Analyzing the No-Standing Provisions of The Mutual Legal Assistance Treaties on Criminal Matters (MLATS) Entered by the Philippines and the Implications of the Supreme Court's Decision in *People v. Sergio* on MLATS

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I. INTRODUCTION

A. The New Breed, the Warriors, and the Weapons

> *With the global village shrinking at a rapid pace, propelled as it is by technological leaps in transportation and communication, we need to push further back our horizons and work with the rest of the civilized [N]ations and move closer to the universal goals of 'peace, equality, justice, freedom, cooperation[,] and amity with all nations.' In the end, it is the individual who will reap the harvest of peace and prosperity from these efforts.*
>
> — Justice Reynato S. Puno[1]

1. Secretary of Justice v. Lantion, 343 SCRA 377, 393-94 (2000) (citing PHIL. CONST. art. II, § 2) (emphasis supplied).

Technology, particularly the internet,[2] has enabled one to communicate with another who lives on the other side of the world.[3] The internet propelled different industries to operate from one place to another and allowed commerce to flourish into various places using the tip of one's fingers.[4] With the advent of the internet, people can even render services to someone living in another country.[5] Indeed, the internet provided a more convenient platform for one to not only send messages of personal character but also venture into different commercial activities.[6] The internet also enabled humans to access different information located that is a thousand (or more) miles away from his or her home using his or her phone, computer, or computer-tablet.[7] With this, it made the Earth that is so vast, small — it works as if putting all countries in a small device.

This convenience that the internet provides in accessing information and in communicating for personal and commercial purposes, unfortunately, is not entirely good as it may seem. The internet has its dark side. It is used to commit fraud, to sell illicit drugs, and to exploit human beings as slaves.[8]

2. Internet is not accurately defined in Philippine Law and Jurisprudence. In *Disini, Jr. v. Secretary of Justice*, the internet is treated as "a system that allows a user to link to other computers and access an array of activities, libraries, and services." Benjamin Lawrence Patrick E. Aritao & John Stephen B. Pangilinan, *Online Sexual Exploitation of Children: Applicable Laws, Casework Perspectives, and Recommendations*, 63 ATENEO L.J. 185, 187 (2018) (citing Disini, Jr. v. Secretary of Justice, 716 SCRA 237, 297-98 (2014)).

3. *See* Aritao & Pangilinan, *supra* note 2, at 187.

4. *See generally* Patricia Nakache, *Why E-Commerce Is Flourishing*, FORBES, Aug. 3, 2010, *available at* https://www.forbes.com/2010/08/02/groupon-facebook-shopstyle-technology-ecommerce-social-media.html#38735b8212be (last accessed Sep. 30, 2020).

5. *Id.*

6. *Id.*

7. *Id.*

8. Aritao & Pangilinan, *supra* note 2, at 188 (citing Philippine National Police — Anti-Cybercrime Group, Common Types of Internet Fraud Scams, *available at* https://pnpacg.ph/main/gad-corner/iec-materials/2-uncategorised/172-common-types-of-internet-fraud-scams (last accessed Sep. 30, 2020)); Katherine Adraneda & Aurea Calica, *Illegal drug sales on Internet booming*, PHIL. STAR, Feb. 28, 2002, *available at* https://www.philstar.com/headlines/2002/02/28/152174/illegal-drug-sales-internet-booming (last accessed Sep. 30, 2020); & Judge Herbert B. Dixon, Jr., Human Trafficking and the Internet★ (★and Other Technologies, too), *available at* https://www.americanbar.org/groups/judicial/

These offenses are not only committed within a State, but they are also committed across borders.[9] This phenomenon created a new species of crimes and modified the traditional treatment of transnational offenses.

Because of this plague that emerged in the cyber landscape travelling almost at the speed of light,[10] the borders of States were virtually removed, which resulted in the confusion as to who should prosecute these offenses.[11] In response, States agreed to cooperate and utilized the pre-existing instruments concluded among each other to fight the cyber plague.[12]

This Note looks into the nature of transnational cybercrime being a crossbreed of transnational crime and cybercrime, and the nature of Mutual Legal Assistance Treaties on Criminal Matters (MLATs) entered by the Philippines to combat transnational crimes. Then, this Note aims to analyze the interplay of search and seizure laws of foreign States and the Philippines in relation to cybercrimes and how issues may arise from that interplay.

This interplay shows the problems on law enforcement. First, who can exercise jurisdiction over these offenses? Second, where is the *situs* of the crime and the search and seizure? Third, when a State conducts a search in a computer located to another State, what are the factors to be considered in determining the *situs* of the search considering that cybercrimes heavily involve the free flow of data? Finally, what law applies in questioning these searches?

For the first query, the previous developments in Public International Law apply in the case of transnational crimes. That said, the principles on

publications/judges_journal/2013/winter/human_trafficking_and_internet_and_other_technologies_too (last accessed Sep. 30, 2020).

9. *See* Nadina Foggetti, *Transnational Cyber Crime, Differences Between National Laws and Development of European Legislation: By Repression?*, 2 MASARYK UNIV. J.L. & TECH 31, 34-37 (2008).

10. Internet data is processed through computers and eventually converted to radio waves which travels exactly at the speed of light. Bernadette Jackson, Can information travel faster than light?, *available at* https://electronics.howstuffworks.com/future-tech/information-travel-faster-than-light1.htm (last accessed Sep. 30, 2020).

11. *See* Foggetti, *supra* note 9, at 34-37.

12 *Id. See also* Convention on Cybercrime, *opened for signature* Nov. 23, 2001, ETS No. 185, arts. 25 & 27 [hereinafter Budapest Convention].

prescriptive jurisdiction apply (i.e., territoriality, nationality, protective, universality, and passive personality).[13]

For the second and third queries, these issues are unresolved in the Philippine context. However, this Note contains a survey of laws and jurisprudence, and analyzes these in a manner that would shed a light on the issues presented herein.

Finally, the issue on the conflict of laws may be analyzed by looking at how different jurisdictions treat transboundary offenses, e.g., the United States (U.S.) and other Federal Jurisdictions.

These issues are synthesized in the Third Section of this Chapter.

As mentioned, this Note looks into the nature of transnational cybercrime. This will be analyzed in detail in its Second Chapter. At present, States have general enforcement mechanisms to combat transnational crimes (e.g., MLATs).

Since 1988, the Philippines has entered into different bilateral and multilateral treaties that involve MLA on Criminal Matters. The pioneer bilateral treaty on MLA which was signed in 1988 is the Treaty Between Australia and the Republic of the Philippines on Mutual Legal Assistance in Criminal Matters (AUS-PH MLAT).[14] The Treaty Between the Government of the United States of America and the Government of the Republic of the Philippines on Mutual Legal Assistance in Criminal Matters (U.S.-PH MLAT)[15] followed the AUS-PH MLAT. The Philippines then entered into other MLATs with the People's Republic of China (China-PH MLAT),[16]

13. JOAQUIN G. BERNAS, S.J., INTRODUCTION TO PUBLIC INTERNATIONAL LAW 132 (2009 ed.) [hereinafter BERNAS, PUBLIC INTERNATIONAL LAW]. *See also* NEIL BOISTER, AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW 138; 142; 144; 145; & 147 (1st ed.).

14. Treaty Between Australia and the Republic of the Philippines on Mutual Legal Assistance in Criminal Matters, Aus.-Phil., Apr. 28, 1988, 1770 U.N.T.S. 209 [hereinafter AUS-PH MLAT].

15. Treaty Between the Government of the United States of America and the Government of the Republic of the Philippines on Mutual Legal Assistance in Criminal Matters, U.S.-Phil., Nov. 13, 1994, 1994 U.N.T.S. 309 [hereinafter U.S.-PH MLAT].

16. Treaty between the Republic of the Philippines and People's Republic of China concerning Mutual Legal Assistance on Criminal Matters, China-Phil., Oct. 16, 2000 [hereinafter China-PH MLAT].

Special Administrative Region of Hong Kong (HK-PH MLAT),[17] Swiss Confederation (Swiss-PH),[18] Republic of Korea (PH-Korea MLAT),[19] Kingdom of Spain (Spain-PH MLAT),[20] and the United Kingdom (U.K.-PH MLAT).[21] The only multilateral MLAT entered by the Philippines, i.e., ASEAN Treaty on Mutual Legal Assistance in Criminal Matters (ASEAN MLAT),[22] is also discussed. The first multi-lateral treaty entered by the Philippines relating to cybercrimes also contains MLA provisions, i.e., the Budapest Convention.[23]

Some of these MLATs contain a provision that no private individual has a right to move for the suppression or exclusion of evidence obtained via the MLAT.[24] In the U.S., for example, there is a strict adherence to this rule that even if there is an allegation that the foreign State, who sent evidence that was requested by the domestic State, acted in violation of its own laws, the person

17. Agreement Between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the Republic of the Philippines Concerning Mutual Legal Assistance in Criminal Matters, H.K.-Phil., Feb. 23, 2001, 2754 U.N.T.S. 145 [hereinafter HK-PH MLAT].

18. Treaty on Mutual Legal Assistance in Criminal Matters Between the Republic of the Philippines and the Swiss Confederation, Phil.-Switz., July 9, 2002 [hereinafter Swiss-PH MLAT].

19. Treaty Between the Republic of the Philippines and the Republic of Korea on Mutual Legal Assistance in Criminal Matters, Phil.-S. Kor., June 3, 2003, Treaty No. 53251 [hereinafter PH-Korea MLAT].

20. Treaty on Mutual Legal Assistance in Criminal Matters the Republic of the Philippines and the Kingdom of Spain, Phil.-Spain, Mar. 2, 2004 [hereinafter PH-Spain MLAT].

21. Treaty on Mutual Legal Assistance in Criminal Matters Between the United Kingdom of Great Britain and Northern Ireland and the Republic of the Philippines, U.K.-Phil., Sep. 18, 2009, Treaty No. 52700 [hereinafter U.K.-PH MLAT].

    Additionally, the Philippines has signed a treaty with Russia on Mutual Legal Assistance on 17 November 2017 in Manila, but it has not yet been concurred in by the Senate. *See* The Kremlin, Law ratifying Russia-Philippines agreement on mutual legal assistance in criminal cases, *available at* http://en.kremlin.ru/acts/news/58197 (last accessed Sep. 30, 2020).

22. Treaty on Mutual Legal Assistance in Criminal Matters, *opened for signature* Jan. 17, 2006, ASEAN Treaty No. 195 [hereinafter ASEAN MLAT].

23. Convention on Cybercrime, *opened for signature* Nov. 23, 2001, ETS No. 185, ch. III, arts. 25-34 [hereinafter Budapest Convention].

24. *See, e.g.*, U.S.-PH MLAT, *supra* note 15, art. 1, ¶ 4.

against whom the search was conducted and is a party to the case cannot move for its exclusion or suppression.[25] This raises a doubt as to the validity of the provision considering that there are MLATs that do not provide for the said no-standing provision, which in effect the evidence obtained from an MLAT request containing the provision is automatically admissible because the accused or a private individual cannot move for the exclusion of the evidence.[26]

B. Statement of the Problem

The development of MLATs and the laws on transnational crimes and cybercrimes introduced various issues that may affect the prosecution of a commission of a transnational cybercrime in the Philippines. The problems presented by this Note, as illustrated in the preceding Section, pertain to those that are specific to the U.S.-PH, PH-China, PH-HK, PH-Spain, and ASEAN MLATs and those that apply to MLATs in general, making the U.S.-PH MLAT as an example. All of which are analyzed within the context of transnational cybercrimes. There are two main issues presented in the case and each main issue has sub-issues:

First Main Issue — Does the prohibition or deprivation of the right to question the legality of searches and seizures in the MLAT violate the Philippine Constitution because some MLATs do not have the said provision?

