, and the formal

578. Pedrito M. Nepomuceno, Former Mayor-Boac, Marinduque v. President Rodrigo R. Duterte, et al., G.R. No. 256207, June 15, 2021, *available at* https://sc.judiciary.gov.ph/20236 (last accessed Jan. 30, 2022).

579. *Id.* at 1.

580. Emmie V. Abadilla, *ICTSI, Razon Group Social Investments Total Over P1.5B*, MANILA BULL., Nov. 24, 2021, *available at* https://mb.com.ph/2021/11/24/ictsi-razon-group-social-investments-total-over-p1-5b (last accessed Jan. 30, 2022) [https://perma.cc/65KR-4RPY].

581. *Pedrito M. Nepomuceno, Former Mayor-Boac, Marinduque*, G.R. No. 256207, at 1.

582. *Id.* at 2-3.

583. *Id.* at 3.

defects of the petition itself.[584] Indirectly, the Court influenced the implementation of the global movement and national policy to vaccinate the people against the COVID-19 virus.

d. International Financial Obligations

In the matter of international financial obligations, the Philippines adheres to the policy of contributing to the promotion of a global economic order that respects the sanctity of agreements and contractual obligations. This is shown in the cases of *Guingona, Jr. v. Carague*,[585] *Constantino, Jr. v. Cuisa*,[586] and *Land Bank v. Atlanta Industries, Inc.*[587]

In *Guingona, Jr. v. Carague*, the Court particularly ruled on the "constitutionality of the automatic appropriation for debt service in the 1990 budget" authorized by Presidential Decree No. 81.[588]

The Court justified Congress' prerogative to provide an appropriation to fulfill the Philippines' international obligation to pay its enormous foreign loans, "the greater portion of which was inherited from the previous administration."[589] The Court observed that

> [i]t is not only a matter of honor and to protect the credit standing of the country. More especially, the very survival of our economy is at stake. Thus, if in the process Congress appropriated an amount for debt service bigger than the share allocated to education, the Court finds and so holds that said appropriation cannot be thereby assailed as unconstitutional.[590]

Also in the aftermath of the Marcos dictatorship, the administration of former President Corazon Aquino, through the Philippine Debt Negotiating Team, devised a scheme to reduce the country's massive foreign debt, which was regarded as "illegitimate."[591] The executive branch thus entered into three restructuring agreements with foreign creditors involving buyback and bond-

584. *Id.*

585. Guingona, Jr. v. Carague, G.R. No. 94571, 196 SCRA 221 (1991).

586. Constantino, Jr. v. Cuisia, G.R. No. 106064, 472 SCRA 505 (2005).

587. Land Bank of the Philippines v. Atlanta Industries, Inc., G.R. No. 193796, 729 SCRA 12 (2014).

588. *Guingona, Jr.*, 196 SCRA at 223-24.

589. *Id.* at 227.

590. *Id.*

591. *Constantino, Jr.*, 472 SCRA at 514 & 521.

conversion programs.[592] These buyback and bond-conversion schemes were assailed in *Constantino, Jr. v. Cuisia* as unconstitutional.[593]

The Court again emphasized the importance of upholding the sanctity of foreign contractual obligations, notwithstanding the controversial and excessive debts incurred by the government during the Marcos regime.[594] It observed that there would be adverse repercussions "[s]hould the executive branch unilaterally ... repudiate or otherwise declare to the international community its resolve not to recognize a certain set of 'illegitimate' loans[.]"[595] Specifically, to repudiate debts, whether totally or selectively

> would put the Philippines at such odds with too many enemies. ... [C]oncerted sanctions from commercial banks, multilateral financial institutions[,] and creditor governments would affect not only our sources of credit but also our access to markets for our exports and the level of development assistance. ... [R]epudiation is not an attractive alternative[.][596]

The Philippines, therefore, restructured its debts instead of resorting to repudiation.[597] Apart from upholding the constitutionality of the contracts and acknowledging the projection of substantial debt-relief, the Court also held that it could not rule on the wisdom of the subject agreements, which were outside the allowable scope of judicial review, thus —

> [T]he discretion on the matter lies not with the courts but with the executive. ... [It is] an offshoot of the decision made by then President Aquino that the Philippines should recognize its sovereign debts despite the controversy that engulfed many debts incurred during the Marcos era. It is a scheme whereby the Philippines restructured its debts following a negotiated approach[.][598]

While the Court avoided passing upon the wisdom of the executive act of entering into the debt-relief agreements, it still appreciated the possible adverse repercussions on foreign relations, should the "illegitimate" loans be unilaterally repudiated by the government.[599] The Court evidently considered

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592. *Id.* at 513-14.

593. *Id.* at 530.

594. *Id.* at 523.

595. *Id.* at 521.

596. *Id.* at 521-22 (citing Dr. Felipe Medalla, *The Management of External Debt*, PIDS DEV. RES. NEWS, Volume V, No. 2, at 2).

597. *Constantino, Jr.*, 472 SCRA at 523.

598. *Id.*

599. *Id.* at 521.

the likely impact of repudiation on the Philippines' sources of credit, access to the market, and development assistance before reaching the conclusion that there was no grave abuse of discretion on the part of the executive branch.[600]

e. Investments

The Court's consciousness of the sanctity of international financial obligations is likewise seen in the field of investments. In *Land Bank v. Atlanta Industries, Inc.*, the Court upheld the country's duty to follow its international obligations in good faith under a treaty or executive agreement, even though it departed from the general policy of requiring competitive bidding.[601]

The case originated from Loan Agreement No. 4833-PH between Land Bank and the International Bank for Reconstruction and Development (IBRD) for the implementation of an IBRD project.[602] The amount of the loan was guaranteed by the Government of the Philippines.[603] The guarantee was "conditioned upon the participation of at least two [ ] [LGUs] by way of a Subsidiary Loan Agreement (SLA) with Land Bank."[604] To fund the development and expansion of the city's water supply system, Land Bank entered into an SLA with the City Government of Iligan.[605] This SLA expressly stated that the necessary procurement of goods, works, and services financed by the loan shall be in accordance with specific IBRD Guidelines and the provisions of Schedule 4.[606]

The City Government of Iligan conducted a bidding procedure which eventually resulted in a failure of bidding and the need for a re-bidding.[607] Atlanta Industries, Inc., the second lowest bidder, alerted the Bids and Awards Committee on the alleged violation of the Government Procurement Reform Act or Republic Act No. 9184 (R.A. No. 9184) and its Implementing Rules and Regulations.[608] Atlanta further claimed that a provision in the SLA that

600. *Id.* at 521-22 (citing Medalla, *supra* note 596, at 2).

601. *See Land Bank of the Philippines*, 729 SCRA at 30-31.

602. *Id.* at 17.

603. *Id.* at 18.

604. *Id.*

605. *Id.*

606. *Id.* at 18 (citing Subsidiary Loan Agreement, § 1).

607. *Land Bank of the Philippines*, 729 SCRA at 18-20 (citing Land Bank of the Philippines, Resolution No. 160, Series of 2009 [Reso. No. 160, s. 2009], at 122 & 152-53).

608. *Id.*

departed from the procurement procedures established by R.A. No. 9184 was invalid since the SLA was not a treaty or an executive agreement, unlike Loan Agreement No. 4833-PH.[609]

The Court recognized the binding nature of Loan Agreement No. 4833-PH as an executive agreement and held that it was governed by international law, including the "rule of *pacta sunt servanda*, a fundamental maxim of international law that requires the parties to keep their agreement in good faith."[610] This maxim has become part of the law of the land by virtue of the doctrine of incorporation in Article II, Section 2 of the Constitution.[611] By extension, since the terms and conditions of Loan Agreement No. 4833-PH "were incorporated and made part of the SLA" as an accessory contract, the latter should likewise be complied with in good faith.[612] Hence, the rules governing the bidding process were the IBRD Guidelines and the provisions of Schedule 4, as expressly provided by Loan Agreement No. 4833-PH, and not R.A. No. 9184.[613]

It can be observed that the Court, in *Land Bank v. Atlanta Industries, Inc.*, considered again the binding effect of international financial obligations by according respect to the specific contract and international law in force (e.g., an executive agreement), rather than the general local statute on procurement procedures.[614]

f. Civil and Political Rights

In the field of human rights, the Court has faced issues involving relations with other States, the jurisdiction of the International Criminal Court, and various obligations under international human rights treaties.

i. On State Claim

In *Vinuya v. Executive Secretary*, the Court was confronted with the claim of reparations for the systematic rape, sexual violence, sexual slavery, and torture

609. *Id.* at 29.

610. *Id.* at 31 (citing Secretary of Justice v. Lantion, G.R. No. 139465, 332 SCRA 160, 196 (2000)).

611. PHIL. CONST. art. II, § 2.

612. *Land Bank of the Philippines*, 729 SCRA at 31-32 (emphasis omitted) (citing Subsidiary Loan Agreement, whereas cl.).

613. *Id.* at 32-33.

614. *See id.*

committed by the Japanese military forces during the Second World War.[615] Members of Malaya Lolas Organization, a non-stock, non-profit organization that provides aid to comfort women, claimed that they approached the executive department to request for assistance in filing a claim against Japanese officials and military officers who were responsible for the comfort women stations that were established in the Philippines.[616] The concerned officials from the Department of Justice, Department of Foreign Affairs, and the Office of the Solicitor General, however, declined to assist them for the reason that "the individual claims of the comfort women for compensation had already been fully satisfied by Japan's compliance with the Peace Treaty between the Philippines and Japan."[617]

The Members of the Malaya Lolas argued that the general waiver of claims in the said treaty was void because the comfort women system constituted a "crime against humanity, sexual slavery, and torture."[618] They further averred that "the Philippine government's acceptance of Japan's 'apologies' as well as funds from the Asian Women Fund [ ] were contrary to international law."[619]

The respondent executive officials maintained, however, that the claims had already been satisfied pursuant to the San Francisco Peace Treaty of 1951 and the bilateral Reparations Agreement of 1956.[620] Moreover, to the respondents, Japan's apologies were satisfactory, and the AWF had already addressed the individual claims of the women.[621]

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615. *Vinuya*, 619 SCRA at 540-42.

616. *Id.* at 539-40.

617. *Id.* at 540.