Second Main Issue — If a person can question the search and seizure conducted to him or her by a foreign State via MLAT, what law will apply in determining the validity of the search?

(1) Is the *situs* of the search and seizure material in transnational cybercrime searches and seizure? If so, what is the *situs* of the search and seizure in a transnational cybercrime?

(2) If the *situs* of the search is the Philippines, can it be considered that the Requested State (whose acts are made through an MLAT) is a State-actor for the Republic of the Philippines, thus Philippine law applies? Assuming that the Philippines did not consent to the search conducted by a foreign State within the

25. U.S. v. Davis, 767 F 2d 1025, 1030 (2d Cir. 1985) (U.S.) (where the Federal Court held that a private person cannot challenge the search conducted against him or her made under the provisions of the MLAT containing the prohibition).

26. *See generally* U.K.-PH MLAT, *supra* note 21.

former's territory, can the Philippines disregard the evidence obtained therefrom?

(3) If the *situs* of the search is a foreign State, is the consent of that foreign State material?

(a) If the foreign State used its own Law Enforcement Agencies (LEA) to conduct searches and seizures regardless whether the searches and seizures were conducted by its own initiative or by an MLA request, can the person searched there question the validity of the search and seizure in the Philippines?

(b) If it is the Philippine LEA that has done the search and seizure abroad with the consent of that State, will the Philippine LEA be considered as an agent of that State, which in effect the Act of State doctrine applies?

(c) If the Philippine LEA has done the search and seizure abroad without the consent of that State, can the Philippine court, to whom the evidence seized is being presented, render the evidence obtained by Philippine LEA inadmissible?

C. Main Argument

Despite the decades of effectivity of the Mutual Legal Assistance Treaty on Criminal Matters (MLAT) between the Philippines and Australia, and the emergence of new MLATs, there has been no law or jurisprudence that directly addresses the issues that surround the MLAT. Among these are the issues on the prohibition against any private person from questioning the searches done by the Requested State's LEA. This Note provides that the prohibition from questioning the searches done by a Requested State's LEA and the prohibition to move for the suppression or exclusion of evidence is void for violating the equal protection clause.

Then, the Note proceeds to analyze the doctrines applicable in scrutinizing the searches and seizures conducted by the Requested State. This analysis begins with the determination of the *situs* of the search to clear the confusion on the technicalities of cyber searches and seizures. Then, when the *situs* is the Philippines and it had consented to the search and seizure by domestic and/or foreign LEAs, Philippine law applies because the foreign LEA may be deemed to be agents of the Philippine government. If the search and seizure by foreign LEA in the Philippines without the consent of the Philippine government, the evidence obtained therefrom may be admitted

into evidence, but the foreign LEA may be held liable for the injury caused to the accused.

When the *situs* is a foreign State and the search and seizure was done by the LEAs therein and initiated either by an MLA request or the initiative of that State, the Act of State Doctrine applies (i.e., the Court will not determine the validity of the search and seizure done by foreign LEAs in their own territory). If the LEAs are Philippine LEAs and the cybercrime search and seizure were made with the consent of the foreign State, the Philippine LEAs acting in a foreign State is an agent of that State, and the Act of State doctrine likewise applies. If, however, the Philippine LEAs acted without the consent of the foreign State, the evidence may be admissible — without prejudice to a claim against the Philippine LEA — because the constitutional and statutory protections on illegally obtained evidence do not have extraterritorial reach.

Finally, this Note will then provide recommendations in improving the search and seizure mechanisms provided by MLATs and recommendations for the rules and laws that may be adopted in requesting for and appreciating the evidence obtained through the searches and seizures conducted by virtue of MLATs.

D. Definition of Terms

Considering the technicalities involved in this Note, the following are the terms and their definitions that are used in this Note:

(1) *Mutual Legal Assistance Treaty on Criminal Matters (MLATs)* — an instrument concluded between two or more States in assisting a State-Party regarding law enforcement.[27]

(2) *Mutual Legal Assistance (MLAs)* — it is the act done by a State to assist another State in the latter's law enforcement.[28]

(3) *Requesting State* — it is the State that aims to prosecute a perpetrator and the one that requests from another State to transmit evidence to the former or effectuate a particular law enforcement procedure (e.g., search and seizure). Additionally, in the context of this Note, the requesting State is the one that prosecutes a person for a violation of penal law. Finally, all mentions of the term "requesting State" in this Note refers to the Philippines.

27. *See generally* BOISTER, *supra* note 13, at 198.

28. *Id.*

(4) *Requested State* — it is the State over whom assistance is sought.

(5) *Transnational Cybercrime* — it is a cybercrime that is planned, committed, or affected outside the territory of one State.[29]

(6) *Jurisdiction* — in the context of this Note, the term refers to both law enforcement and judicial jurisdictions, except when otherwise indicated.

E. Objectives of the Study

This Note aims to:

(1) Discuss and analyze the nature of transnational cybercrimes;

(2) Provide an in-depth analysis of the nature of the MLATs entered into by the Philippines within the context of transnational cybercrimes;

(3) Provide an analysis of the Constitutionality of the prohibition to question the search and seizure conducted under the different MLATs entered by the Philippines;

(4) Provide a clarification on the *situs* of searches and seizures of things relating to cybercrimes;

(5) Provide an analysis of the law applicable whenever a foreign State conducts a search and seizure by virtue of an MLAT on computer data, which is the *corpus delicti* of a transnational cybercrime, that is found in or originated from the Philippines;

(6) Provide an analysis of the effects of a State's consent when transboundary search and seizure occur; and

(7) Provide recommendations in improving the Philippine mechanisms in combatting transnational cybercrime vis-à-vis MLAs.

F. Methodology

This Note involves the extensive analysis of the legality of MLAT provisions entered by the Philippines, the effects of other treaties entered into by the Philippines to the U.S.-PH, PH-China, PH-HK, PH-Spain, and ASEAN

29. An elaboration to this definition will be provided *infra*. *See also* United Nations Convention Against Transnational Organized Crime, *ratified* May 28, 2002, 2225 U.N.T.S. 209 [hereinafter UNCTOC].

MLATs, the issues on the *situs* of searches and seizures made under the provisions of MLATs regarding the commission of transnational cybercrimes, the law applicable in questioning those searches and seizures, and the effects of questioning those searches and seizures in the Requested State's court to the proceedings in the Requesting State.

The Author will survey the jurisprudence involving the constitutionality of treaties and other laws. The Author will also survey the appreciation of different jurisdictions on transnational offenses and MLAT provisions on searches and seizures.

The Author will then analyze the issues, laws, and jurisprudence in two sets: the first set pertains to the analysis on the issue surrounding the MLATs, and the second pertains to the issues governing the search and seizure regarding cybercrimes. The first set involves the harmonization of the Philippine Constitution, the U.S.-PH, PH-China, PH-HK, and PH-Spain MLATs, and other MLATs entered into by the Philippines in a transnational cybercrime aspect. The second set involves the analysis on the search and seizure provisions of MLATs as applied to a transnational cybercrime perspective.

Finally, the Author will provide the conclusion on the two general issues concerning MLATs and recommendations to improve the mechanisms of MLATs in the domestic law aspect.

G. Significance of the Study

The analyses and findings of this Note may be used by the bench, the bar, and the public in the enforcement of cybercrime laws and the prosecution of any violations therein in a transnational perspective considering that transnational cybercrime law is a fairly new field in law.

The court and the counsels may use the analyses of this Note in determining the constitutionality of the U.S.-PH, PH-China, PH-HK, and PH-Spain MLATs. The recommendations provided may pave a way for the Executive to renegotiate the current MLATs to conform to the changes in the circumstances brought about by the advent of transnational cybercrimes. At *status quo*, these analyses will guide the Philippine LEAs in requesting searches and seizures by virtue of the MLAT by making sure that there are specific instructions in the requests that conform to the laws of the Requested State and the Philippines.

As regards the second set of analyses, cybercrime courts and other courts handling cybercrime cases may use those analyses in deciding cases that used the provisions of other MLATs. These analyses, as mentioned, aim to resolve

the jurisdictional and conflicts of law issues that surrounds the execution of MLATs. Since MLATs as applied to transnational cybercrime law is a new field, the findings of this Author may guide the bench in the nature of MLAT mechanisms as applied to transnational cybercrimes and may give the bench and the bar the warning on the issues that surround MLATs.

Furthermore, the discussion on transnational crimes have been expanding recently and research thereon is necessary to guide legal professionals.[30] The Philippines is also the hub of Southeast Asia in investigating Online Sexual Exploitation of Children (OSEC), i.e., the Philippines will be a center of international law enforcement cooperation to combat OSEC.[31] As law enforcement against OSEC greatly involves the use of MLAT, this Note will be helpful as there has been no guiding study on this matter.

H. Scope and Limitation

The Note is limited to transnational cybercrimes because they may involve situations where the search and seizure are made against a person located in the Philippines, but the searching authority is a Foreign State.[32]

The issues presented by the Author are analyzed within the Philippine context. Hence, it is assumed that any reference to "Requesting State or Party" or "Domestic State" pertains to the Philippines. Furthermore, the investigation, prosecution, and conviction referred herein are done by Philippine LEAs and judicial authorities, whereas searches, seizures, and transmittals referred herein are done by Foreign States. The Foreign States being referred are those that have MLATs with the Philippines or Parties to the Budapest Convention because MLAs cannot occur without an existence of a Treaty or an international agreement. This does not mean however that the analyses herein do not apply to MLATs and other international agreements

30. *See* People v. Sergio, G.R. No. 240053, Oct. 9, 2019, at 11, *available at* http://sc.judiciary.gov.ph/7732 (last accessed Sep. 30, 2020).

31. Michelle Abad, *FAST FACTS: Why online sexual exploitation of children happens in the Philippines*, RAPPLER, Feb. 11, 2020, *available at* https://rappler.com/newsbreak/iq/things-to-know-online-sexual-exploitation-children-philippines (last accessed Sep. 30, 2020).

32. Rambo Talabong, *Europe's most wanted online child sex offender nabbed in Cebu*, RAPPLER, July 25, 2019, *available at* https://www.rappler.com/nation/236280-europe-most-wanted-child-sex-offender-arrested-cebu-july-2019?utm_medium=Social&utm_campaign=Echobox&utm_source=Facebook&fbclid=IwAR1xbn5CV9XFgbB8e2LCYqa8sGoICJF6KeP2UekpLCfYiDHIYmdO2ji7wpU#Echobox=1564043777 (last accessed Sep. 30, 2020).

that the Philippines will enter in the future that relate to transnational cybercrimes or plain cybercrimes.

Furthermore, the Treaties involved in this Note are analyzed primarily in a domestic law perspective considering that the Philippines is a dualist country (this will be discussed further in the succeeding Chapters) and secondarily in an international law perspective when necessary. The principles under conflict of laws will also be tackled regarding the law governing the searches and seizures conducted by virtue of the MLATs.

The MLATs are analyzed primarily on their provisions on standing and searches and seizures.

It is also assumed that the Philippines already acquired the jurisdiction over the offense because the analyses herein are premised on the fact that the evidence obtained from the search and seizure will be used in a criminal prosecution in the Philippines.

The doctrines on searches and seizures are not extensively discussed except insofar as standing is concerned because the question mainly posed by this Note is whether a private person can question the search and seizure against him or her and whether the law on search and seizure of the Requested State applies in questioning the search and seizure, insofar as cyber privacy is concerned, and insofar as state-agency exists.