618. *Id.* at 541-42 (citing Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal art. 6 (c), *opened for signature* Aug. 8, 1945, 82 U.N.T.S. 279; Tokyo Charter, art. 5 (c); Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Control Council Law No. 10; Slavery Convention, *opened for signature* Sept. 25, 1926, 60 L.N.T.S. 254; & Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1.1, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85).

619. *Id.* at 542.

620. *Id.* (citing Treaty of Peace with Japan (with Two Declarations), *signed* Sept. 8, 1951, 136 U.N.T.S. 46). *See also* Press Statement *by* Ramon Magsaysay, President of the Republic of the Philippines, *President Magsaysay on the Signing of the Reparations Agreement Between the Philippines and Japan* (May 9, 1956) (on file with the Presidential Museum and Library).

621. *Vinuya*, 619 SCRA at 543-44.

In dismissing the petition, the Court noted that, traditionally, individuals can only bring a claim within the international legal system through the State.[622] In such a case, the State would be asserting its own rights and not that of the individuals concerned.[623] Ultimately, the Court lamented that the Philippines was not under an international obligation to bring the petitioners' claims against Japan.[624]

Substantively, the Philippine government is committed to upholding the legal prohibitions of "rape, sexual slavery, torture, and sexual violence" under contemporary international law.[625] In terms of procedure, however, the Philippines has no "non-derogable obligation to prosecute international crimes" and recover monetary reparations from another State such as Japan.[626] Due to the general reluctance of States to directly prosecute claims,

> recent developments support the modern trend to empower individuals to directly participate in suits against perpetrators of international crimes. [ ] [N]otwithstanding an array of General Assembly resolutions calling for the prosecution of crimes against humanity and the strong policy arguments warranting such a rule, the practice of [S]tates does not yet support the present existence of an obligation to prosecute international crimes.[627]

The Court conceded, albeit regrettably, that the matter of seeking reparations for the petitioners fell within the executive's prerogative in the conduct of the country's foreign relations, thus —

> Whether or not to espouse petitioners' claim against the Government of Japan is left to the exclusive determination and judgment of the [e]xecutive [d]epartment. ... Accordingly, we cannot direct the [e]xecutive [d]epartment,

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622. *Id.* at 566 (citing Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University v. The State of Czechoslovakia) (Czech v. Hung.), Merits, Judgment, 1933 P.C.I.J. (ser. A/B) No. 61, ¶ 102 (Dec. 15)).

623. *Vinuya*, 619 SCRA at 566-67.

624. *Id.* at 566.

625. *Id.* at 572.

626. *Id.* at 573-75.

627. *Id.* at 575 (citing Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 L. & CONTEMP. PROBS. 41, 59 (1996); John Dugard, *Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?*, 12 LEIDEN J. INT'L L. 1001, 1003 (1999); & Jessica Gavron, *Amnesties in Light of Developments in International Law and the Establishment of the International Criminal Court*, 51 INT'L & COMP. L.Q. 91, 106 (2002)).

> either by writ of *certiorari* or injunction, to conduct our foreign relations with Japan in a certain manner.[628]

It can be observed that the Court resorted to the traditional notion of the concept of reparation in international law, which included both public and private acts committed by the occupying belligerent military forces.[629] In doing so, it missed the opportunity to reinforce the shift in perspective in the context of modern humanitarian law violations, which today recognizes military-related sexual offenses during situations of armed conflict.[630]

Nevertheless, the Court, in this case, indirectly participated in the exercise of foreign relations policy by adhering to the position of the executive department on whether the Philippines would pursue a claim against the Government of Japan.[631] Moreover, the Court indirectly participated in the policy to avoid further diplomatic friction[632] when it found that there was no non-derogable duty on the part of the Philippines to prosecute the claims.

ii. On Human Rights and Extrajudicial Killings

A topic that finds relevance in both domestic and international spheres is the policy against impunity and serious violations of human rights. With regard to treaty obligations in this area, the Supreme Court has resolved issues regarding the constitutionally permissible manner by which the Philippines relates with other States. In *Pimentel, Jr. v. Executive Secretary*,[633] the Court had to clarify the role of the President and the Senate in the ratification of treaties.[634] The case specifically concerned the Rome Statute, which established the ICC, a

628. Vinuya v. Romulo, G.R. No. 162230, 732 SCRA 595, 610-11 (2014) (resolution of motion for reconsideration).

629. *See Vinuya*, 732 SCRA at 612-13 (J. Sereno, concurring opinion) (citing Geneva Convention IV, *supra* note 371, arts. 147-148; OSCAR M. UHLER & HENRI COURSIER, 4 COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROJECTION OF CIVILIAN PERSONS IN TIME OF WAR 602-03 (Jean S. Pictet ed., 1958); & Hague Convention IV, *supra* note 447, art. 3).

630. *See generally* Noëlle N. R. Quénivet, SEXUAL OFFENSES IN ARMED CONFLICT AND INTERNATIONAL LAW (2005).

631. *Vinuya*, 732 SCRA at 610-11 (resolution of motion for reconsideration).

632. *See* Golia, *supra* note 309, at 151-52.

633. Pimentel, Jr. v. Office of the Executive Secretary, G.R. No. 158088, 462 SCRA 622 (2005).

634. *Id.* at 637-38 (citing *Bayan (Bagong Alyansang Makabayan)*, 342 SCRA at 482-83; ISAGANI A. CRUZ, INTERNATIONAL LAW 174 (1998); & JOVITA R. SALONGA & PEDRO L. YAP, PUBLIC INTERNATIONAL LAW 138 (1992)).

tribunal that is granted jurisdiction over "genocide, crimes against humanity, war crimes[,] and crime of aggression."[635] The Philippines, "through *Charge d' Affairs* Enrique A. Manalo of the Philippine Mission to the United Nations[,]" signed the same on 28 December 2000.[636]

Following the signing by the Philippine representative, petitioners theorized that the ratification of the treaty should be left to the Senate.[637] Hence, through a petition for *mandamus*, they sought to compel the President to transmit the signed text of the Rome Statute of the ICC to the Senate.[638] Based on the Constitution, however,

> the power to ratify is vested in the President, subject to the concurrence of the Senate. ... [The Supreme] Court has no jurisdiction over actions seeking to enjoin the President in the performance of his official duties. ... [I]t is beyond its jurisdiction to compel the executive branch of the government to transmit the signed text of Rome Statute to the Senate.[639]

Eventually, former President Benigno S. Aquino III ratified the Rome Statute on 30 August 2011.[640] The executive act of ratification is consistent with the policy of the State to address serious violations of international humanitarian law and human rights law.[641]

A later case brought before the Court concerned the country's withdrawal from the Rome Statute.[642] It is noteworthy that different jurisdictions may have divergent approaches to treaty withdrawal. In European jurisdictions, courts have imposed procedural requirements that grant participatory rights to

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635. *Pimentel, Jr.*, 462 SCRA at 628 (citing Rome Statute, *supra* note 36, art. 5).

636. *Id.* at 628.

637. *Id.* at 629.

638. *Id.* at 628.

639. *Id.* at 637-38 (citing Severino v. Governor-General, 16 Phil. 366, 402 (1910)).

640. Perfecto Caparas, *EXPLAINER: Yes, Int'l Criminal Court Can Prosecute Duterte for Killing Spree*, RAPPLER, May 4, 2017, *available at* https://www.rappler.com/newsbreak/iq/150285-international-criminal-court-trial-duterte-killings (last accessed Jan. 30, 2022) [https://perma.cc/2AWV-XXVX].

641. *See, e.g.*, United Nations Human Rights Treaty Bodies, Ratification Status for Philippines, *available at* https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=137&Lang=EN (last accessed Jan. 30, 2022) [https://perma.cc/PA29-AANQ].

642. *See Pangilinan, et al.*, G.R. No. 238875.

parliaments or other actors.[643] On the other hand, in the U.S., the manner of implementing or withdrawing from a treaty is "a field where the [ ] political question doctrine remains almost untouchable[.]"[644] In *Goldwater v. Carter*,[645] a few members of Congress questioned the President's action of terminating a treaty with Taiwan without securing congressional approval.[646] The U.S. Supreme Court then held that this presented a nonjusticiable political question that was not proper for judicial review.[647]

In the Philippines, the Court seems to have drawn a different path from that of the U.S., having attempted to take the matter of treaty withdrawal outside the sole prerogative of the President.[648] In *Pangilinan v. Cayetano*, the Court was faced with the issue of whether the Senate must concur with the President's decision to withdraw from the treaty.[649] On 15 March 2018, President Duterte announced that the Philippines would be withdrawing from the Rome Statute.[650] The following day, on 16 March 2018, the Philippines submitted its Notice of Withdrawal to the United Nations.[651] Subsequently, several senators assailed the constitutionality of the executive's unilateral act of withdrawal.[652]

In *Pangilinan*, since the President's withdrawal followed the procedural mechanism in the treaty, the Court did not find any grave abuse of discretion on the part of the President.[653] In this respect, it invoked the well-settled principle that the "[c]ourts cannot resolve political questions."[654] Therefore, absent a showing that the executive department committed grave abuse of discretion, the petitions for *certiorari* and *mandamus* questioning the act of

643. Golia, *supra* note 309, at 147-48.

644. *Id.* at 148 (citing Goldwater v. Carter, 444 U.S. 996 (1979)).

645. Goldwater v. Carter, 444 U.S. 996 (1979).

646. *Id.* at 998.

647. *Id.* at 1002.

648. *See, e.g.*, *Pangilinan, et al.*, G.R. No. 238875.

649. *Pangilinan, et al.*, G.R. No. 238875, at 11.

650. *Id.* at 3.

651. *Id.*

652. *Id.* at 5.

653. *Id.* at 69.