The issue on the credibility of obtained evidence by virtue of MLATs will not be discussed in this Note because the discussions herein center on the legal implications of the searches and seizures provisions of the MLATs and not on the weight of the evidence. Furthermore, the question on the credibility of the evidence is primarily a factual issue, and this Note involves primarily the legal issues concerning MLATs in relation to transnational cybercrime.

I. Organization

This Note begins by laying down the basic premises of MLATs and transnational cybercrimes. It then proceeds with the survey of laws and jurisprudence and other authorities to analyze the problems mentioned in this Chapter.

Chapter Two of this Note discusses different law enforcement mechanisms of States in combatting transnational crimes. It also discusses the MLATs entered by the Philippines with different States with the context of the provision prohibiting private individuals from questioning the evidence obtained via the treaty.

Chapter Three of this Note explains the characterization of treaties in the Philippines considering that it is a dualist State. Chapter Three also explains how a treaty should be construed in line with the developing trends in international law in giving paramount interest to human rights.

Chapter Four proceeds with the scrutiny of laws vis-à-vis its constitutionality. It discusses the conditions before striking down a law for unconstitutionality, such as harmonization with other laws and the Constitution, then to the grounds to declare a law unconstitutional. The grounds mentioned thereat are those that are relevant to the problems presented herein.

Chapter Five provides the analysis of the MLATs entered by the Philippines. The discussion is focused on the constitutionality of the prohibition to question the search and seizure made under an MLAT.

Chapter Six concludes the answers found by the Author on the questions presented in this Note.

Chapter Seven provides a recommendation to improve the transnational law enforcement mechanisms of the Philippines vis-à-vis cybercrimes by modifying the no-standing provisions of MLATs.

II. WEAPONS USED BY STATES

Now that the new enemy of States has been introduced, the Author introduces the instruments and mechanisms used and can be used by the States in combatting transnational cybercrimes. The Author begins with the discussion on one of the oldest forms of enforcement of transnational offenses, (i.e., extradition). Then, the Author proceeds with the discussion on letters rogatory and the fairly new law enforcement mechanism, i.e., MLATs. Finally, the Author makes a comparison of the three mechanisms, which includes the discussion on their appropriate uses.

A. Extradition

Fr. Joaquin G. Bernas, S.J., a renowned scholar of Constitutional and Public International Law, defines extradition as "the surrender of an individual by the [S]tate within whose territory he [or she] is found to the [S]tate under whose laws he is alleged to have committed a crime or to have been convicted of a crime."[33] Extradition can only be done if (1) there is a treaty between the State prosecuting a person being extradited and the State where he or she is found, (2) the process over which extradition is executed complies with the

33. BERNAS, PUBLIC INTERNATIONAL LAW, *supra* note 13, at 174.

laws of the State where the person being extradited is found, and (3) the crime involved is neither political nor religious.[34]

B. Letters Rogatory

A letter rogatory "involves the communication of an official request for legal assistance to a foreign [S]tate, the assistance to be executed by that [F]oreign [S]tate's officials."[35] In the Philippines, the rules on letters rogatory are found in the Rules of Civil Procedure,[36] but the Supreme Court made the rules on Modes of Discovery, which provides for the rules on letters rogatory, applicable to criminal cases as a consequence of the institution of the civil action. [37] Usually, a letter rogatory operates in a court-to-court communication wherein a domestic court having jurisdiction over a particular case requests for the taking of testimony a person who is found within the territorial jurisdiction of the foreign court.[38] The grant of the request via letter rogatory is purely discretionary on the part of the foreign court because the grant of letter rogatory is always subject to the laws of the foreign court.[39]

C. Mutual Legal Assistance Treaties on Criminal Matters (MLATs)

The term Mutual Legal Assistance (MLA) has no concrete definition that was provided by authorities because MLA is decided by States through treaties.[40] MLAs cover various aspects of law enforcement from investigation to surrender of witnesses.[41] The mechanism of MLAs involves a Requesting State or the State where a person is being investigated or prosecuted and a Requested State or the State where an evidence (object, document, or a person who can provide for testimonial evidence) for the investigation or prosecution of an offense or the effects of a crime, such as the proceeds of

34. *Id*. The requirement as regards the legal compliance on the State where the person being extradited includes the compliance to the due process requirements. *Id*. *See also Lantion*, 343 SCRA at 397.

35. BOISTER, *supra* note 13, at 197.

36. 1997 REVISED RULES OF CIVIL PROCEDURE, rule 23.

37. Aritao & Pangilinan, *supra* note 2, at 220 (citing People v. Webb, 312 SCRA 573, 595 (1999) & *Webb*, 312 SCRA at 593-97 (C.J. Davide, Jr., separate opinion)).

38. *See* BOISTER, *supra* note 13, at 197-98.

39. *Id*. at 198.

40. *Id*. at 199-200.

41. *Id*. at 200.

money laundering, may be found.[42] Basically, MLAs operate when a Requesting State sends a request, which is in accordance to the provisions of the States' MLAT, to the Requested State, and then the latter executes the request in accordance with its domestic laws, contents of the request, and/or provisions of the MLAT.[43]

The obligations of States to provide MLA may arise from bilateral treaties or conventions.[44] For example, the Budapest Convention contains MLA provisions.[45] MLATs may provide for search and seizure, taking of testimonies, surrender of witnesses, or transmittal of records.[46] MLATs may also cover the reception of telecommunications.[47] Through the Budapest Convention, State Parties therein are allowed to conduct real-time collection of data so long as the collection does not violate the domestic laws of a State Party obligated to do the collection.[48] This proviso on real-time collection is not suppletory to the existing MLATs of State Parties to the Budapest Convention.[49]

D. Extradition v. Letters Rogatory v. MLATs

As a comparison, extradition involves the surrendering of a fugitive or accused from a foreign State to a domestic State (or the State where he or she is accused or convicted for an offense).[50] A letter rogatory is a request for mutual legal assistance, which usually involves the transmittal of evidence.[51] Finally, an

42. *Id.* at 207.

43. *Id.* at 207-09.

44. *See* BOISTER, *supra* note 13, at 199-201.

45. Budapest Convention, *supra* note 23, ch. III, arts. 25-34.

46. *See* BOISTER, *supra* note 13, at 201 (citing Budapest Convention, *supra* note 23 & United Nations Convention Against Corruption, *entered into force* Dec. 14, 2005, 2349 U.N.T.S. 41).

47. *See* BOISTER, *supra* note 13,at 203. *See also* Budapest Convention, *supra* note 23, ch. III, art. 33 (this provision requires State Parties to conduct real-time collection of traffic data so long as the collection does not violate the laws of a Requested State Party).

48. Budapest Convention, *supra* note 23, ch. III, art. 33, ¶ 1.

49. *See* Budapest Convention, *supra* note 23, ch. III, art. 27, ¶ 1 (wherein the Convention provides that its Article 27, paragraphs 2 to 9 are only applicable when there is no pre-existing MLAT between State Parties).

50. BERNAS, PUBLIC INTERNATIONAL LAW, *supra* note 13, at 174.

51. BOISTER, *supra* note 13, at 197.

MLAT involves various forms of legal assistance that were agreed by State Parties (e.g., search and seizure and forfeiture of properties).[52] Extradition and MLATs essentially exist by virtue of a treaties entered by States.[53] A letter rogatory, on the other hand, need not be based on a treaty as it involves court-to-court comity.[54]

Extradition inherently involves a criminal procedure.[55] In criminal cases, letters rogatory and the provisions of MLATs may be used, but only letters rogatory may be used in civil cases.[56] In criminal cases, MLATs may be used in any stage of law enforcement (i.e., investigation to execution of judgment),[57] while a letter rogatory may only be used after the investigative process because a letter rogatory presupposes a court-to-court comity.[58]

In the Philippines, the nature and consequences of extradition and letters rogatory were extensively discussed in jurisprudence.[59] As regards MLAT, the case of *People v. Sergio*[60] extensively discussed the testimony-taking aspect of MLATs, which to the mind of the Author had liberalized the treatment of the Philippines to the MLAT. This case will be discussed later in this Chapter.

E. Mutual Legal Assistance Treaties Entered by Philippines

This Section provides a background on the MLATs entered by the Philippines that are related to law enforcement against transnational cybercrimes. As provided by the Cybercrime Prevention Act of 2012, the international

52. *See* BOISTER, *supra* note 13, at 199-200.

53. BERNAS, PUBLIC INTERNATIONAL LAW, *supra* note 13, at 174 & BOISTER, *supra* note 13, at 199-201.

54. *See* T. Markus Funk, Mutual Legal Assistance Treaties and Letters Rogatory: A Guide for Judges (A Manual Distinguishing the Nature of Mutual Legal Assistance Treaties and Letters Rogatory) at 3, *available at* https://www.fjc.gov/sites/default/files/2017/MLAT-LR-Guide-Funk-FJC-2014.pdf (last accessed Sep. 30, 2020).

55. BERNAS, PUBLIC INTERNATIONAL LAW, *supra* note 13, at 174.

56. Funk, *supra* note 54, at 2-3.

57. *See* Funk, *supra* note 54, at 2-3.

58. *Id.*

59. *See, e.g.*, *Lantion*, 343 SCRA at 393 (where the Court set the due process requirements for extradition) & *Webb*, 312 SCRA at 586 (where the Court made the provisions on Modes of Discovery applicable to criminal cases).

60. People v. Sergio, G.R. No. 240053, Oct. 9, 2019, *available at* http://sc.judiciary.gov.ph/7732 (last accessed Sep. 30, 2020).

cooperation mechanisms of the Philippines are "given full force and effect."[61] This Section begins with the discussions on the treaties of the Philippines with other States in chronological order then on the mutual legal assistance provisions of the Budapest Convention, which is the subject of the cited provision.

1. Australia and the Philippines

Signed on 28 April 1988 and entered into force on 19 December 1993[62] is the first bilateral MLAT of the Philippines (i.e., the AUS-PH MLAT). The list of the types of offenses included in the term "criminal matter" under Article 1, Paragraph 2 of the Treaty seems to exclude other offenses.[63]

The AUS-PH MLAT also provides the matters that are not covered by the assistance (i.e., (1) extradition requests and (2) execution of criminal judgments not covered by the MLAT).[64] The MLAT also provides for the automatic refusal for assistance if the case involved falls under Article 4,

61. An Act Defining Cybercrime, Providing for the Prevention, Investigation, Suppression and the Imposition of Penalties Therefor and for Other Purposes [Cybercrime Prevention Act of 2012], Republic Act No. 10175, § 22 (2011).

62. *See* AUS-PH MLAT, *supra* note 14, art. 22, ¶ 1 & Australia Treaty Series, Treaty Between Australia and the Republic of the Philippines on Mutual Assistance in Criminal Matters, *available at* http://www.austlii.edu.au/au/other/dfat/treaties/1993/37.html (last accessed Sep. 30, 2020).

63. AUS-PH MLAT, *supra* note 14, art. 1, ¶ 2. It provides that

> [C]riminal matter includes:
>
> (a) a criminal matter relating to revenue (including taxation and customs duties);
>
> (b) a criminal matter relating to foreign exchange control; [and]
>
> (c) a criminal matter relating to graft and corruption, unlawfully acquired or acquiring property, bribery, frauds against the public treasury, or malversation or fraudulent conversion of public funds or property[.]

Id. art. 1, ¶ 2 (a)-(c).

64. *Id.* art. 1, ¶ 4.