654. *Id.* at 78.

withdrawal from the Rome Statute were unavailing.[655] The Court expounded on the matter, thus —

> Between the executive and this Court, it is the executive that represents the Philippines in the international sphere. This Court interprets laws, but its determinations are effective only within the bounds of Philippine jurisdiction. Even within these bounds, this Court must caution itself in interpreting the Constitution and our laws, for it can undermine the discretion of the political agencies. This Court's mandate is clear [—] it is the presence of grave abuse of discretion that sanctions us to act. It is not merely discretion, but abuse of that discretion; and it is not only abuse of discretion, but grave abuse of discretion.
>
> The President's withdrawal from the Rome Statute was in accordance with the mechanism provided in the treaty. The Rome Statute itself contemplated and enabled a State Party's withdrawal. A [S]tate [P]arty and its agents cannot be faulted for merely acting within what the Rome Statute expressly allows.[656]

Due to the lack of procedural infirmity, Court also refused to look into the political motivations behind the withdrawal. It held that

> [a]s far as established facts go, all there is for this Court to rely on are the manifest actions of the executive, which have nonetheless all been consistent with the letter of the Rome Statute. Suggestions have been made about supposed political motivations, but they remain just that: suggestions and suppositions.
>
> Were the situation different — where it is shown that the President's exercise of discretion ran afoul of established procedure; or was done in manifest disregard of previously declared periods for rectification, terms, guidelines, or injunctions, belying any rhyme or reason in the course of action hastily and haphazardly taken; or was borne out of vindictiveness, as retaliation, merely out of personal motives, to please personal tastes or to placate personal perceived injuries-whimsical and arbitrary exercise of discretion may be appreciated, impelling this Court to rule on the substance of petitions and grant the reliefs sought.[657]

Moreover, the Court opined that the lack of procedural infirmity in the withdrawal also implied that the executive department did not violate the principle of *pacta sunt servanda* —

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655. *Pangilinan, et al.*, G.R. No. 238875, at 79.

656. *Id.* at 78 (emphases omitted).

657. *Id.* at 78-79.

> The Philippines' withdrawal was submitted in accordance with relevant provisions of the Rome Statute. The President complied with the provisions of the treaty from which the country withdrew. There cannot be a violation of *pacta sunt servanda* when the executive acted precisely in accordance with the procedure laid out by that treaty. Article 127 (1) of the Rome Statute states[—]
>
> > (1) A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.
>
> From its text, the Rome Statute provides no room to reverse the accepted withdrawal from it. While there is a one-year period before the withdrawal takes effect, it is unclear whether we can read into that proviso a permission for a state party to rethink its position, and retreat from its withdrawal.[658]

The act of withdrawal was not only procedurally legal, but also complete and acknowledged by the ICC; hence, the Court already considered the matter *fait accompli*.[659] Nonetheless, based on the mirror principle and the Youngstown Framework, the Court laid down guidelines regarding the need for Senate concurrence in treaty withdrawals.[660] It thus appears that the majority, through an *obiter dictum*, indirectly expressed the view that ruling on the legality of treaty withdrawals is not precluded by the political question doctrine.[661] This is in contrast with the trend in the U.S. where the political question doctrine prevailed in deciding the manner by which the State withdraws from treaties.[662] Due to the factual milieu of the case, however, the guidelines set by the Court were not applied therein but were rather envisioned to apply prospectively, thus —

> As guide for future cases, this Court recognizes that, as primary architect of foreign policy, the President enjoys a degree of leeway to withdraw from treaties which are bona fide deemed contrary to the Constitution or our laws, and to withdraw in keeping with the national policy adopted pursuant to the Constitution and our laws.
>
> However, the President's discretion to withdraw is qualified by the extent of legislative involvement on the manner by which a treaty was entered into or

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658. *Id.* at 82-83 (citing Rome Statute, *supra* note 36, art. 127, ¶ 1) (emphasis omitted).

659. *Pangilinan, et al.*, G.R. No. 238875, at 64.

660. *Id.* at 50-51.

661. *Id.* at 56.

662. Golia, *supra* note 309, at 148 (citing *Goldwater*, 444 U.S.).

> came into effect. The President cannot unilaterally withdraw from treaties that were entered into pursuant to the legislative intent manifested in prior laws, or subsequently affirmed by succeeding laws. Treaties where Senate concurrence for accession is expressly premised on the same concurrence for withdrawal likewise cannot be the subject of unilateral withdrawal. The imposition of Senate concurrence as a condition may be made piecemeal, through individual Senate resolutions pertaining to specific treaties, or through encompassing legislative action, such as a law, a joint resolution by Congress, or a comprehensive Senate resolution.
>
> Ultimately, the exercise of discretion to withdraw from treaties and international agreements is susceptible to judicial review in cases attended by grave abuse of discretion, as when there is no clear, definite, or reliable showing of repugnance to the Constitution or our statutes, or in cases of inordinate unilateral withdrawal violating requisite legislative involvement. Nevertheless, any attempt to invoke the power of judicial review must conform to the basic requisites of justiciability. Such attempt can only proceed when attended by incidents demonstrating a properly justiciable controversy.[663]

Although the Court did not look into the wisdom and motivations of the President's unilateral withdrawal from the Rome Statute, and although the contested act was already deemed *fait accompli*, the Court still indirectly participated in the management or administration of foreign relations by providing procedural guidelines for the Congress and the President to follow.[664] It imposed participatory or procedural rights of Congress, notwithstanding the lack of a clear constitutional or statutory provision on this point.[665]

Significantly, the case shows an interplay among the three branches of government on the matter of treaty withdrawal — a delicate subject touching on foreign relations.[666] Even though the case was deemed *fait accompli*, the Court still asserted a procedural requirement in the management of foreign relations insofar as treaty withdrawal was concerned.[667] Notably, this judicial involvement is similar to the effect of the United Kingdom Supreme Court's ruling in *R(Miller) v. Secretary of State for Exiting European Union*,[668] where it

663. *Pangilinan, et al.*, G.R. No. 238875, at 99-100.

664. *See* Golia, *supra* note 309, at 147.

665. *Id.*

666. *See Pangilinan, et al.*, G.R. No. 238875, at 55 & 58-61.

667. *Id.* at 51-56.

668. R(Miller) v. Secretary of State for Exiting European Union, [2017] UKSC 5 (2017).

required the authorization of the parliament before the government could commence withdrawal from the European Union.[669] This shows a trend of less reliance on the political question doctrine in some aspects of foreign relations.

As regards the foreign policy determinants of the executive act assailed in *Pangilinan*, the Court recognized that the completed withdrawal from the Rome Statute followed the proper procedure.[670] Hence, from a legal standpoint, there was no grave abuse of discretion and violation of the principle of *pacta sunt servanda*.[671] By following the prescribed procedure for withdrawal, the President tries to justify the act of withdrawal as lawful and therefore, not a breach of international law.[672] It can be surmised that the executive branch is cognizant of the fact that breaches of international law will not only trigger state responsibility, but also adversely affect the reputation of the country.[673]

From a foreign policy standpoint, however, the decision to withdraw from the Rome Statute still has negative implications. Some members of the international community, as well as human rights advocates, view the withdrawal as an attempt to hamper the investigation of extrajudicial killings committed during President Duterte's war on drugs.[674] President Duterte's aggressive personality and character, particularly towards certain States and bodies such as the ICC, have had a profound impact on the formation and execution of foreign policy. His statements undermining the jurisdiction of the ICC have made headlines both domestically and internationally.[675]

669. *Id.* at 148 (citing *R(Miller)*, [2017] UKSC at 16).

670. *Pangilinan, et al.*, G.R. No. 238875, at 82.

671. *Id.*

672. *See* Sotong, *supra* note 12, at 5.

673. *Id.* at 5-6 (citing Watts, *supra* note 27, at 7 & Koh, *supra* note 29, at 2639).

674. Amnesty International, Philippines: Withdrawal from the ICC Must Spur UN Action, *available at* https://www.amnesty.org/en/latest/press-release/2019/03/philippines-withdrawal-icc-spur-un-action (last accessed Jan. 30, 2022) [https://perma.cc/5VPL-D427] & Jason Gutierrez, *Philippines Officially Leaves the International Criminal* Court, N.Y. TIMES, Mar. 17, 2019, *available at* https://www.nytimes.com/2019/03/17/world/asia/philippines-international-criminal-court.html (last accessed Jan. 30, 2022) [https://perma.cc/J6FE-VQY7].

675. *See, e.g.*, Jason Gutierrez, *Philippines is Defiant as Hague Court Announces Full Drug War Inquiry*, N.Y. TIMES, Sept. 16, 2021, *available at* https://www.nytimes.com/2021/09/16/world/asia/philippines-duterte-icc-hague.html (last accessed Jan. 30, 2022) [https://perma.cc/W76X-WSFJ] & Al

Nonetheless, as mentioned, the Court did not take cognizance of possible political motivations of the President behind the withdrawal from the Rome Statute due to procedural regularity.[676]

iii. On Nationality

European domestic courts have increasingly referred to human rights to enforce international law or grant self-executing status to international norms within their domestic legal systems.[677] Courts of other jurisdictions have also exhibited reduced deference to the interpretations or findings of the executive department or administrative agencies, owing to the influence of international human rights law.[678]

In *Poe-Llamanzares v. Commission on Elections*,[679] the Court took a similar approach in establishing a "presumption of natural-born citizenship" in favor of a foundling, contrary to the submission of the Commission on Elections.[680] The Court referred to official statistics and other circumstantial evidence to conclude that the parents of Grace Poe-Llamanzares were Filipinos, making her a natural-born Filipino citizen.[681] After consulting the deliberations of the framers of the 1935 Constitution, the Court also held that although the language of the law was silent, foundlings were not intended to be excluded from the enumeration of Filipino citizens.[682] Moreover, considering that domestic laws on adoption require the adoptee to be a Filipino, the adoption of Poe-Llamanzares supports the conclusion that she is a natural-born Filipino citizen.[683] In addition, the Court referred to international law in upholding the presumption that foundlings have a nationality based on the country where

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Jazeera, *Duterte Bashes ICC but Says Deaths of Druglords, Mayors on Him*, AL JAZEERA, Nov. 5, 2021, *available at* https://www.aljazeera.com/news/2021/11/5/duterte-bashes-icc-but-admits-deaths-of-drug-lords-mayors-on-him (last accessed Jan. 30, 2022) [https://perma.cc/LW99-SP4N].

676. *Pangilinan, et al.*, G.R. No. 238875, at 82.

677. Golia, *supra* note 309, at 152.

678. *Id.* at 142.

679. Poe-Llamanzares v. Commission on Elections, G.R. No. 221697, 786 SCRA 1 (2016).

680. *Id.* at 148-49.

681. *Id.* at 136-37.

682. *Id.* at 139-40.