Paragraph 1 of the Treaty[65] and discretionary refusal if the case involved falls under the Treaty's Article 4, Paragraph 2.[66]

65. *Id.* art. 4, ¶ 1. The Treaty provides —

> Assistance *shall* be refused if:
>
> (a) the request relates to an [offense] that is regarded by the Requested State as: (i) an [offense] of a political character, provided that graft and corruption, unlawfully acquired or acquiring property, bribery, frauds against the public treasury, or malversation or fraudulent conversion of public funds or property shall not per se be regarded as [offenses] of a political character; or (ii) an [offense] solely under its military law which is not an [offense] under its ordinary criminal law;
>
> (b) the request relates to an [offense] in respect of which the offender has been finally acquitted or pardoned;
>
> (c) the request relates to an [offense] in respect of which the offender has served the sentence imposed, except that assistance shall not be refused if the request relates to forfeiture of property in relation to a criminal matter or the recovery of a pecuniary penalty arising out of criminal conduct;
>
> (d) there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing, or otherwise causing prejudice to a person on account of that person's race, sex, religion, nationality or political beliefs; or
>
> (e) the Requested State is of the opinion that the request, if granted, would seriously impair its sovereignty, security, national or similar interests.

Id. (emphases supplied).

66. *Id.* art. 4, ¶ 2. The Treaty states —

> Assistance may be refused if:
>
> (a) the request relates to an [offense] where the acts or omissions alleged to constitute that [offense] would not, if they had taken place within the jurisdiction of the Requested State, have constituted an [offense];
>
> (b) the request relates to an [offense] which is committed outside the territory of the Requesting State and the law of the Requested State does not provide for the punishment of an [offense] committed outside its territory in similar circumstances;
>
> (c) the request for assistance relates to an [offense] which, had it been committed in the Requested State, could no longer be prosecuted by reason of lapse of time or any other reason; or

Notably, while dual criminality is not generally a condition precedent to execute a request made via MLATs,[67] the AUS-PH MLAT does not require dual criminality to execute a request, but it grants the discretion to the Requested State to deny a request if the offense covered by the request is not an offense punished by the laws of the Requested State.[68] It also recognizes that requests have to be executed in a way that it complies with the domestic law of the Requested State.[69]

It, however, does not concern itself with the appreciation and admissibility of evidence under the laws of the Requesting State on the aspect of the admissibility of retrieved evidence using the MLAT.[70] Since there is no provision governing the appreciation of evidence obtained through a search and seizure request under the MLAT as to its admissibility and credibility, it may be presumed that a person may question the admissibility of evidence subject to the laws of the Requested State.[71]

2. United States and the Philippines

The U.S. and the Philippines signed their MLAT on 13 November 1994.[72] The MLAT neither requires dual criminality to execute a request nor makes dual criminality as a ground for discretionary refusal to execute a request.[73]

In the MLAT, the Parties explicitly declared that it "is intended solely for [MLA] between the Parties. The provisions [thereof] shall not give rise to a right on the part of any private person to obtain, suppress, or exclude any

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(d) the provision of the assistance sought could prejudice an investigation or proceeding in the Requested State, endanger the safety of any person or impose an excessive burden on the resources of that State.

AUS-PH MLAT, *supra* note 14, art. 4, ¶ 2 (emphasis supplied).

67. Funk, *supra* note 54, at 11.

68. AUS-PH MLAT, *supra* note 14, art. 4, ¶ 2 (a).

69. *Id.* art. 5, ¶ 1.

70. *See generally* AUS-PH MLAT, *supra* note 14.

71. *See* Manila Electric Company v. Public Service Commission, 60 Phil. 658, 661 (1934) (where the Supreme Court held that "what is not expressly or impliedly prohibited by law may be done, except when the act is contrary to morals, customs[,] and public order"). *See also* AUS-PH MLAT, *supra* note 14, art. 5, ¶ 1.

72. U.S.-PH MLAT, *supra* note 15, at 20.

73. *Id.* art. 1, ¶ 3.

evidence, or to impede the execution of a request."[74] While it requires that a request be executed in compliance with the domestic laws of the Requested State,[75] there is no means for a person searched by the Requested State to question the search made to him or her, at least in the language of the law itself.[76] This situation was already decided upon by *U.S. v. Davis*[77] and *U.S. v. Sturman*,[78] where the U.S. courts in both instances disallowed the accused to question the admissibility of the evidence obtained via MLAT.[79]

It seems that this requirement of compliance to the domestic laws of the Requested State may have been rendered nugatory in the context of transnational cybercrimes. In transnational cybercrimes, a Foreign State may conduct searches and seizures to data and computer system located at or originated from another State.[80] With these, how can an accused located in the Philippines whose data was transmitted to and searched in the U.S. question the search against him or her if there is a possibility that the U.S. violated its own laws in doing the search?

3. People's Republic of China and the Philippines

The PH-China MLAT was signed on 16 October 2000.[81] The MLAT has a similar provision with AUS-PH MLAT on the discretionary refusal on the

74. *Id.* art. 1, ¶ 4.

75. *Id.* art. 5, ¶ 3. The Treaty provides — "Requests shall be executed in accordance with the laws of the Requested State except to the extent this Treaty provides otherwise. However, the method of execution specified in the request shall be followed except insofar as it is prohibited by the laws of the Requested State." *Id.*

76. *See* U.S.-PH MLAT, *supra* note 15, art. 5, ¶ 3.

77. U.S. v. Davis, No. 11, Docket 84-1392, 767 F.2d 1025 (2d Cir. 1985) (U.S.) (where the Federal Court held that a private person cannot challenge the search conducted against him or her made under the provisions of the MLAT containing the prohibition).

78. U.S. v. Sturman, No. 90-3147, 951 F.2d 1466 (6th Cir. 1991) (U.S.) (where the Federal Court qualified that a person may still question the search made via the MLAT containing the same provision if and only if there is an evidence of "serious governmental misconduct").

79. *See generally Davis*, 767 F.2d & *Sturman*, 951 F.2d.

80. *See* Anna-Maria Osula & Mark Zoeteko, *The Notification Requirement in Transborder Remote Search and Seizure: Domestic and International Law Perspectives*, 11 MASRYK U.J.L. & TECH. 103, 104-07 (2017).

81. PH-China MLAT, *supra* note 16, at 13.

basis of lack of dual criminality.[82] It also prohibits a private individual from questioning the search conducted against him or her by virtue of the MLAT.[83] Similar with the U.S.-PH MLAT, the PH-China MLAT also provides that the execution of requests be made in accordance with the laws of the Requested State and if there has been specific instructions in the request, the instructions in the request shall be followed insofar as the instructions do not contradict the law of the Requested State.[84]

4. Hongkong and the Philippines

The PH-HK MLAT was signed on 23 February 2001.[85] The MLAT has similar provision with the AUS-PH MLAT on the discretionary refusal on the basis of lack of dual criminality.[86] It also provides for mandatory and discretionary refusal.[87] It also seems that it prohibits a private individual from questioning the search conducted against him or her by virtue of the MLAT.[88] Similar with the U.S.-PH MLAT, the PH-HK MLAT also provides that the execution of requests be made in accordance with the laws of the Requested State and if there has been specific instructions in the request, the instructions in the request shall be followed insofar as the instructions do not contradict the law of the Requested State.[89]

5. Swiss Confederation and the Philippines

The Swiss-PH MLAT was signed on 9 July 2002.[90] The MLAT also provides for the applicable law in obtaining an evidence via a request under the MLAT.[91] It also expressly provides that requests may be granted so long as the

82. *Id.* art. 3, ¶ 1 (a). *See also* AUS-PH MLAT, *supra* note 14, art. 4, ¶ 2 (a).

83. PH-China MLAT, *supra* note 16, art. 1, ¶ 4.

84. *Id.* art. 5, ¶ 1.

85. PH-HK MLAT, *supra* note 17, at 14.

86. *Id.* art. IV, ¶ 2 (c). *See also* AUS-PH MLAT, *supra* note 14, art. 4, ¶ 2.

87. PH-HK MLAT, *supra* note 17, art. IV.

88. *Id.* art. I, ¶ 5.

89. *Id.* art. VI, ¶ 2.

90. Swiss-PH MLAT, *supra* note 18, at 16.

91. *Id.* ch. II, art. 4. The MLAT provides that —

> ARTICLE 4
>
> APPLICABLE LAW
>
> A request shall be executed in accordance with the law of the Requested State.

offense is punishable under the jurisdiction of the Requesting State.[92] The MLAT is also not clear whether dual criminality is relevant in granting or denying a request.[93] It also does not expressly prohibit a private person to move for the suppression or exclusion of evidence obtained through the MLAT.[94]

6. Republic of Korea and the Philippines

The PH-Korea MLAT was signed on 3 June 2003.[95] It provides a discretionary denial of request based on lack of dual criminality.[96] It also provides that the request for evidence may be denied for the meantime had there been an ongoing civil or criminal process concerning the evidence, in such case, copies thereof shall be delivered instead of the original.[97] It also requires that the request be executed in accordance with the laws of the Requested State.[98]

7. Kingdom of Spain and the Philippines

Signed on 2 March 2004 is the Spain-PH MLAT.[99] It provides that while dual criminality is not generally required to execute a request under the MLAT, dual criminality is required for the execution of request for search and seizure and forfeiture of assets.[100] It also prohibits a private individual from moving for the suppression and exclusion of obtained evidence via the MLAT.[101]

> If the Requesting State desires the application of a specific procedure with regard to the execution of a request for [MLA], it shall expressly so request, and the Requested State shall comply with the request if its law does not prohibit it.

Id.

92. *Id.* art. 1, ¶ 1.

93. *See* Swiss-PH MLAT, *supra* note 18, art. 1, ¶ 1.

94. *See generally* Swiss-PH MLAT, *supra* note 18.

95. PH-Korea MLAT, *supra* note 19, at 16.

96. *Id.* art. 5, ¶ 1 (f).

97. *Id.* art. 6, ¶ 2.

98. *Id.* art. 6, ¶ 1.

99. PH-Spain MLAT, *supra* note 20, at 12.

100. *Id.* art. 1, ¶¶ 2 (f) & (h) & 3.

101. *Id.* art. 1, ¶ 4.

8. United Kingdom and the Philippines

The Philippines and the United Kingdom signed their MLAT on 18 September 2009.[102] The MLAT does not require dual criminality in the execution of a request.[103] Despite this, the MLAT requires that for a request for search and seizure to be executed, the request must "contain[ ] information that would justify such action under the domestic law of the Requested State."[104] The quoted provision might mean that for search and seizure to be executed, dual criminality must be present. It does not contain any prohibition regarding motions to exclude or suppress evidence obtained via the MLAT.[105] Notably, it expressly recognizes human rights and the rule of law in its perambulatory clauses, and it expressly provides therein the recognition of the rights of an accused under the Parties' respective legal systems.[106]

9. ASEAN MLAT

In 2006, the Philippines, along with other ASEAN States, signed the ASEAN MLAT.[107] Just like the U.S. MLAT, it does not grant a right to private persons to move for the suppression or exclusion of evidence obtained through the MLAT.[108]

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102. U.K.-PH MLAT, *supra* note 21, at 20.

103. *Id.* art. 1, ¶ 3.

104. *Id.* art. 16, ¶ 1.

105. *See generally* U.K.-PH MLAT, *supra* note 21.