683. *Id.* at 142.

they are found and are born of citizens of the territory where they were born —

> The principles found in two conventions, while yet unratified by the Philippines, are generally accepted principles of international law. The first is Article 14 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws under which a foundling is presumed to have the 'nationality of the country of birth[.]'
>
> ...
>
> The second is the principle that a foundling is *presumed born of citizens* of the country where he is found, contained in Article 2 of the 1961 United Nations Convention on the Reduction of Statelessness[.][684]

In sum, the Court held that the presumption on the citizenship of foundlings is a generally accepted principle of international law.[685] Pursuant to Article II, Section 1, this principle forms part of the law of the land even if the Philippines is not a party to specific treaties that expressly provide for the same.[686]

Being considered a national by a State comes with the enjoyment of concomitant civil and political rights such as the right of suffrage.[687] As for citizens living abroad, the cases of *Macalintal v. Commission on Elections*[688] and *Nicolas-Lewis v. Commission on Elections*[689] show that the State may adopt a policy that enables them to effectively exercise their rights. This touches on foreign policy, as the Philippines deals with other nations to extend protection and guarantee rights to its nationals living abroad.

In the case of Filipinos residing overseas for economic reasons, a population that significantly and constantly contributes to the country's economic development, the Constitutional Commission and lawmakers deemed it best to preserve their relations to their homeland through political participation.[690] The Court, in *Macalintal v. Commission on Elections*, upheld

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684. *Poe-Llamanzares*, 786 SCRA at 146.

685. *Id.* at 148.

686. *Id.* at 147.

687. *Id.* (J. Leonardo-De Castro, dissenting opinion).

688. Macalintal v. Commission on Elections, G.R. No. 157013, 405 SCRA 614 (2003).

689. Nicolas-Lewis v. Commission on Elections, G.R. No. 162759, 497 SCRA 649 (2006).

690. *See* PHIL. CONST. art. V, § 2 & An Act Providing for a System of Overseas Absentee Voting by Qualified Citizens of the Philippines Abroad, Appropriating

the constitutionality of Section 5 (d) of the Absentee Voting Act of 2003 or Republic Act No. 9189, which requires the absentee voter to execute an affidavit that he or she "shall resume actual physical permanent residence in the Philippines not later than three [ ] years from approval of his/her registration[.]"[691] This is considered an exception to the residency requirement for the exercise of the right of suffrage found in Section 1, Article V of the Constitution.[692] In arriving at this interpretation, the Court turned to the deliberations of the Constitutional Commission and concluded that

> [Article V, Section 2] of the Constitution came into being to remove any doubt as to the inapplicability of the residency requirement in Section 1. It is precisely to avoid any problems that could impede the implementation of its pursuit to enfranchise the largest number of qualified Filipinos who are not in the Philippines that the Constitutional Commission explicitly mandated Congress to provide a system for overseas absentee voting.[693]

Similarly, in *Nicolas-Lewis v. Commission on Elections*, the Court affirmed that the benefit of absentee voting under Republic Act No. 9189 is also available to dual citizens who retained or reacquired their Philippine citizenship under the Citizenship and Retention Act of 2003 or Republic Act No. 9225, thus —

> [T]here is no provision in the dual citizenship law — R.A. [No.] 9225 — requiring 'duals' to actually establish residence and physically stay in the Philippines first before they can exercise their right to vote. On the contrary, R.A. [No.] 9225, in implicit acknowledgment that 'duals' are most likely non-residents, grants under its Section 5 (1) the same right of suffrage as that granted an absentee voter under R.A. [No.] 9189. It cannot be overemphasized that R.A. [No.] 9189 aims, in essence, to enfranchise as much as possible all overseas Filipinos who, save for the residency requirements exacted of an ordinary voter under ordinary conditions, are qualified to vote.[694]

Keeping overseas Filipinos involved in nation-building through political participation encourages a culture of patriotism. Moreover, by allowing them

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Funds Therefor, and for Other Purposes [The Overseas Absentee Voting Act of 2003], Republic Act No. 9189 (2003).

691. *Macalintal*, 405 SCRA at 646 (citing The Overseas Absentee Voting Act of 2003, § 5 (d)).

692. *Macalintal*, 405 SCRA at 642-43.

693. *Id.* at 638.

694. *Nicolas-Lewis*, 497 SCRA at 659.

to exercise the rights of a citizen while they are working abroad, their economic contributions to the Philippines are likewise supported and maintained.

As for refugees and their access to Philippine citizenship, the Court has applied a liberal construction of the law based on a state obligation, contrary to the interpretation of the Office of the Solicitor General. In *Republic v. Karbasi*,[695] the Court read the provisions of Commonwealth Act No. 473, or Revised Naturalization, with international human rights obligations under the 1951 Convention Relating to the Status of Refugees.[696] The case involved a petition for naturalization of Kamran F. Karbasi, a refugee from the country of Iran, which does not grant the same benefit of naturalization to Filipinos.[697] In relaxing the requirement of reciprocity, the Court held that

> Articles 6 and 34 of the 1951 Convention relating to the Status of Refugees, to which the Philippines is a signatory, must be considered in this case[.]
>
> ...
>
> In the same vein, Article 7 of the said Convention expressly provides exemptions from reciprocity, while Article 34 states the earnest obligation of contracting parties to 'as far as possible facilitate the assimilation and naturalization of refugees.'[698]

In the end, Karbasi was granted Filipino citizenship "in consonance with Philippine statutory requirements and international obligations. Indeed, the Naturalization Law must be read in light of the developments in international human rights law specifically the granting of nationality to refugees and stateless persons."[699]

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695. Republic v. Karbasi, G.R. No. 210412, 764 SCRA 352 (2015).

696. *Id.* 382-84.

697. *Id.* at 357.

698. *Id.* at 382-84 (citing 1951 Convention Relating to the Status of Refugees arts. 6, 7, & 34, *opened for signature* July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention]).

699. *Karbasi*, 764 SCRA at 384. Article 6 of the 1951 Refugee Convention provides —

> For the purposes of this Convention, the term 'in the same circumstances' implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to [fulfill] for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling.

Notwithstanding the absence of a domestic law that particularly relaxes the requirements for the naturalization of refugees, the Court was able to turn to international law and interpret certain treaty provisions as self-executory to benefit the refugee petitioner in the case.[700] The Court thus enforced international law by referring to human rights and granting self-executing status to the international obligation found in a treaty that binds the Philippines.[701]

While there is currently no comprehensive Philippine law on the protection of refugees and stateless persons, the Court recognizes the need to comply with the country's relevant treaty obligations[702] under Article 34 of the 1951 Convention Relating to the Status of Refugees[703] and its 1967 Protocol,[704] Article 32 of the 1954 Convention Relating to the Status of Stateless Persons,[705] and the 1961 Convention on the Reduction of Statelessness.[706] Thus, the Court approved A.M. No. 21-08-22-SC or the

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1951 Refugee Convention, *supra* note 698, art. 6.

Article 34 of the 1951 Convention provides — "The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings." *Id.* art. 34.

700. *See Karbasi*, 764 SCRA at 382.

701. *Id.*

702. RULE ON FACILITATED NATURALIZATION FOR REFUGEES AND STATELESS INDIVIDUALS, A.M. No. 21-07-22-SC, whereas. cl. para. 9 (Feb. 15, 2022).

703. 1951 Refugee Convention, *supra* note 698, art. 34 ("The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.").

704. Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 606 U.N.T.S. 267.

705. Convention Relating to the Status of Stateless Persons art. 32, *adopted* Sept. 28, 1954, 360 U.N.T.S. 117 ("The Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.").

706. Convention on the Reduction of Statelessness, *opened for signature* Aug. 30, 1961, 989 U.N.T.S. 175. Pursuant to this treaty, "the Philippines, as a Contracting State, shall provide safeguards to prevent and reduce statelessness in four areas of concern: (1) statelessness among children; (2) statelessness due to renunciation of nationality; (3) statelessness due to deprivation of nationality; and (4) statelessness

Rule on Facilitated Naturalization of Refugees and Stateless Persons on 15 February 2022,[707] in the exercise of its power to promulgate rules under Section 5 (5), Article VIII of the Constitution.[708] The Rule is an international landmark for the Philippines as it is "the only Judiciary-led initiative of its kind at the global level that facilitates the naturalization procedure for refugees and stateless persons."[709]

g. Culture and Heritage

i. On Rights of Cultural or Religious Minority

Constitutional provisions and jurisprudence on public ownership of natural resources fall within the ambit of foreign relations law.[710] In this regard, courts may base their decisions on balancing or proportionality techniques and take cognizance of policy goals reflected in legislative, constitutional, or international norms.[711] By assigning weight to certain values or rights, the Court inevitably exercises discretion and affects the State's foreign relations.[712] In effect, it is able to indirectly perform administrative functions in relation to foreign policy.[713]

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in the context of State succession." RULE ON FACILITATED NATURALIZATION FOR REFUGEES AND STATELESS INDIVIDUALS, whereas. cl. para. 4.

707. RULE ON FACILITATED NATURALIZATION FOR REFUGEES AND STATELESS INDIVIDUALS, A.M. No. 21-07-22-SC (Feb. 15, 2022).

708. PHIL. CONST. art. VIII, § 5 (5). ("The Supreme Court shall have the following powers: ... (5) Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged. ... .") *See also* RULE ON FACILITATED NATURALIZATION FOR REFUGEES AND STATELESS INDIVIDUALS, whereas. cl. paras. 3-4 & 9-10.

709. Supreme Court of the Philippines, Primer on the Rule on Facilitated Naturalization of Refugees and Stateless Persons, at 4, *available at* https://sc.judiciary.gov.ph/25634 (last accessed Jan. 30, 2022) [https://perma.cc/V6M8-AMFX].

710. Golia, *supra* note 309, at 136.

711. *Id.* at 134.

712. *Id.* at 149.

713. *Id.* at 134.

In *Cruz v. Secretary of Environment and Natural Resources*,[714] at issue in a petition for *mandamus* and prohibition was the constitutionality of certain provisions of R.A. No. 8371 or the Indigenous Peoples' Rights Act of 1997 (IPRA).[715] The petitioners questioned the provisions defining the extent and coverage of ancestral domains and ancestral lands; outlining the rights and responsibilities of indigenous peoples over the same; providing that ancestral domains are private and community properties of indigenous peoples; and the powers and jurisdiction of the National Commission on Indigenous Peoples (NCIP).[716]

In a *per curiam* resolution, seven Justices voted to grant the petition, while the seven other Justices voted to dismiss the same.[717] Thus, for not having met the required majority, the Court held that the assailed provisions were constitutional.[718]

Justice Puno voted to dismiss the petition,[719] and in his separate opinion, he recognized the rights of indigenous peoples as part of the international agenda —

> Presently, there is a growing concern for indigenous rights in the international scene. This came as a result of the increased publicity focused on the continuing disrespect for indigenous human rights and the destruction of the indigenous peoples' environment, together with the national governments' inability to deal with the situation. Indigenous rights came as a result of both human rights and environmental protection, and have become a part of today's priorities for the international agenda.[720]

Justice Puno further explained the roots of the policy to promote the right to self-determination of indigenous peoples —

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714. Cruz v. Secretary of Environment and Natural Resources, G.R. No. 135385, 347 SCRA 128 (2000).

715. *Id.* at 158-59.

716. *Id.* at 158-60.

717. *Id.* at 161.

718. *Id.* at 162.

719. *Id.* at 161.

720. *Id.* at 239 (J. Puno, separate opinion) (citing José Paulo Kastrup, *The Internationalization of Indigenous Rights from the Environmental and Human Rights Perspective*, 32 TEX. INT'L L.J. 97, 102 (1997) & Benedict Kingsbury, "*Indigenous Peoples*" *in International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L L. 414, 429 (1998)).

> The 1987 Philippine Constitution formally recognizes the existence of ICCs/IPs and declares as a State policy the promotion of their rights within the framework of national unity and development.
>
> ...
>
> The struggle of the Filipinos throughout colonial history had been plagued by ethnic and religious differences. These differences were carried over and magnified by the Philippine government through the imposition of a national legal order that is mostly foreign in origin or derivation. Largely unpopulist, the present legal system has resulted in the alienation of a large sector of society, specifically, the indigenous peoples. The histories and cultures of the indigenes are relevant to the evolution of Philippine culture and are vital to the understanding of contemporary problems. It is through the IPRA that an attempt was made by our legislators to understand Filipino society not in terms of myths and biases but through common experiences in the course of history. The Philippines became a democracy a centennial ago and the decolonization process still continues. If the evolution of the Filipino people into a democratic society is to truly proceed democratically, i.e., if the Filipinos as a whole are to participate fully in the task of continuing democratization, it is this Court's duty to acknowledge the presence of indigenous and customary laws in the country and affirm their co-existence with the land laws in our national legal system.[721]

From the foregoing, it can be observed that ruling in favor of the constitutionality of the IPRA duly considers not only the human rights, but also the culture and history of indigenous peoples as part of Philippine society.

As for the realization of the right to internal self-determination of the Bangsamoro people, *PHILCONSA v. GPH*[722] highlights the role of the executive branch in negotiating and entering into peace agreements, and that of the Congress in enacting a law to give legal effect to such agreements.[723]

After the MOA-AD between the government and the Moro Islamic Liberation Front (MILF) was declared unconstitutional in *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP)*, negotiations continued between the parties, which led to the signing of a preliminary peace agreement called the Framework Agreement

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721. *Cruz*, 347 SCRA at 240 (citing Kingsbury, *supra* note at 720, at 417; Perfecto V. Fernandez, *Towards a Definition of National Policy on Recognition of Ethnic Law Within the Philippine Legal Order*, 55 PHIL. L.J. 383, 385, & 391 (1980); & SAMUEL K. TAN, A HISTORY OF THE PHILIPPINES 6 (1997)).

722. Philippine Constitution Association (PHILCONSA) v. Philippine Government (GPH), G.R. No. 218406, 811 SCRA 284 (2016).

723. *Id.* at 300.

on the Bangsamoro (FAB).[724] The FAB called for the creation of an autonomous political entity called the "Bangsamoro" to replace the ARMM.[725] Further negotiations also resulted in the signing of the Comprehensive Agreement on the Bangsamoro (CAB), which integrated previously executed annexes, addendum, and other agreements.[726]

Former President Noynoy Aquino presented to the 16th Congress a draft of the Bangsamoro Basic Law.[727] The Congress, however, adjourned without passing the proposed law or its revised version.[728] Several petitions were filed before the Court to assail the constitutionality of the CAB, the FAB, and the FAB's annexes.[729] The Court observed that

> contrary to the imagined fear of petitioners, the CAB and the FAB are not mere reincarnations or disguises of the infirm MOA-AD.
>
> The CAB and the FAB require the enactment of the Bangsamoro Basic Law for their implementation. It is a fundamental constitutional principle that Congress has full discretion to enact the kind of Bangsamoro Basic Law that Congress, in its wisdom, deems necessary and proper to promote peace and development in Muslim areas in Mindanao. Congress is expected to seriously consider the CAB and the FAB but Congress is not bound by the CAB and the FAB. Congress is separate, independent, and co-equal of the [e]xecutive branch that alone entered into the CAB and the FAB. The [e]xecutive branch cannot compel Congress to adopt the CAB and the FAB.
>
> ...
>
> The CAB and the FAB remain peace agreements whose provisions cannot be enforced and given any legal effect unless the Bangsamoro Basic Law is duly passed by Congress and subsequently ratified in accordance with the Constitution. The CAB and the FAB are preparatory documents that can 'trigger a series of acts' that may lead to the exercise by Congress of its power to enact an organic act for an autonomous region under Section 18, Article X of the Constitution. The CAB and the FAB do not purport to preempt this [c]ongressional power.[730]

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724. *Id.* at 291-92 (citing Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP), G.R. No. 183591, 568 SCRA 402 (2008)).

725. *Philippine Constitution Association (PHILCONSA)*, 811 SCRA at 292.

726. *Id.* at 292-93.

727. *Id.* at 294.

728. *Id.* at 295.

729. *Id.*

730. *Id.* at 300 (citing PHIL. CONST. art. X, § 18).

As the Court rejected the arguments of the petitioner, it considered the government's political system where Congress ultimately possesses the power to pass an organic act for an autonomous region.[731] Hence, a Bangsamoro Basic Law was still needed to implement the preparatory peace agreements.[732]

In reviewing foreign relations, the Court may opt to balance certain rights and values, which then allows it to exercise discretion and affect the State's foreign relations. This kind of judicial participation in the management or administration of foreign relations can be seen in *La Bugal-B'Laan Tribal Association, Inc. v. Ramos*, where the Court balanced the interests of the State and the affected indigenous peoples in deciding whether to allow foreign participation in the exploitation of natural resources.[733]

In *La Bugal-B'Laan*, the Court was confronted with a petition for *mandamus* and prohibition assailing the constitutionality of the Philippine Mining Act of 1995, the Implementing Rules of Procedure, DENR Administrative Order No. 96-40, and the Financial and Technical Assistance Agreement (FTAA) between the Republic of the Philippines and Western Mining Corporation Philippines, Inc. (WMCP).[734] One of the petitioners was La Bugal B'laan Tribal Association, Inc., a farmers' and indigenous people's cooperative representing a community that stood to suffer "irremediable displacement" as a result of the WMCP's mining activities, which were authorized by the FTAA.[735]

The WMCP was a fully foreign-owned corporation at the time of the execution of the FTAA.[736] In the main decision, the Court opined that foreign corporations may only enter into financial or technical assistance agreements with the government for the exploitation of minerals, petroleum, and other mineral oils.[737] The FTAA was struck down as unconstitutional on the theory that it was a service contract, which was disallowed by the Constitution.[738] In

731. *Philippine Constitution Association (PHILCONSA)*, 811 SCRA at 300.

732. *Id.*

733. *La Bugal-B'Laan Tribal Association, Inc.*, 445 SCRA at 237-38 (resolution of motion for reconsideration).

734. La Bugal-B'Laan Tribal Association, Inc. v. Ramos, G.R. No. 127882, 421 SCRA 148, 170 (2004).

735. *Id.* at 179.

736. *Id.* at 216.

737. *Id.* at 247.

738. *Id.* at 243-45.

overturning the main decision, the Court's resolution of the motion for consideration settled the proper interpretation of the phrase "agreements involving either technical or financial assistance" in the fourth paragraph of Section 2, Article XII of the Constitution.[739]

As supported by constitutional construction, the Court held that such agreements are in fact service contracts with respect to minerals, petroleum, and other mineral oils, subject to the safeguards provided in Constitution.[740] It also laid down the test of full control "over all aspects of exploration, development[,] and utilization of natural resources" found in Section 2, Article XII, which flows from the State's sovereign ownership.[741] It further clarified that the objective of economic development is compatible with reasonable foreign participation in the operation of mining activities. The Court explained, thus —

> Control ... must be taken to mean a degree of control sufficient to enable the State to direct, restrain, regulate[,] and govern the affairs of the extractive enterprises. Control by the State may be on a macro level[.] ... Such a degree of control would be compatible with permitting the foreign contractor sufficient and reasonable management authority over the enterprise it has invested in, to ensure efficient and profitable operation.[742]

Based on the test of full state control, the Court then upheld the constitutionality of the Philippine Mining Act and DENR Department Order No. 96-40.[743] The Court also held that "it is not unconstitutional to allow a wide degree of discretion to the Chief Executive" with regard to the "negotiations over the terms of FTAAs, particularly when it comes to the government share of financial benefits from FTAAs."[744]

The Philippines' economic development was considered in evaluating the constitutionality of the participation of foreign investors in the exploration, development, and utilization of the Philippines' natural resources.[745] To the Court, the interests of the indigenous community of La

739. *La Bugal-B'Laan Tribal Association, Inc.*, 445 SCRA at 98-128 (resolution of motion for reconsideration).

740. *Id.* at 128.

741. *Id.* at 129.

742. *Id.* at 223-24 (emphases omitted).

743. *Id.* at 224-34.

744. *Id.* at 235 (emphases omitted).

745. *La Bugal-B'Laan Tribal Association, Inc.*, 445 SCRA at 237-38 (resolution of motion for reconsideration).