106. U.K-PH MLAT, *supra* note 21, pmbl. paras. 3 & 4. The Preamble provides —

> The United Kingdom of Great Britain and the Northern Ireland and the Republic of the Philippines, hereinafter referred to as the Contracting States;
>
> DESIRING to improve the effectiveness of co-operation between the Contracting States in the investigation, prosecution and suppression of crime by making provision for mutual legal assistance in criminal matters;
>
> HAVING DUE REGARD for human rights and the rule of law; [and]
>
> *MINDFUL of the guarantees under their respective legal systems which provide an accused person with the right to a fair trial, including the right to adjudication by an impartial tribunal established pursuant to law*[.]

Id. (emphasis supplied).

107. ASEAN MLAT, *supra* note 22, at 33.

108. *Id.* art. 1, ¶ 3.

10. Mutual Legal Assistance Provisions of the Budapest Convention

The Budapest Convention was signed and ratified by the Philippines and concurred in by Senate in 2017.[109] The Budapest Convention's provisions on MLA give the discretion to States to require dual criminality for a request to be executed.[110] Dual criminality is satisfied if the Requested and Requesting States substantially punish the same offense.[111]

Generally, the procedure in the execution of MLA requests for cybercrimes is based on the MLATs of the Requesting and Requested States that are also Parties to the Budapest Convention; in the absence of MLATs, the provisions of the Budapest Convention apply.[112] In regard to the confidentiality and limitation in the use of data gathered by virtue of the Budapest Convention, the provision of the Convention applies if and only if there is no pre-existing MLAT between the Requesting and Requested States.[113]

Aside from the general provisions on MLA, the Convention specifically provides for the mechanisms on MLA that are specific to cybercrimes.[114] The MLA provisions cover (1) provisional measures on expedited preservation of

109. Senate of the Philippines, TREATIES/AGREEMENT SUBMITTED FOR CONCURRENCE BY THE SENATE (Prepared by the Indexing, Monitoring and LIS Section, Legislative Bills and Index Service) 17th Congress, *available at* https://www.senate.gov.ph/17th_congress/treaties_17thcongress.asp (last accessed Sep. 30, 2020).

110. Budapest Convention, *supra* note 23, art. 25, ¶ 5.

111. *Id.* The Convention provides —

> Where, in accordance with the provisions of this chapter, the [R]equested Party is *permitted* to make mutual assistance conditional upon the existence of dual criminality, *that condition shall be deemed fulfilled, irrespective of whether its laws place the* [*offense*] *within the same category of* [*offense*] *or denominate the* [*offense*] *by the same terminology as the requesting Party*, if the conduct underlying the [offense] for which assistance is sought is a criminal [offense] under its laws.

Id. (emphases supplied).

112. *Id.* art. 27, ¶ 1.

113. *Id.* art. 28, ¶ 1.

114. *Id.* ch. III, § 2.

computer data and expedited disclosure of preserved traffic data;[115] (2) investigative measures;[116] and (3) 24/7 network for law enforcement.[117]

The investigative measures involve the search and seizure of computer data.[118] The notable provisions that are unique in the Budapest Convention are the transboundary access to stored computer data and real-time collection of data.[119] The transboundary access of stored computer data allows a State-Party to access computer data located in another State-Party using the computer system in the former.[120] On the other hand, the real-time collection of data provisions are premised on the validity of the real-time collection under the domestic law of a Party.[121]

The problem now arises when there is a non-consensual access to computer data made by a State whose MLAT with the Philippines prohibits the questioning of the search in order to exclusion or suppression of evidence obtained through the MLAT. For example, U.S. LEAs sent a tip to the Philippines regarding the commission of a cybercrime; U.S. LEA obtained the data that has been the basis of the tip from a search and seizure of computer data located in the Philippines — the search and seizure were made without the consent of the perpetrator. The Philippine LEA requested the data that will be used to apply for a search warrant against the perpetrator, which was subsequently granted. Can the perpetrator now move to quash the search warrant? But before one could answer that question, one must look first to the treatment of MLATs by States, particularly on the no-Standing provision.

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115. Budapest Convention, *supra* note 23, § 2, title 1, arts. 29 & 30.

116. *Id.* § 2, title 2, arts. 31-34.

117. *Id.* § 2, title 3, art. 35.

118. *Id.*

119. *Id.* § 2, title 2, arts. 32 & 33.

120. *Id.* art. 32. The Convention provides —

> A Party may, without the [authorization] of another Party:
>
> (a) access publicly available (open source) stored computer data, regardless of where the data is located geographically; or
>
> (b) access or receive, through a computer system in its territory, stored computer data located in another Party, *if the Party obtains the lawful and voluntary consent of the person who has the lawful authority to disclose the data to the Party through that computer system*.

Budapest Convention, *supra* note 23, art. 32 (emphasis supplied).

121. *Id.* art. 33.

F. People v. Sergio

This Section discusses the decision of the Court in *People v. Sergio*. The discussion begins with the facts of that case, the substantive issues, and potential constitutional issues that may arise from the decision.

The case involves the recruiters of Mary Jane Veloso — a Filipina death row convict in Indonesia — namely, Maria Cristina P. Sergio and Julius L. Lacanilao.[122] In this case, the Prosecution moved with leave of court to take Mary Jane's testimony via deposition by using the provisions of the ASEAN MLAT.[123] The Indonesian Government granted the Philippines' request to the testimony-taking of Mary Jane on the conditions that

(1) Mary Jane shall remain in detention in Indonesia;

(2) No cameras shall be allowed;

(3) The lawyers of the parties shall not be present; and

(4) The questions to be propounded to Mary Jane shall be in writing.[124]

In preparing to get the testimony of Mary Jane and in consideration of the abovementioned conditions, the trial court ordered the prosecution to submit the question that it will ask Mary Jane and the defense may object to the questions propounded despite the defense's objection to this manner of testimony-taking.[125] Furthermore, the trial court ordered that Mary Jane's testimony shall be written verbatim.[126] Thereafter, the testimony of Mary Jane shall be subject to the objections of the defense, and cross-examination questions via interrogatories shall likewise be allowed.[127]

The issue in the case relevant to this is whether a prosecution witness can give his or her testimony via deposition pursuant to an MLA request.[128] The Court ruled in the affirmative but with qualifications.[129]

122. *Sergio*, G.R. No. 240053, at 1.

123. *Id.* at 4.

124. *Id.* (emphases omitted).

125. *Id.* at 21-22.

126. *Id.* at 22.

127. *Id.*

128. *See Sergio*, G.R. No. 240053, at 1.

129. *Id.* at 12-16.

The Court said that allowing the prosecution to take a witness' testimony who is abroad is pursuant to the MLAT the Philippines had entered with another State so long as the resort to the MLA mechanism was done due to a compelling reason, such as the witness is being detained in that State, and his or her release is uncertain.[130] In this case, the Court said that the ASEAN MLAT "recognizes the significance of cooperation and coordination among the [S]tates to prevent, investigate[,] and prosecute criminal offenses especially if perpetuated not only in a single State just like in the case of drug and human trafficking, and illegal recruitment ... ."[131]

With the decision of the Court in *Sergio*, this Author notes the following:

(1) The prosecution may use the mechanisms of the MLAT vis-à-vis testimony taking only on extraordinary circumstances, such as the detention of a prosecution witness abroad would not allow him or her to be transported to the Philippines;[132] and

(2) While the deposition itself — meaning, the paper and transcript — may be presented in court, *the defense may still raise its objections as to the responses of the witness to the questions propounded despite the fact that it is the Indonesian authority who interviewed the witness*.[133]

III. CHARACTERIZATION OF TREATIES IN THE PHILIPPINES

In analyzing treaties in a domestic perspective, it is important to determine the characterization of treaties by a State before whom a controversy regarding a treaty is presented. This characterization begins with the determination of the State's legal system vis-à-vis international law, i.e., whether it is a dualist or a monist State.[134] A dualist State is one who treats international and domestic laws differently whereas a monist State is one who considers both international and domestic laws to be part of one legal system.[135] This Chapter discusses the dualist approach used in the Philippines and its effects vis-à-vis law enforcement.

130. *Id.* at 17-19.

131. *Id.* at 19.

132. *See Sergio*, G.R. No. 240053, at 17-19.

133. *Id.* at 22.

134. *See* BERNAS, PUBLIC INTERNATIONAL LAW, *supra* note 13, at 58.

135. *Id.*

A. Treaty as a Statute in the Philippines

While the ratification of a treaty establishes an international obligation upon the Philippines, the act of ratification in itself does not bind the citizens of the Philippines.[136] A treaty has to be concurred by the Senate in order to be binding within the territory of the Philippines.[137] This Section discusses the doctrine of transformation and the effect of transforming a treaty into domestic law.

1. Treaty as Domestic Law

In the Philippines, there are two ways to make international law part of the law of the land (i.e., incorporation and transformation). The doctrine of incorporation provides that international law is automatically part of the law of the land.[138] The doctrine of incorporation can be seen in Article II, Section 2 of the Philippine Constitution wherein it provides the general principles of international law shall form part of the law of the land.[139]

On the other hand, the doctrine of transformation requires the concurrence of the legislative body of a state in order to make the treaty or international law a binding municipal law.[140] Article VII, Section 21 of the Constitution provides that two-thirds of Senate must vote affirmatively to concur in any international agreement entered by the Executive.[141] However, jurisprudence shows that only treaties, i.e., those international agreements that cover a broader or general subjects and not those that cover the details of implementation of other international agreements (e.g., executive agreements) are covered by Article VII, Section 21.[142] This shows the differences in the

136. *See generally* Government of Hong Kong Special Administrative Region v. Olalia, Jr., 521 SCRA 470, 482 (2007).

137. *See* Bayan (Bagong Alyansang Makabayan) v. Zamora, 342 SCRA 449, 496 (2000) (citing MICHAEL AKEHURST, MODERN INTRODUCTION TO INTERNATIONAL LAW 45 (5th ed.) & U.S. v. Curtis-Wright Export Corp., 299 U.S. 304, 319 (1936)).

138. *See* BERNAS, PUBLIC INTERNATIONAL LAW, *supra* note 13, at 60.

139. PHIL. CONST. art II, § 2. *See also* BERNAS, PUBLIC INTERNATIONAL LAW, *supra* note 13, at 60 (citing WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS WITH ANALYSIS OF THE WORK 48 (18th ed.)).

140. BERNAS, PUBLIC INTERNATIONAL LAW, *supra* note 13, at 60.

141. PHIL. CONST. art. VII, § 27.

142. *See generally* Saguisag v. Ochoa, Jr., 779 SCRA 241 (2016) & *Bayan (Bagong Alyansang Makabayan)*, 342 SCRA.

treatment of treaties and other international agreements by the Philippines even though under international law a treaty is necessarily an international agreement.[143]

In any case, whether an international law is incorporated or transformed, the effect would be that it will be binding as domestic law.[144]

The famous case dealing with the weight of a treaty in a dualist State is the *Head Money Cases*.[145] In the *Head Money Cases*, the Supreme Court of the United States (SCOTUS) held that

> [a] treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may, in the end, be enforced by actual war. It is obvious that, with all this, the judicial courts have nothing to do, and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that
>
> '[the U.S.] Constitution and the laws made in pursuance thereof, and all treaties made[,] or which shall be made under authority of the United States, shall be the supreme law of the land.'[146]

The SCOTUS added that there is no basis that a treaty is irrepealable or is superior over an act of Congress especially when private rights are involved.[147] Furthermore, the SCOTUS said, "[a treaty] is subject to such acts as Congress may pass for its enforcement, modification, or repeal."[148]

143. *See* Vienna Convention on the Law of Treaties, art. 2, ¶ 1 (a), *opened for signature* 23 May 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

144. BERNAS, PUBLIC INTERNATIONAL LAW, *supra* note 13, at 60.

145. Head Money Cases, 112 U.S. 580 (1884).

146. *Id.* at 598 (citing U.S. CONST., art. VI, para. 2).