Bugal B'Laan and other tribal groups should be balanced with the economic return of developing the mining industry and utilizing the mineral resources of the country.[746] The Court emphasized

> the need for an appropriate balancing of interests and needs — the need to develop our stagnating mining industry and ... mineral wealth lying hidden in the ground, in order to jumpstart our floundering economy on the one hand, and on the other, the need to enhance our nationalistic aspirations, protect our indigenous communities, and prevent irreversible ecological damage.[747]

In *La Bugal-B'Laan*, the Court, through the interpretation of the Constitution, supported the executive department's policy on mining and natural resources.[748] Mindful of the need for economic development, the Court balanced the interests of the indigenous peoples or cultural communities with the right of the State to manage and profit from mining activities for the benefit of the economy and the general public to whom the mineral wealth of the country belongs.[749] The Court's judgment inevitably impacted the State's foreign relations in the exploitation of mineral wealth.[750]

ii. Heritage

On the matter of national heritage, in *Knights of Rizal v. DMCI Homes, Inc.*,[751] the Court had to determine whether the Philippines was bound by domestic or international law in preventing the construction of buildings that would ruin the scenic backdrop of a national heritage site.[752] At issue in the case was the legality of the construction of the Torre de Manila condominium, which presented a visible obstruction in the background of the Rizal Shrine, a monument dedicated to national hero José Rizal.[753]

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746. *Id.* at 237.

747. *Id.* (emphasis omitted).

748. *See id.* at 98-128; 206-07; & 220-38.

749. *La Bugal-B'Laan Tribal Association, Inc.*, 445 SCRA at 237-38 (resolution of motion for reconsideration).

750. *See generally La Bugal-B'Laan Tribal Association, Inc.*, 445 SCRA at 98-207 (resolution of motion for reconsideration).

751. Knights of Rizal v. DMCI Homes, Inc., G.R. No. 213948, 824 SCRA 327 (2017).

752. *Id.* at 402-03.

753. *Id.* at 387 & 462.

Knights of Rizal, a non-profit organization, argued that DMCI's Torre de Manila condominium project violated the Philippines' commitment under the International Charter for the Conservation and Restoration of Monuments and Sites, or the Venice Charter.[754] Despite the policy of promoting the preservation of historical sights and treasures, as reflected in the Venice Charter, the Court found that the Philippines had no legally binding international obligation to revoke the permits already granted to DMCI in order to preserve the background view of the Rizal Shrine.[755] The Court explained —

> The Venice Charter is not a treaty and therefore does not become enforceable as law. The Philippines is not legally bound to follow its directive, as in fact, these are not directives but mere guidelines — a set of the best practices and techniques that have been proven over the years to be the most effective in preserving and restoring historical monuments, sites and buildings.[756]

In *Knights of Rizal*, the Court found that while the Venice Charter codified "guiding principles for the preservation and restoration of ancient monuments, sites, and buildings[,]" it was mere soft law lacking in obligatory force, as opposed to treaties.[757] The case thus illustrates the Court's power to identify specific sources of obligation in international law that ought to guide the government in the conduct of its affairs.

After the extensive review of fairly recent cases in this Chapter, Chapter IV will assess the trend in the Court's use of constitutional principles and international law in evaluating foreign policy. The Court's role in foreign policy determination will also be observed in light of its application (or non-application) of the political question doctrine.

IV. ANALYSIS

A. Traditional Roles of the Three Branches of Government

In other jurisdictions, it has been observed that courts appear to decreasingly rely on "'exceptional' doctrines of non-justiciability" such as the political question doctrine in the U.S.[758] The political question doctrine, a concept

754. *Id.* at 382.

755. *Id.* at 435.

756. *Id.* at 403.

757. *Knights of Rizal*, 824 SCRA at 402.

758. Golia, *supra* note 309, at 142.

likewise used by Philippine courts, is rooted in the traditional role of the Judiciary.[759]

Pursuant to the principle of separation of powers, the three branches of government have well-demarcated roles and functions that ensure a system of checks and balances.[760] While they are meant to operate independently to fulfill their respective mandates, it should be remembered that they make up one system of government. Hence, there may be an interplay of these three branches in certain aspects of governance.[761] Based on the previously discussed cases, this Chapter will specifically inquire into the Judiciary's relation with the executive department on foreign policy and observe their influence on one another.

The President has been regarded as "the chief architect of [ ] foreign policy[.]"[762] Hence, he or she is in the position to lead the government in its relations with other States.[763] Meanwhile, the Supreme Court monitors foreign policy by virtue of its power to "review, revise, reverse, modify, or affirm on appeal or *certiorari*" the decision of lower courts in "all cases in which the constitutionality or validity of any treaty, international or executive agreement, [or] law ... is in question."[764] Under its expanded power of judicial review, the Court can also "determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the [g]overnment."[765] This includes the acts of the political branches of government in the formulation and implementation of foreign policy.[766]

In monitoring foreign policy, the Judiciary is mandated to be only interpretative of laws, so as to avoid committing judicial legislation.[767] Notwithstanding this limitation, the cases discussed in the previous Chapter show that the Court can influence foreign policy either by affirming, setting

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759. *Id.*

760. BERNAS, COMMENTARY, *supra* note 166, at 678.

761. *Id.*

762. *Bayan (Bagong Alyansang Makabayan)*, 342 SCRA at 494.

763. *Id.* (citing IRENE R. CORTÉS, THE PHILIPPINE PRESIDENCY: A STUDY OF EXECUTIVE POWER 195 (2d. 1974)).

764. PHIL. CONST. art. VIII, § 5 (2) (a).

765. PHIL. CONST. art. VIII, § 1.

766. PHIL. CONST. art. VIII, § 5 (2) (a).

767. BERNAS, COMMENTARY, *supra* note 166, at 985.

aside, or prescribing guidelines that modify the political acts of the executive department.

B. Historical Progression

This Section synthesizes most of the cases mentioned in the previous Chapter to observe the progression of judicial participation in foreign relations. Legislation paved the way for test-case litigations and the engagement of the court in areas that are traditionally left to the wisdom of the political branches of government. These cases reveal the role that the Court has played in fairly recent years on foreign policy matters.

1. Use of Constitutional Principles and International Law in Evaluating Foreign Policy

It can be observed that the Court takes part in the judicial trend of using constitutional principles and international law as an evaluative set of norms in foreign policy.

Globally, courts are playing the increasingly frequent role of internal participants in determining foreign policy direction while resolving concrete issues, as opposed to being mere external reviewers.[768] Moreover, author Angelo Jr. Golia observes that courts tend to be more conditioned by the expected effect of their decisions, guided by "future-oriented purposes set by law in specific regulatory fields, as general or indeterminate as they may appear."[769] Using constitutional or international norms, they translate their perception of policy goals into decisions that are intended to resolve concrete issues, thereby "performing de facto executive [or] administrative functions."[770]

In the Philippines, the Court has been historically tasked to interpret and apply the law. Hence, in deciding cases relating to foreign policy, the Court has consistently relied on the Constitution and international law as both limits and determinants of foreign policy.

In different foreign relations cases discussed in the previous Chapter, the Court heavily relied on constitutional principles regarding human rights, treaty-making, national economy and patrimony, and utilization of natural resources, among others, in resolving issues that evaluate and affect foreign policy.

768. Golia, *supra* note 309, at 134.

769. *Id.*

770. *Id.*

Likewise, *the Court has integrated international law into foreign relations law*.[771] According to Angelo Jr. Golia, courts tend to "use balancing techniques, [the standard of] reasonableness[,] and human rights" when they recognize or enforce international law within domestic legal systems.[772]

In the field of human rights, the Court has relied on different sources of international law. For instance, in the 2016 case of *Poe-Llamanzares v. Commission on Elections*, the Court adopted the presumption that foundlings have the nationality of the country where they were found and are born of citizens of the territory where they were born.[773] It referred to principles found in international treaties that are generally practiced by other *jus sanguinis* countries.[774] The Court then held that the presumption on the citizenship of foundlings is a generally accepted principle of international law, thus forming part of the law of the land even if the Philippines is not a party to specific treaties that expressly provide for the same.[775]

Prior to the *Poe-Llamanzares* case, the Court, in the 2015 case of *Republic v. Karbasi*, took a liberal stance in interpreting the provisions of Commonwealth Act No. 473 on judicial naturalization.[776] The Court treated the obligation of the Philippines in the 1951 Convention on the Status of Refugees as self-executory and facilitated the naturalization of Karbasi, an Iranian refugee, despite not meeting the requirement of reciprocity under Commonwealth Act No. 473.[777]

These two cases on foundlings and refugees tend to establish the trend of upholding human rights in the interpretation of domestic law.

Members of the Supreme Court have also referred to principles of IHL and customary international law. For example, in *Ocampo v. Abando*, Justice Leonen explained in his concurring opinion the application of IHL to the armed conflict with communist rebels.[778] The main decision's rejection of the principle of absorption in rebellion vis-à-vis serious violations of international

771. *Id.* at 137.

772. *Id.* at 152.

773. *Poe-Llamanzares*, 786 SCRA at 148 (2016).

774. *Id.*

775. *Id.*

776. *Karbasi*, 764 SCRA at 382-84.

777. *Id.*

778. *Ocampo*, 715 SCRA at 737-38 (J. Leonen, concurring opinion).

humanitarian law[779] — viewed with the concurring opinion of Justice Leonen[780] — lends support to the policy and campaign to end local communism.

2. Use of Legal Justifications for Affirming Executive Findings and Discretion

Meanwhile, in a fair share of cases, the Court has also exhibited deference to the political branches of government. Nonetheless, *even when it accords such deference, it still increasingly provides its own legal justifications for affirming executive findings and discretion*.[781]

For instance, in *Lagman v. Medialdea*, the Court affirmed the sufficiency of the factual bases for the President's decision to declare martial law in Mindanao.[782] Pursuant to the standard found in Section 18, Article VII of the Constitution, the Court ruled that it is not mandated to assess the correctness of the President's decision, but only to rule on whether there are sufficient factual bases giving rise to a probable cause to believe that there is actual rebellion or invasion and that public safety requires the declaration of martial law.[783]

In the 2010 case of *Vinuya v. Romulo*, the Court also upheld the legality of the executive's decision to deny the claim for reparations of comfort women.[784] As justification, it resorted to the traditional notion of reparation in international law and maintained that the Philippines has no duty to bring a claim of reparations against the government of Japan for the crimes against humanity committed against Filipino comfort women.[785]

The use of legal justifications by the Court to support the exercise of executive prerogative can also be observed in both the pre-ratification of and post withdrawal from the Rome Statute. In the 2005 case of *Pimentel, Jr. v. Executive Secretary*, the political system outlined in the Constitution impelled the Court to rule that it cannot enjoin the President to transmit the signed

779. *See Ocampo*, 715 SCRA at 690.

780. *Ocampo*, 715 SCRA at 709 (J. Leonen, concurring opinion).

781. *See* Golia, *supra* note 309, at 142.

782. *Lagman*, 829 SCRA at 216.

783. *Id.* at 178.

784. *Vinuya*, 732 SCRA at 610–11.

785. *Id.*

text of the Rome Statute to the Senate for ratification.[786] It also clarified that ratification is a power solely vested in the President even after the treaty is signed by the Philippine representative; hence, the Senate can only choose to withhold or grant its concurrence in the ratification.[787] Likewise, in the 2021 case of *Pangilinan v. Cayetano*, the Court did not find any grave abuse of discretion or violation of the principle of *pacta sunt servanda* on the part of President Duterte, considering that he followed the procedure for withdrawal as prescribed in the Rome Statute.[788]

In other cases where the Court has deferred to the executive's interpretations or findings, *it has rationalized the political decisions concerned by appreciating determinants of foreign policy, while still referring to constitutional principles and international norms*.

This tendency is commonly seen in cases where economic development served as a main consideration in the formulation of foreign policy. In *Tañada v. Angara*, the Court clarified the meaning of constitutional provisions on economic nationalism and self-reliance. [789] While the Court considered the decision to become part of the WTO as a "judgment call" by policymakers, it examined provisions of the WTO agreement to demonstrate its conformity with the Constitution and the State's policy on fair foreign competition and trade practices.[790]

Alongside economic factors, the Court has considered the sanctity of international financial obligations entered into by the executive department on behalf of the government. In *Guingona, Jr. v. Caragüe*, the Court appreciated the purpose of the assailed automatic appropriation for debt service, which is to manage and pay foreign loans for the survival of the economy.[791] In *Constantino, Jr. v. Cuisa*, the Court likewise upheld the validity of the debt restructuring agreements that were aimed at managing the debt incurred by the Philippines during the Marcos regime.[792] In assessing the legality of the agreements, it considered the possible repercussions on the country's foreign relations if the government unilaterally repudiated

786. *Pimentel, Jr.*, 462 SCRA at 637-38.

787. *Id.* at 637.

788. *Pangilinan, et al.*, G.R. No. 238875, at 78-79.

789. *Tañada*, 272 SCRA at 56-58 (citing PHIL. CONST. art. XII, §§ 10 & 12; art. II, § 19; & art. XIII, § 13).

790. *Tañada*, 272 SCRA at 63.

791. *Guingona, Jr.*, 196 SCRA at 227 & 235.

792. *Constantino, Jr.*, 472 SCRA at 523.

illegitimate loans.[793] Moreover, in *Land Bank v. Atlanta Industries, Inc.*, the Court held that the subject loan agreement was binding as an executive agreement, and pursuant to the principle of *pacta sunt servanda,* its provisions therefore governed the procedure for the procurement of goods.[794]

The foregoing cases show the general trend of respecting the binding effect of international financial obligations and considering the economic benefits of the executive or legislative act in question. These are also illustrations of how the Court, through its decisions and the determinants it identifies, can contribute to the direction of the country's foreign policy.

The aspect of economic development has likewise been appreciated in other areas. The Court recognized that the system of absentee voting was designed to enfranchise qualified Filipinos living abroad, who have historically made significant contributions to the economy.[795] More importantly, the Constitution and the Absentee Voting Act of 2003, as interpreted by the Supreme Court in *Macalintal v. Commission on Elections* and *Nicolas-Lewis v. Commission on Elections*, exempt qualified Filipinos and dual citizens living abroad from the residency requirement for the exercise of their right of suffrage.[796]

3. Direct Review and Indirect Co-Determination of the Implementation of International Obligations

Apart from economic development, the environment is a significant aspect of domestic and international law, as well as a foreign policy determinant. Through the use of "result-oriented domestic and international norms," it is evident that the *Court can review the actions of political branches and indirectly co-determine the implementation of the particular international obligations*.[797]

In *Oposa v. Factoran*, petitioners were seeking to undo the DENR's action of granting timber licenses to various corporations.[798] On the issue of legal standing, the Court notably applied the IEL principle of intergenerational responsibility in interpreting the constitutional right to a balanced and healthful ecology of the petitioners, their generation, and generations yet

793. *Id.*

794. *Land Bank of the Philippines*, 729 SCRA at 31.

795. *Macalintal*, 405 SCRA at 642–43.

796. *Id.* & *Nicolas-Lewis*, 497 SCRA at 659.

797. *See* Golia, *supra* note 309, at 146.

798. *Oposa*, 224 SCRA at 796–97.

unborn.[799] Further, in the 2015 case of *International Service v. Greenpeace*, the Court referred to IEL in scrutinizing the biosafety of genetically modified crops and foods, and the non-implementation of the National Biosafety Network in the stages of risk assessment and public consultation.[800] The main decision found that there were compelling reasons to apply the precautionary principle, which is similarly based on IEL.[801] However, due to the factual milieu of the case, the Court later ruled in a resolution that the controversy was already moot.[802]

4. Balancing Techniques and Exercise of Judgment Affecting Foreign Relations

As can be observed in the previous discussions, foreign relations and policy have various determinants. Hence, they are "best addressed by judicial bodies through traditional balancing[or]proportionality standards of review."[803] When the Court identifies the factors or rights to be balanced in a case and decides the degree of importance that should be given to each of them, *it inevitably exercises judgment that affects foreign relations.*[804] *In this respect, it also plays a role in the management or administration of foreign relations.*[805]

For instance, environmental impact and advocacy of interest groups have not always prevailed as determinants of foreign policy because of other conflicting interests or rights. In the 2008 case of *Akbayan v. Aquino*, the Court upheld the claim of executive privilege and ruled against the release of the offers for the JPEPA.[806] This was notwithstanding that the JPEPA was a matter of public concern because of serious environmental considerations. As stated in the dissenting opinion of Justice Puno, the public has the right to information on the insertion of provisions involving the trade of toxic and

799. *Id.* at 802-03.

800. *International Service for the Acquisition of Agri-Biotech Applications, Inc.*, 776 SCRA at 607.

801. *Id.*

802. *International Service for the Acquisition of Agri-Biotech Applications, Inc.*, 798 SCRA at 290 (resolution of motion for reconsideration).

803. Golia, *supra* note 309, at 149 (citing Daniele Amoroso, *Judicial Abdication in Foreign Affairs and the Effectiveness of International Law*, 14 CHINESE J. INT'L L. 99 (2015)).

804. *Id.*

805. *Id.* at 150.

806. *Akbayan Citizens Action Party ("AKBAYAN")*, 558 SCRA at 553.

hazardous wastes.[807] Nonetheless, the Court ruled that a valid claim of executive privilege was an overriding interest.[808]

Moreover, in the 2004 resolution of *La Bugal-B'Laan Tribal Association, Inc. v. Ramos*, based on the interpretation of the Constitution, the Court allowed the participation of foreign investors through FTAAs or service agreements, in support of the executive department's policy on mining and utilization of natural resources.[809] As against the interests of indigenous peoples or cultural communities in the mining sites, the Court was more inclined to appreciate the potential contribution of the mining industry to the economy of the Philippines for the benefit of the general public.[810]

Nonetheless, the Court has affirmed the right of indigenous peoples to self-determination and to ancestral domain in *Cruz v. Secretary of Environment and Natural Resources*.[811] Although the members of the Court were equally divided, the majority opinion upheld the constitutionality of the provisions of the IPRA.[812] The separate opinion of Justice Puno put this decision in perspective by regarding the protection of indigenous peoples' human rights and environment as part of the international agenda.[813] Further, giving due protection to indigenous people was a way to embrace their culture and history as part of Philippine society.[814]

6. Judicial Assessment of How to Avoid Diplomatic Frictions

Another manifestation of the Court's capability to affect foreign policy is how *it can explicitly or implicitly decide cases "based on its own assessment of how to avoid diplomatic frictions."*[815]

This can mean deferring to the executive department's foreign policy decisions such as in the 2014 case of *Funa v. MECO*. In the said case, the Court respected the executive department's adherence to the One China

807. *Id.* at 680 (J. Puno, dissenting opinion).

808. *Akbayan Citizens Action Party ("AKBAYAN")*, 558 SCRA at 553.

809. *La Bugal-B'Laan Tribal Association, Inc.*, 445 SCRA at 98-128; 206-07; & 220-38 (resolution of motion for reconsideration).

810. *Id.* at 237-38.

811. *Cruz*, 347 SCRA at 161-62.

812. *Id.* at 161.

813. *Id.* at 239 (J. Puno, dissenting opinion).

814. *Id.* at 241.

815. Golia, *supra* note 309, at 151.

Policy.[816] According to this policy, the Philippines recognizes the People's Republic of China as the sole government of China, with Taiwan as a mere part of its territory.[817] The government also adopted the foreign policy of maintaining unofficial relations with Taiwan through MECO.[818] The delicate role of MECO affected the decision of the Court in classifying it as a *sui generis* private entity under the policy supervision of the executive department.[819] In arriving at its decision, the Court appreciated the prevailing power structure that the Philippines has committed to in the international system.

More recently in the 2021 case of *Esmero v. Duterte*, the Court dismissed the petition for *mandamus* to compel President Duterte to file a case against China before the UN Security Council and the International Court of Justice for its encroachment on the Philippines' EEZ.[820] This was grounded on the President's immunity from suit and the lack of any constitutional or statutory mandate upon the President to defend the national territory in the specific manner asserted by the petitioner.[821] The Court also noted that the prior filing of an arbitration case had already put the Philippines' trading relations with China at risk, and that President Duterte had the discretion to take a different approach, notwithstanding the favorable PCA ruling.[822] Although the Court accorded deference to the Chief Executive's power to conduct foreign relations, it provided its own legal justifications for doing so and even took cognizance of the policy to avoid diplomatic friction.[823]

7. Imposition of Procedural Requirement on the Management of Foreign Relations

Another way that the Court indirectly participates in the formulation of foreign policy is the *imposition of a procedural requirement on the management of a foreign relations issue*.[824]

816. *Funa*, 715 SCRA at 256.

817. *Id.*

818. *Id.* at 286.

819. *Id.* at 291.