147. *Head Money Cases*, 112 U.S. at 598-99.

148. *Id.* at 599.

2. Judicial Review on Treaties and the Effect of Nullification or Repeal

When a treaty is entered by the Philippines and was subsequently concurred in by the Senate, the treaty or any of its provisions may be a proper subject of judicial review under Article VIII, Section 5 of the Constitution.[149] As an effect of the exercise of judicial review, a treaty or any of its provisions, although creating an international obligation to the Philippines, may not have binding effect to its citizens or within its territory if it is against its Constitution.[150]

According to Fr. Joaquin G. Bernas, S.J., when a treaty is declared void or is treated equal in rank to a domestic statute, the declaration of nullity or treatment "applies only in the domestic sphere. The treaty, even if contrary to later statute, remains as international law[.]"[151] In effect, a State-Party to a treaty may file a claim against another State-Party even if the local courts of the latter nullified the treaty or any of its provisions.[152]

Because of the character of a treaty or any of its provisions being a proper subject of judicial review and having the same weight as a domestic law, a treaty provision must be scrutinized the same way as a domestic law with a view of the international obligations of the Philippines.

B. Treaty Implementation and Fundamental Rights

Philippine jurisprudence is replete with the discussion on the implementation of treaties relating to law enforcement assistance, but the discussion thereon varies from being strictly compliant with the international obligation[153] to being highly considerate of the rights of persons.[154]

149. *See* PHIL. CONST. art. VIII, § 5 (2) (a).

150. *See* PHIL. CONST. art. VIII, § 5 (2) (a). It must be noted, however, that a treaty declared to be unconstitutional may not have an efficacy within the Philippine territory, but its declaration as unconstitutional does not excuse the State to perform its obligations to other States unless the violation to the Constitution was "manifest and concerned a rule of its internal law of fundamental importance." VCLT, *supra* note 143, art. 46, ¶¶ 1-2.

151. BERNAS, PUBLIC INTERNATIONAL LAW, *supra* note 13, at 66.

152. *Id.*

153. *See generally* Government of the United States of America v. Purganan, 389 SCRA 623 (2002).

154. *See generally Olalia, Jr.*, 521 SCRA.

This series of varying decisions began with *Government of the United States of America v. Purganan*[155] — a sequel to the *Secretary of Justice v. Lantion* case.[156] The case involves the petition for extradition request by U.S. against Mark B. Jimenez.[157] Upon knowing that he is the subject of extradition, Jimenez applied for a temporary restraining order against the proceedings to be conducted against him.[158] In addition to the application for the temporary restraining order, he filed a petition to require the Department of Justice to apply for a warrant of arrest and to grant him bail.[159] The Regional Trial Court granted his application for bail.[160] The U.S. government questioned the grant of bail, among others, asserting that there is no right to bail in extradition proceedings.[161] The Supreme Court ruled in the affirmative and stated that an extradition proceeding is not a criminal proceeding.[162] Thus, the right to bail will not apply.[163] Despite the ruling, the Court provided an exception to the ruling (i.e., the extraditee must show through clear and convincing evidence that "(1) [ ] he will not be a flight risk or a danger to the community, and (2) [ ] there exist special, humanitarian[,] and compelling circumstances").[164]

In the subsequent case of *Government of Hongkong Special Administrative Region v. Olalia, Jr.*,[165] the Court modified its ruling in *Purganan* and applied the right of persons to bail in extradition cases.[166] This is in light of the trend

155. Government of the United States of America v. Purganan, 389 SCRA 623 (2002).

156. Secretary of Justice v. Lantion, 322 SCRA 160 (2000) & Secretary of Justice v. Lantion, 343 SCRA 377 (2000) (resolution of motion for reconsideration).

157. *Purganan*, 389 SCRA at 644-45.

158. *Id.* at 645.

159. *Id.* at 646.

160. *Id.*

161. *Id.* at 647-48.

162. *Id.* at 654 (citing *Lantion*, 343 SCRA at 392).

163. *Purganan*, 389 SCRA at 654 (citing *Lantion*, 343 SCRA at 392).

164. *Purganan*, 389 SCRA at 667 (citing In re Michell, 171 F. Rep. 289, (1909) (U.S.); United States v. Kirby, Brennan and Artt, No. 96-10068, 106 F.3d. 855 (1997) (U.S.); & Beaulieu v. Hartigan, Civ. A. No. 77-639-T, 460 F.Supp. 915 (1977) (U.S.)).

165. Government of Hongkong Special Administrative Region v. Olalia, Jr., 521 SCRA 470 (2007).

166. *Id.* at 482-83.

in international law to make human rights paramount.[167] In summarizing the ruling in *Olalia, Jr.*, Fr. Joaquin G. Bernas, S.J. said —

> [T]he Court ... could not ignore the following trends in international law: (1) the growing importance of the individual person in public international law who ... has gradually attained global recognition; (2) the higher value now being given to human rights in the international sphere; (3) the corresponding duty of countries to observe these universal human rights in fulfilling their treaty obligations; and (4) the duty of the Court to balance the rights of the individual under [the] fundamental law, on one hand, and the law on extradition, on the other.[168]

In sum, because of the ruling in *Olalia, Jr.*, the Court may take a proactive step in scrutinizing the international obligations of the Philippines especially when the rights of private individuals are affected by those international obligations.[169]

With the discussions above, the key takeaways are:

(1) A treaty once concurred by the Senate is treated the same way as a domestic statute;[170] and

(2) In enforcing the treaty obligations of the Philippines, the fundamental rights of individuals who are objects of the treaty obligation should be considered.[171]

IV. SCRUTINY OF LAWS VIS-À-VIS EQUAL PROTECTION

It is the right of every person to have the equal protection of the laws.[172] This right to equal protection of the laws does not require an absolute equality as to the enforceability of laws, but it only requires a reasonable equality.[173] With this, a law that violates the right to the equal protection of the laws or the

167. *Id.*

168. BERNAS, PUBLIC INTERNATIONAL LAW, *supra* note 13, at 190 (citing *Olalia, Jr.* 521 SCRA at 481).

169. *See* BERNAS, PUBLIC INTERNATIONAL LAW, *supra* note 13, at 190 (citing *Olalia, Jr.*, 521 SCRA).

170. *See generally Head Money Cases*, 112 U.S.

171. *See* BERNAS, PUBLIC INTERNATIONAL LAW, *supra* note 13, at 190 (citing *Olalia, Jr.*, 521 SCRA).

172. PHIL. CONST. art. III, § 1.

173. *See* Tiu v. Court of Appeals, 301 SCRA 278, 288 (1999).

equal protection clause is invalid and cannot be given effect.[174] The rationale of the protection is that

> [t]he equal protection of the law clause is against undue favor and individual or class privilege, as well as hostile discrimination or the oppression of inequality. It is not intended to prohibit legislation, which is limited either in the object to which it is directed or by territory within which it is to operate. It does not demand absolute equality among residents; it merely requires that all persons shall be treated alike, under like circumstances and conditions both as to privileges conferred and liabilities enforced. The equal protection clause is not infringed by legislation which applies only to those persons falling within a specified class, if it applies alike to all persons within such class, and reasonable grounds exists for making a distinction between those who fall within such class and those who do not.[175]

A. Tests in Determining the Validity of a Law Based on the Equal Protection Clause

In scrutinizing a law based on the equal protection clause, the classification that it provides must:

(1) "[R]est on substantial distinctions;"[176]

(2) "[B]e germane to the purpose of the law;"[177]

(3) "[N]ot be limited to existing conditions only; and"[178]

(4) "[A]pply equally to all members of the same class."[179]

174. *See generally* Ichiong, etc., et al. v. Hernandez, etc., and Sarmiento, 101 Phil. 1135 (1957).

175. *Ichiong, etc., et al.*, 101 Phil. at 1164 (citing THOMAS M. COOLEY, 2 A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 824-25 (1871)) (emphasis omitted).

176. *Tiu*, 301 SCRA at 289 (citing JOAQUIN G. BERNAS, S.J., THE 1987 PHILIPPINE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 124 (1996)).

177. *Id.*

178. *Id.*

179. *Id.*

With the development of jurisprudence, however, the scrutiny of laws vis-à-vis the equal protection clause varied.[180]

If the subject of the law pertains to a classification based on "race, national origin, religion, alienage, denial of the right to vote, interstate migration, access to courts[,] and other rights recognized as fundamental[,]"[181] the test to be used is *strict scrutiny test* — the test on classification which has the highest threshold.[182] In this case, the Government must show that the "classification serves a compelling state interest and that the classification is necessary to serve that interest."[183]

The next test is *intermediate* or *middle-tier scrutiny test*. This applies when the subject of the classification relates to gender or illegitimacy.[184] With this test, a classification based on gender or illegitimacy is valid if there is "an important state interest and the classification is at least substantially related to serving that interest."[185]

Finally, the commonly used test is the *minimum* or *rational basis scrutiny*, which provides that the classification must be "rationally related to serving a legitimate state interest."[186]

B. Doctrine of Relative Constitutionality

Philippine jurisprudence on the equal protection clause includes a multitude of subjects like gender[187] and alienage.[188]

With this miscellany of equal protection cases in the Philippines, it is unavoidable that the Supreme Court will expound on the elements of the rational basis test that it has set in its prior decisions — among which is the

180. JOAQUIN G. BERNAS, S.J., THE 1987 PHILIPPINE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 139 (2009) [hereinafter BERNAS, 2009 COMMENTARY].

181. *Id.* at 140.

182. *Id.* at 139-40.

183. *Id.*

184. *Id.* at 140. *See also* Garcia v. Drilon, 699 SCRA 352, 435 (2013) (J. Leonardo-De Castro, concurring opinion).

185. BERNAS, 2009 COMMENTARY, *supra* note 180, at 140.

186. *Id.*

187. *See Garcia*, 699 SCRA.

188. *See, e.g.*, Bell and Co. v. Natividad, 40 Phil. 136 (1919) & Kwong Sing v. City of Manila, 41 Phil. 103 (1920).

celebrated or notorious (depending on the judicial philosophy one has) case of *Central Bank Employees Association, Inc. v. Bangko Sentral ng Pilipinas*.[189]

The case involves the question on the constitutionality of the compensation and wage structure provision of Republic Act No. 7653 or the "New Central Bank Act" after its eight-year effectivity.[190] The proposition of the petitioners is that the subsequent legislation on the wage and structure of other Government Financial Institutions (GFIs) wherein the rank-and-file employees of those GFIs are exempted from the coverage of the Salary Standardization Law (SSL) creates an unlawful classification against the Bangko Sentral ng Pilipinas (BSP) employees because those rank-and-file employees of the BSP are still covered by the SSL.[191]

Then-Justice Reynato S. Puno wrote the main opinion of the case and ruled in favor of the employees.[192] In declaring Section 15, Paragraph (c) of The New Central Bank Act unconstitutional, Justice Puno said that the assailed law "started as a valid measure well within the legislature's power[.]"[193]

In his *ponencia,* Justice Puno introduced the concept of relative constitutionality wherein he explained first that "[a] statute valid at one time may become void at another time because of *altered circumstances*. Thus, if a statute in its practical operation becomes arbitrary or confiscatory, its validity, even though affirmed by a former adjudication, is open to inquiry and investigation in the light of *changed conditions*."[194] Justice Puno took the opportunity to remind everyone that the concept of declaring a law unconstitutional despite its prior invalidity is not new in the Philippines by

189. Central Bank Employees Association, Inc. v. Bangko Sentral ng Pilipinas, 446 SCRA 299 (2004).

190. *Id.* at 340 (citing The New Central Bank Act, Republic Act No. 7653, § 15 (c), para. 2 (1993)).

191. *Central Bank Employees Association, Inc.*, 446 SCRA at 340-41.

192. *Id.* at 392.

193. *Id.* at 347.

194. *Id.* at 347-48 (citing Nashville, C. & St. L. Ry. v. Walters, No. 183, 294 U.S. 405 (1935); Atlantic Coast Line R. Co. v. Ivey, 139 A.L.R. 973 (1941) (U.S.); Louisville & N. R. Co. v. Faulkner, 307 S.W.2d 196 (Ky. 1957) (U.S.); Vernon Park Realty v. City of Mount Vernon, 307 N.Y. 493 (1954) (U.S.); & Murphy v. Edmonds, No. 99, 601 A.2d 102 (1992) (U.S.)).

providing an excerpt of the post-World War II case of *Rutter v. Esteban*.[195] In *Rutter*, the Supreme Court struck down the debt moratorium legislation after World War II because the eight-year moratorium provided by the law and its other provisions —

> [W]orks injustice to creditors who are practically left at the mercy of the debtors. Their hope to effect collection becomes extremely remote, more so if the credits are unsecured. And the injustice is more patent when, under the law, the debtor is not even required to pay interest during the operation of the relief, unlike similar statutes in the [U.S.].[196]

The Court in *Rutter* took note that the present circumstance rendered the continued operation of the moratorium law unreasonable and oppressive; thus, warranting its declaration as unconstitutional.[197]

This ratiocination that a law valid in the past may be invalid at some other time was applied by Justice Puno in the *Central Bank Employees Association, Inc.* case by conducting a survey of jurisprudence from foreign countries, as well as domestic jurisprudence.[198] He explained that the subsequent enactments that relate to the exemption of rank-and-file employees of other GFIs from the SSL and the retention of the status of BSP (being a GFI) rank-and-file employees' being covered by the SSL produced a situation that is grossly discriminatory and oppressive against the BSP rank-and-file employees.[199]

Furthermore, Justice Puno argued that the choice of Congress as to whom to exclude in the coverage of a particular law while being a policy determination is nevertheless subject to judicial scrutiny.[200] To wit —

> [T]he inequality of treatment cannot be justified on the mere assertion that each exemption (granted to the seven other GFIs) rests 'on a policy determination by the legislature.' *All legislative enactments necessarily rest on a policy determination — even those that have been declared to contravene the*

195. *See Central Bank Employees Association, Inc.*, 446 SCRA at 348-50 (citing Rutter v. Esteban, 93 Phil. 68 (1953)).

196. *Rutter*, 93 Phil. at 77.

197. *Id.* at 82.

198. *See generally Central Bank Employees Association, Inc.*, 446 SCRA at 351-53 (*Atlantic Coast Line R. Co.*, 139 A.L.R.; *Louisville & N.R. Co.*, 307 S.W.2d; People v. Dela Piedra, 350 SCRA 163 (2001); People v. Vera, 65 Phil. 56 (1937); & Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

199. *Central Bank Employees Association, Inc.*, 446 SCRA at 359 (citing *Dela Piedra*, 350 SCRA).

200. *Central Bank Employees Association, Inc.*, 446 SCRA at 360.

> *Constitution*. Verily, if this could serve as a magic wand to sustain the validity of a statute, then no due process and equal protection challenges would ever prosper. There is nothing inherently sacrosanct in a policy determination made by Congress or by the Executive; it cannot run riot and overrun the ramparts of protection of the Constitution.
>
> In *fine*, the 'policy determination' argument may support the inequality of treatment between the rank-and-file and the officers of the BSP, but it cannot justify the inequality of treatment between BSP rank-and-file and other GFIs' who are similarly situated. It fails to appreciate that what is at issue in the *second level of scrutiny* is not the *declared* policy of each law *per se*, *but the oppressive results of Congress' inconsistent and unequal policy* towards the BSP rank-and-file and those of the seven other GFIs.[201]

Justice Puno also explained that in order to declare for the validity of the assailed provision of The New Central Bank Act, it must be shown that there are "characteristics peculiar only to the seven GFIs or their rank-and-file [employees] so as to justify the exemption which BSP rank-and-file employees were denied[.]"[202] Furthermore, "all persons shall be treated alike, under like circumstances and conditions both as to privileges conferred and liabilities enforced."[203]

In sum, there are three key takeaways in applying the doctrine of relative constitutionality vis-à-vis equal protection:

(1) There must be a change in the circumstances — this may relate to the enforcement or operation of the law[204] or to the developments in legislation;[205]

(2) The change in the circumstance affects only a portion of a particular class;[206] and

(3) The affected portion of a particular class does not have peculiar characteristics as opposed to the unaffected portion so as to justify a different treatment brought by the change in the circumstance.[207]

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201. *Id.* (emphasis supplied).

202. *Id.* at 367 (emphasis omitted).

203. *Id.* at 369 (emphasis omitted).

204. *See Rutter*, 93 Phil. at 77.

205. *See Central Bank Employees Association, Inc.*, 446 SCRA at 347.

206. *Id.* at 367.

207. *Id.*

V. Analysis of MLATs' No-Standing Provisions

This Chapter analyzes the no-Standing provisions of the MLATs entered by the Philippines with other States. This Chapter begins with the discussion on the changed circumstances and then to the particular class affected.

A. Changes in the Circumstances

As mentioned, for the concept of relative constitutionality to apply, there must be a change in the circumstances.[208] These altered circumstances may arise from changes in legislation.[209]

The analyses in this Section revolve around the concept that treaties, once ratified, become part of the domestic law and should be treated the same way as legislation.[210] Then, the Section proceeds to linking the developments in the MLATs with the changes in the circumstance of the no-Standing provision.

1. Characterization of MLATs

Because of the characterization of treaties in a domestic perspective that they are of equal rank to a domestic statute, MLATs should also be treated the same way as domestic laws.[211] MLATs should be made equal among each other in the same vein as they, as a class, are equal to domestic legislation.[212]

MLATs are not immune to judicial scrutiny because the Constitution itself declares that the Supreme Court may review the constitutionality of treaties.[213] With that, MLATs should altogether be scrutinized in the same manner as the Supreme Court has scrutinized all salary-related legislations to GFI rank-and-file employees in *Central Bank Employees Association, Inc.*.[214]

2. Changed Circumstances

As a summary to the survey of MLATs vis-à-vis the no-standing provision, below is a table on the development of the MLATs:

208. *Id.* at 347-48.

209. *See Central Bank Employees Association, Inc.*, 446 SCRA at 347.

210. *See Head Money Cases*, 112 U.S.

211. *Id.* at 598-99.

212. *Id.*

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

214. *See generally Central Bank Employees Association, Inc.*, 446 SCRA.

Date of Senate's Concurrence (SC) or Entry Into Force (EIF)	*Treaty*	*No-Standing Provision*
19 December 1993 (EIF)[215]	AUS-PH MLAT	N/A
22 November 1996 (EIF)[216]	U.S.-PH MLAT	"intended solely for [MLA] between the Parties. The provisions [thereof] shall not give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence, or to impede the execution of a request."[217]
8 May 2012 (SC)[218]	China-PH MLAT	"This Treaty is intended solely for mutual assistance between the Parties. The provisions of this Treaty shall not give rise to any right on the part of any private person to obtain, suppress or exclude any evidence or to impede the execution of a request."[219]

215. Manuel T. Soriano, Jr., International Cooperation: Extradition and Mutual Legal Assistance at 136, *available at* https://www.unafei.or.jp/publications/pdf/GG6/05-6_Philippines.pdf (last accessed Sep. 30, 2020).

216. *Id.*

217. U.S.-PH MLAT, *supra* note 15, art. 1, ¶ 4.

218. S. Res. No. 83, 15th Congress, 2d Regular Sess. (2012).

219. PH-China MLAT, *supra* note 16, art. 1, ¶ 4.

24 March 2004 (EIF)[220]	HK-PH MLAT	"This Agreement is intended solely for mutual assistance between the Parties. The provisions of this Agreement shall not give rise to any right on the part of any private person to obtain, suppress[,] or exclude any [e]vidence[,] or to impede the execution of a request."[221]
1 December 2005 (EIF)[222]	Swiss-PH MLAT	N/A
6 October 2008 (SC)[223]	PH-Korea MLAT	N/A
6 October 2008 (SC)[224]	PH-Spain MLAT	"This Treaty is intended solely for mutual legal assistance between the Contracting Parties. The provisions of this Agreement shall not give rise to a right on the part[ ] of any private person to obtain, suppress, or exclude any [e]vidence[,] or to impede the execution of a request."[225]

220. Soriano, Jr., *supra* note 215, at 136-37.

221. PH-HK MLAT, *supra* note 17, art. I, ¶ 5.

222. Soriano, Jr., *supra* note 215, at 136-37.

223. S. Res. No. 128, 14th Congress, 2d Regular Sess. (2008).

224. Soriano, Jr., *supra* note 215, at 136-37.

225. PH-Spain MLAT, *supra* note 20, art. 1, ¶ 4.

8 May 2012 (SC)[226]	U.K.-PH MLAT	N/A
6 October 2008 (SC)[227]	ASEAN MLAT	"This Treaty applies solely to the provision of mutual assistance among the Parties. The provisions of this Treaty shall not create any right on the part of any private person to obtain, suppress[,] or exclude any evidence[,] or to impede the execution of any request for assistance."[228]
19 February 2018 (SC)[229]	Budapest Convention	N/A

As seen above, there is a flipflopping of treaty provisions as to the deprivation to private persons from obtaining, suppressing, or excluding any evidence, or from impeding the execution of any request for assistance. As it has been seen with the practice of U.S., the provision, while not absolute, is construed strictly against the private person.[230] Also, the general treaty covering transnational cybercrime does not provide for the prohibition.[231]

Furthermore, these MLATs are considered to be domestic legislation once they had been concurred by the Senate.[232] In effect, as provided by jurisprudence, a treaty already concurred by Senate will be treated the same way as a domestic law and may be modified subsequently by another statute.[233]

226. S. Res. No. 81, 15th Congress, 2d Regular Sess. (2012).

227. S. Res. No. 126, 14th Congress, 2d Regular Sess. (2008).

228. ASEAN MLAT, *supra* note 22, art. 1, ¶ 3.

229. S. Res. No. 89, 17th Congress, 2d Regular Sess. (2018).

230. *See Davis*, 767 F.2d & *Sturman*, 951 F.2d.

231. *See generally* Budapest Convention, *supra* note 23.

232. *Head Money Cases*, 112 U.S. at 598 (citing U.S. CONST., art. VI, para. 2).

233. *Head Money Cases*, 112 U.S. at 599.