820. *Atty. Romeo M. Esmero*, G.R. No. 256288, at 7.

821. *Id.* at 6.

822. *Id.*

823. *See id.*

824. Golia, *supra* note 309, at 148.

In *Pangilinan v. Cayetano*, *more than reviewing the legality of the executive's conduct*, the Court dictated specific measures that must be taken in the exercise of the power to withdraw from treaties.[825] This was a way of *indirectly yet actively participating in the management of foreign relations*.[826]

Notably, while the questioned act of unilateral withdrawal by President Duterte was already found to be *fait accompli*, the Court still aimed to set guidelines for future cases of treaty withdrawal.[827] The Court provided that the President's discretion to withdraw from a treaty finds basis in its duty to enforce the Constitution and other laws.[828] Hence, he has wide leeway to withdraw from treaties in cases where there is a violation of the highest law of the land or even of domestic statutes.[829] Moreover, the power to withdraw is qualified by the "extent of legislative involvement" at the time the Philippines entered into the treaty or when it became effective.[830] In other words, there can be no unilateral withdrawal by the President if it will defeat the legislative intent found in prior or succeeding laws, or when the Senate has expressly provided that the same concurrence for accession also applies to any future withdrawal.[831]

8. The Judicial Power to Review the Constitutionality of Treaties, Agreements, Laws, and Executive Acts, and Its Effect on Foreign Policy

Apart from being able to prescribe measures or procedures relating to foreign relations, it cannot be overlooked that *the Court can definitively influence and determine the bounds of foreign policy by having the final say in the interpretation of the Constitution and the validity of treaties, executive agreements, and laws*.

Specifically, in *Province of North Cotabato v. GRP*, the Court struck down the MOA-AD as unconstitutional.[832] In effect, it influenced the executive department in renegotiating the terms of the agreement within the context of a peace process to conform to the government's position on internal self-determination of the Bangsamoro people.[833] After the consequent

825. *Pangilinan, et al.*, G.R. No. 238875, at 51-56.

826. Golia, *supra* note 309, at 147.

827. *Pangilinan, et al.*, G.R. No. 238875, at 50-51, & 64.

828. *Id.* at 99-100.

829. *Id.*

830. *Id.*

831. *Id.*

832. *Province of North Cotabato*, 568 SCRA at 521.

833. *Id.* at 463.

renegotiation with the MILF, the Court then emphasized in the case of *PHILCONSA v. GPH* that the power to enact an organic act for an autonomous region of the Bangsamoro people is vested in Congress.[834] Hence, while the executive branch negotiated and entered into the assailed preparatory peace agreements, Congress has the prerogative to enact the necessary law to give legal effect thereto.[835]

In a series of cases relating to national security and military alliance, the Court, guided by constitutional limits, has upheld the validity of treaties and agreements with the U.S. In the 2000 case of *Bayan v. Zamora*, the Court clarified that the Constitution requires Senate concurrence in the VFA, a treaty that allows the entry of foreign troops in the Philippines on a temporary basis.[836] In the 2002 case of *Lim v. Executive Secretary*, according to the Court, the joint exercises of the Philippine and American armed forces were legitimately within the scope of the broad activities authorized by the VFA.[837] Later, in the 2016 case of *Saguisag v. Ochoa, Jr.*, the Court also ruled in favor of the constitutionality of the EDCA as an executive agreement, considering that it only implemented an earlier treaty that allowed the entry of foreign troops.[838]

Through its review power, the Court can affect the dynamic of military alliances when deciding the legality of pertinent treaties and executive agreements. On a related note, key military alliances such as that with the U.S. also have geo-political implications in safeguarding the national territory of the Philippines and ensuring global security. This is significant in a political setting where the PCA arbitral award remains difficult to enforce.

Moreover, the Court's impact on foreign policy has created support for the global anti-terrorism campaign. In the 2010 case of *Southern Hemisphere v. ATC*, it supported the policy of the State to counter terrorism by disallowing the application of the void-for-vagueness and overbreadth doctrines to criminal statutes such as the Human Security Act.[839] In the 2021 case of *Calleja v. Executive Secretary*, however, the Court permitted a facial challenge against several provisions of the Anti-Terrorism Act of 2020, as the petitions "sufficiently raised concerns regarding freedom of speech, expression, and its

834. *Philippine Constitution Association (PHILCONSA)*, 811 SCRA at 300.

835. *Id.*

836. *Bayan*, 342 SCRA at 481-83.

837. *Lim*, 380 SCRA at 755.

838. *Saguisag*, 779 SCRA at 475.

839. *Southern Hemisphere Engagement Network, Inc.*, 632 SCRA at 186.

cognate rights."[840] Only two provisions among the many counterterrorism measures in the law were held to be unconstitutional.[841] Meanwhile, in the 2017 case of *Lagman v. Medialdea*, the Court also clarified that the existence of terrorism did not preclude the President from exercising his constitutional power to declare martial law on account of actual rebellion and when public safety requires it.[842] Likewise, the sufficiency of the factual bases for the President's decision to declare martial law is reviewable by the Court as provided in the Constitution.[843]

The review of the foregoing cases shows that the Court, in the exercise of its judicial functions, has taken different approaches to foreign policy matters in order to adjust to the demands of the time. The Court referred to constitutional principles and international norms, as well as assessed various determinants of foreign policy, suggesting that these considerations are not limited to the decision-making process of the executive department.

Guided by the historical progression of judicial involvement, the next Section will assess the Court's usage of the political question doctrine.

C. Political Question Doctrine

The Supreme Court, in the trend of recent case law, has indirectly — and probably unconsciously — co-determined matters of foreign policy. In other jurisdictions, courts appear to progressively reduce the use and scope of doctrines that render issues non-justiciable.[844] An example of this is the political question doctrine,[845] which is also present in the Philippine jurisdiction.

In various Philippine cases discussed in the previous Chapter and Sections, the Court did not shy away from expressing its views on the conduct of the political branches of government. Even in cases where the Court deferred to the interpretation and discretion of the executive, the former still appreciated foreign policy considerations behind certain actions and provided its own legal justifications for adopting its ruling. Thus, it is observed that resort to the political question doctrine appears to have declined.

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840. *Calleja, et al.*, G.R. No. 252578, at 61.

841. *Id.* at 232 (citing The Anti-Terrorism Act of 2020, §§ 4 & 25, para. 2).

842. *Lagman*, 829 SCRA at 215.

843. *Id.* at 178.

844. Golia, *supra* note 309, at 142.

845. *Id.*

The most recent example is the case of *Pangilinan v. Cayetano*, where the Court laid down guidelines regarding the need for Senate concurrence in treaty withdrawals initiated by the President — a matter clearly within the realm of foreign policy.[846] Contrary to the trend in the U.S. where the political question doctrine is "almost untouchable" when deciding the manner by which to withdraw from treaties,[847] the majority opinion in *Pangilinan* appears to take the view that treaty withdrawals are not entirely protected by the political question doctrine.[848] Particularly, the Court prescribed a procedure for future treaty withdrawals, which are to be implemented by the political branches of the government. [849]

This illustrates how the Court is empowered, through the exercise of its review power, to significantly affect the management and administration of foreign relations.

D. A More Empowered Court

For years, the Court has been traditionally engaged to interpret the economic provisions of the Constitution and to rule on the validity of international treaties and local legislation. It is observed that apart from dealing with economic policy, the Court has also rendered decisions on non-traditional areas. It has been involved in many other facets that relate to foreign policy — moving to human rights, IHL, environmental law, national security, and anti-terrorism, among others.

Considering the progression of jurisprudence, the highest Court appears to be a more empowered court in the present, as it effectively develops and implements review norms on the conduct of a wider array of foreign affairs.[850] Guided by concrete and justiciable legal standards in foreign relations law, such as constitutional principles and international law, the Court, to a limited extent, contributes to the development and exercise of foreign policy[851] — a function that has been traditionally lodged with the President alone. If viewed through the lens of global administrative law, the Court, together with the domestic courts of other jurisdictions, is potentially empowered to "take part

846. *Pangilinan, et al.*, G.R. No. 238875, at 55-56.

847. Golia, *supra* note 309, at 148.

848. *Pangilinan, et al.*, G.R. No. 238875, at 79.

849. *Id.* at 51-56.

850. *See* Golia, *supra* note 309, at 139.

851. *See id.* at 138.

of the regulation [or] administration of global governance" insofar as foreign relations are concerned.[852]

To emphasize, the Court — may it be voluntarily or involuntarily — has been increasingly participating in the exercise of foreign relations policy by contributing to the set of legal norms that the political branches are expected to follow presently and prospectively.[853] This is notwithstanding the instances where the Court adopts the position of the political branches of the government.[854] Analytically, the Court's participation in the area of foreign relations is unchanged by whether its own independent assessment affirms that of the executive department.[855] Moreover, such a level of participation in foreign affairs remains arguably proper for being within the Court's review power and jurisdiction as provided in the Constitution.[856]

V. CONCLUSION

It is inevitable for constitutional courts such as the Philippine Supreme Court to decide on issues relating to foreign policy.[857] As seen in jurisprudence, the Court has resorted to constitutional principles and international law standards in determining the legality of the actions of the executive branch. Through the progressive use of constitutional legal principles and international law, the Court has become part of the evaluative process of foreign policy.

While the use of constitutional principles and international law is among the conventional ways of deciding cases, the practices of courts in other jurisdictions suggest that these methods are also used to evaluate and indirectly influence foreign policy.

The trend in Philippine jurisprudence shows that foreign policy is no longer exclusively within the realm of the President's political discretion. The Court is increasingly developing and implementing review norms in foreign relations law, thereby influencing administrative action.[858] Likewise, it has been progressively conditioned by the expected effect or result of its

852. *Id.* at 140.

853. *Id.* at 157.

854. *See id.* at 157.

855. *Id.*

856. *See* PHIL. CONST. art. VIII, §§ 1 & 5 (2) (a) & BERNAS, COMMENTARY, *supra* note 166, at 968.

857. Golia, *supra* note 309, at 136.

858. *Id.* at 139.

decisions.[859] Thus, more than being an external reviewer of foreign relations issues, the Court has shown its capacity to contribute to the implementation and development of legal patterns in the context of foreign policy.[860]

859. *See id.* at 134.

860. *See* Golia, *supra* note 309, at 134-36.