Considering that the Budapest Convention is a general law transformed by the Philippines as a domestic law and the MLATs are specific laws entered and transformed by the Philippines, the MLATs' provision on the prohibition of private persons to obtain, suppress, or exclude any evidence, or to impede the execution of any request would remain despite the silence of the Budapest Convention on the prohibition.[234]

In 1993, the specific AUS-PH MLAT was concurred by the Senate that is silent as to the supposed absence of a right.[235] Then, in 1996 and in 2004, the U.S.-PH and HK-PH MLATs were concurred in by the Senate containing the no-Standing provision.[236] Then, in 2005, the Swiss-PH MLAT was concurred in without a no-standing provision.[237] Then, on 6 October 2008, the Senate concurred in three specific MLATs (i.e., PH-Korea, PH-Spain, and ASEAN MLATs), two of which have the no-standing provision and one does not have it.[238] Finally, in 2012, the China-PH MLAT that contains the no-standing provision was concurred by Senate while the U.K.-PH MLAT does not contain the prohibition.[239]

This series of Senate concurrences creates a change in circumstance in Philippine legislation (i.e., the start of the MLAT series concurrence and transformation is one that does not have the no-standing provision and the subsequent treaties either have the no-standing provision or not). This "start" of the MLAT series created a situation where a person may move to obtain, suppress, or exclude, or to impede the execution of the MLA request because it is not expressly prohibited by the treaty.[240] The subsequent concurrences of the Senate on MLATs that have the no-standing provision created a change

234. *See generally* Budapest Convention, *supra* note 23. In Statutory Construction, in the absence of a specific provision, a general law does not repeal the provisions of a specific law. Valera v. Tuason, Jr., 80 Phil. 823, 827 (1948).

235. *See* AUS-PH MLAT, *supra* note 14.

236. U.S.-PH MLAT, *supra* note 15, art. 1, ¶ 4 & PH-HK MLAT, *supra* note 17, art. 1, ¶ 5.

237. *See* Swiss-PH MLAT, *supra* note 18.

238. *Compare* PH-Korea MLAT, *supra* note 19 *with* PH-Spain MLAT, *supra* note 20, art. 1, ¶ 4 & ASEAN MLAT, *supra* note 22, art. 1, ¶ 3.

239. *Compare* PH-China MLAT, *supra* note 16, art. 1, ¶ 4 *with* U.K.-PH MLAT, *supra* note 21.

240. *See Manila Electric Company*, 60 Phil. at 661 (where the Supreme Court held that "what is not expressly or impliedly prohibited by law may be done, except when the act is contrary to morals, customs[,] and public order").

in the circumstances because what is not previously prohibited was somewhat expressly prohibited.[241]

The introduction of the no-standing provision by some MLATs while some do not have the provision is a form of development in legislation akin to what happened in *Central Bank Employees Association, Inc.*[242] In that case, the Court considered as change in circumstance the fact that there are subsequent legislation excluding all GFI employees from the coverage of the SSL, except the BSP employees.[243] What is involved in the present situation is that there are people who are not allowed to move for the obtaining, suppression, or exclusion of evidence, or for the impeding of the execution of MLA requests while there are people who may still do so.[244] The Author is of the position that insofar as domestic legislation is concerned these developments in MLAT provisions are similar to the situation in *Central Bank Employees Association, Inc.*, i.e., subsequent legislations grants a right to a particular group while others do not enjoy the grant of a right.[245]

With that, there is obviously a disparity in the treatment of persons under different MLAs. The next question now is — "is this disparity in the treatment proper?" This will be answered in the subsequent Section.

B. Affected Portion of a Class and the Peculiar Characteristics

In analyzing whether a law is unconstitutional on the basis of relative constitutionality and the equal protection clause, a member or members of a class must be affected by the changed circumstances and there are no peculiar characteristics to the member or members of the class.[246]

In the context of this Note, the private person subject of an MLAT is the accused in a criminal case in the Philippines. Obviously, the developments in legislation on MLATs affected a particular group of persons in a class (e.g., an accused who was searched via a request made through the U.S.-PH MLAT

241. *Id.*

242. *See Central Bank Employees Association, Inc.*, 446 SCRA at 347.

243. *Id.*

244. *Compare* AUS-PH MLAT, *supra* note 14; PH-Korea MLAT *supra* note 19; Swiss-PH MLAT, *supra* note 18; & U.K.-PH MLAT, *supra* note 21, art. 16 *with* PH-Spain MLAT, *supra* note 20, art. 1, ¶ 4; PH-China MLAT, *supra* note 16, art. 1, ¶ 4; U.S.-PH MLAT, *supra* note 15, art. 1, ¶ 4; PH-HK MLAT, *supra* note 17, art. 1, ¶ 5; & ASEAN MLAT, *supra* note 22, art. 1, ¶ 3.

245. *See Central Bank Employees Association, Inc.*, 446 SCRA at 347.

246. *Id.* at 367.

(which has the no-standing provision) may no longer move to suppress to obtain, suppress, or exclude evidence, or to impede the execution of an MLA request but an accused who was searched via a request made through the U.K.-PH MLAT (which does not have the provision) may).

The point of inquiry now is — what makes an accused whose evidence against him or her was obtained via an MLAT without the no-standing provision different from an accused whose evidence against him or her was obtained via an MLAT with the no-standing provision to warrant a different treatment as to a right to obtain, suppress, or exclude evidence, or to impede the execution of an MLA request?

These accused, in a domestic perspective, are not different from one another. The only difference that these accused have is that they were searched under a different MLAT, which is a law. In *Central Bank Employees Association, Inc.*, the Court has said that legislation alone cannot be the sole basis of classification.[247] In other words, the law cannot say that someone is different from another because it said so.[248] The Constitution requires a deeper reasoning to the change in the treatment.[249] Hence, the requirement of a peculiar characteristic was mentioned by the Court.[250]

In applying the requirement of a peculiar characteristic to the problem in this Note, when an accused who was searched under a request made via, for example, the U.S.-PH MLAT (which does not grant the standing to obtain, suppress, or exclude evidence, or to impede the execution of a request made via an MLAT) questions the validity of the search and its admissibility and invokes the equal protection clause, the Court cannot simply say that the accused cannot question the search because his or her situation is specific so as to distinguish him or her from other persons searched under different MLATs. To say so is akin to saying that an apple is an apple because it is an apple. A classification dictated by foreign policy is not a basis to make a person searched under a particular MLAT different from another who was searched under a different MLAT because the Supreme Court has already said that classification by law alone is not sufficient to justify a valid classification under the equal protection clause.[251]

247. *Id.* at 360.

248. *See Central Bank Employees Association, Inc.*, 446 SCRA at 360.

249. *Id.*

250. *Id.*

251. *Central Bank Employees Association, Inc.*, 446 SCRA at 360.

Furthermore, does the argument that the accused was covered by a different treaty justify the difference of treatment? The answer is in the negative. This is practically similar to the *Central Bank Employees Association, Inc.* where the petitioners whose right to equal protection of the law was violated are covered by a law different from the laws covering other GFI employees.[252] Thus, the governing law (which in this case is a treaty) per se is not sufficient to justify a difference in treatment.[253]

One may further argue that there is a substantial distinction between the U.S. and, say, the European Union as to the place of the commission of an offense or the place where the effects of a crime can be found, such that the difference as to the treatment of accused is warranted. However, this argument may fail. In *Commissioner of Customs v. Hypermix Feeds Corporation*,[254] the Supreme Court declared a regulation of the Bureau of Customs wherein the determination of the quality of an imported wheat — which affects the tariff rate applicable — would depend on the origin of that wheat, among others, unconstitutional because there is no correlation between the origin of the wheat and its quality.[255] In the same vein, the applicability of the rules of evidence (i.e., the right of a person to raise an objection to the admissibility of an evidence) should not be based on the place where the evidence was found or the person who found that evidence.[256]

C. The Constitutionality of the No-Standing Provision

In sum, the Author is of the position that the no-standing provision contained in different MLATs should be declared unconstitutional because it violates the equal protection clause. This is because:

(1) The developments of MLAT provisions (i.e., some containing the provision and some do not, created a change in the circumstances);

(2) This change in the circumstances covers only particular members of the class (i.e., the class being the class of persons searched via MLATs and the particular members being the group of persons

252. *Id.*

253. *Id.*

254. Commissioner of Customs v. Hypermix Feeds Corporation, 664 SCRA 666 (2012).

255. *Id.* at 676-77.

256. *See Commissioner of Customs*, 664 SCRA at 676-77.

searched under MLATs containing the no-standing provision); and

(3) The affected members of the class do not have a peculiar characteristic from the other members of the class because the only thing that distinguishes them from the other members of the class is the law governing their MLA request but not really their personal character of being subject of a search.

The analyses above are also supported by the general treatment of the Supreme Court to the international obligations of the Philippines (i.e., in performing the international obligations of the Philippines, the rights of a private individual must also be considered and respected).[257] Hence, if, in the performance the international obligation of the Philippines, the rights of individuals, particularly their right against discriminatory State practices,[258] the international obligation must be reviewed and the apparent conflict between the obligation and the right of the private individual, which is also recognized by international law, should be reconciled.[259]

Thus, the no-standing provisions of these MLATs must be struck down because they violate the equal protection clause.

D. Observations from and Comments on the Sergio Ruling

As noted above, the ruling in *Sergio* shows that the defense may still raise its objections with regard to the deposition taken by Indonesian authorities.[260] It must be recalled also that the ASEAN MLAT provides that the provision of the Treaty does not create any right to a private person to suppress or exclude an evidence obtained via the MLAT,[261] yet the *Sergio* decision implicitly allows a private person to object to the admissibility (which means to suppress or exclude) of an evidence obtained via the MLAT.[262]

257. BERNAS, PUBLIC INTERNATIONAL LAW, *supra* note 13, at 190 (citing *Olalia, Jr.* 521 SCRA at 481).

258. *See* BERNAS, PUBLIC INTERNATIONAL LAW, *supra* note 13, at 190 (citing *Olalia, Jr.* 521 SCRA).

259. *Id.*

260. *Sergio*, G.R. No. 240053, at 22.

261. ASEAN MLAT, *supra* note 22, art. 1, ¶ 3.

262. *Sergio*, G.R. No. 240053, at 22.

To the mind of the Author, this might be a resonance of the Court's assertion of its supremacy in terms of its rule-making power over all courts. To recall, in *In Re Garcia*,[263] the Supreme Court invoked its rule-making power and power to determine as to whom may be admitted in the Philippine Bar when it disallowed Spanish lawyers to practice law in the Philippines as the treaty allowing the practice of profession across States shall be subject to their laws and regulations.[264]

VI. CONCLUSION

The provision that does not give the right for a private person to question the search and seizure is void for violating the right to equal protection of laws because there is no substantial distinction between a person whose data was searched by a foreign State and another person whose data was searched by another foreign State, e.g., a person searched by U.S. LEA for a cybercrime is not different from a person searched by U.K. LEA; and even if one would uphold the view that the language does prohibit the questioning of search conducted via an MLAT absolutely, the validity of the no-standing provision cannot be sustained because these provisions found on different treaties violate the equal protection clause. As mentioned, almost half of the MLATs entered by the Philippines do not contain a no-standing provision, and there is no difference between a person who was searched by a foreign LEA whose MLAT with the Philippines contains the supposed no-standing provision and another person who was searched by another foreign LEA whose MLAT with the Philippines does not contain the supposed no-standing provision. In this case, the accused, subject to the requirements of standing vis-à-vis his or her privacy rights, may question the search. The basis to question would be the rules of evidence, conflict of laws doctrines, and the Budapest Convention. Furthermore, the ruling in *People v. Sergio* implies that the MLATs' provisions, especially when they involve evidence, are subject to the provisions of the Rules of Court.[265]

VII. RECOMMENDATION

The renegotiation of MLATs would necessarily involve the modification of the prohibitory provision regarding the questioning of the evidence obtained. The clause, "Notwithstanding the abovementioned, the State-Party where the private individual is being indicted or tried is not precluded from adopting

263. In Re Garcia, 2 SCRA 984 (1961).

264. *Id.* at 986.

265. *See generally Sergio*, G.R. No. 240053.

laws and rules of procedure providing the manner of questioning the searches and seizures conducted via this Treaty" may be added to the prohibitory provision in order to clarify the fact that the no-standing provision is not absolute.