# Republic of the Philippines
# Supreme Court
## Manila

**EN BANC**

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| **SENATORS FRANCIS "KIKO" N. PANGILINAN, FRANKLIN M. DRILON, PAOLO BENIGNO "BAM" AQUINO IV, LEILA M. DE LIMA, RISA HONTIVEROS, AND ANTONIO 'SONNY' F. TRILLANES IV,**<br>Petitioners,<br><br>-versus-<br><br>**ALAN PETER S. CAYETANO, SALVADOR C. MEDIALDEA, TEODORO L. LOCSIN, JR., AND SALVADOR S. PANELO,**<br>Respondents. | **G.R. No. 238875** |
| x----------x | x----------x |
| **PHILIPPINE COALITION FOR THE INTERNATIONAL CRIMINAL COURT (PCICC), LORETTA ANN P. ROSALES, DR. AURORA CORAZON A. PARONG, EVELYN BALAIS-SERRANO, JOSE NOEL D. OLANO, REBECCA DESIREE E. LOZADA, EDELIZA P. HERNANDEZ, ANALIZA T. UGAY, NIZA CONCEPCION ARAZAS, GLORIA ESTER CATIBAYAN-GUARIN, RAY PAOLO "ARPEE" J. SANTIAGO, GILBERT TERUEL ANDRES, AND AXLE P. SIMEON,**<br>Petitioners, | **G.R. No. 239483** |

-versus-

**OFFICE OF THE EXECUTIVE SECRETARY, REPRESENTED BY HON. SALVADOR MEDIALDEA, THE DEPARTMENT OF FOREIGN AFFAIRS, REPRESENTED BY HON. ALAN PETER CAYETANO, AND THE PERMANENT MISSION OF THE REPUBLIC OF THE PHILIPPINES TO THE UNITED NATIONS, REPRESENTED BY HON. TEODORO LOCSIN, JR.,**
Respondents.

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**INTEGRATED BAR OF THE PHILIPPINES,**
Petitioner,

-versus-

**OFFICE OF THE EXECUTIVE SECRETARY, REPRESENTED BY HON. SALVADOR C. MEDIALDEA, THE DEPARTMENT OF FOREIGN AFFAIRS, REPRESENTED BY HON. ALAN PETER CAYETANO AND THE PERMANENT MISSION OF THE REPUBLIC OF THE PHILIPPINES TO THE UNITED NATIONS, REPRESENTED BY HON. TEODORO LOCSIN, JR.,**
Respondents.

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**G.R. No. 240954**

Present:

PERALTA, *Chief Justice*,
PERLAS-BERNABE,
LEONEN,
CAGUIOA,
GESMUNDO,
HERNANDO,
CARANDANG,
LAZARO-JAVIER,
INTING,
ZALAMEDA,
LOPEZ, M.,
DELOS SANTOS,
GAERLAN,
ROSARIO, and
LOPEZ, J., *JJ.*

**Promulgated:**
March 16, 2021

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**DECISION**

**LEONEN, *J.*:**

Treaties may effectively implement the constitutional imperative to protect human rights and consider social justice in all phases of development—but so can a statute, as Republic Act No. 9851, the Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, does.

The president, as primary architect of our foreign policy and as head of state, is allowed by the Constitution to make preliminary determinations on what, at any given moment, might urgently be required in order that our foreign policy may manifest our national interest.

Absent a clear and convincing showing of a breach of the Constitution or a law, brought through an actual, live controversy and by a party that presents direct, material, and substantial injury as a result of such breach, this Court will stay its hand in declaring a diplomatic act as unconstitutional.

On March 15, 2018, the Philippines announced its withdrawal from the International Criminal Court. On March 16, 2018, it formally submitted its Notice of Withdrawal through a Note Verbale to the United Nations Secretary-General's Chef de Cabinet. The Secretary General received this communication the following day, March 17, 2018.

Through these actions, the Philippines completed the requisite acts of withdrawal. This was all consistent and in compliance with what the Rome Statute plainly requires. By this point, all that were needed to enable withdrawal have been consummated. Further, the International Criminal Court acknowledged the Philippines' action soon after it had withdrawn. This foreclosed the existence of a state of affairs correctible by this Court's finite jurisdiction. The Petitions were, therefore, moot when they were filed.[1] The International Criminal Court's subsequent consummate acceptance of the withdrawal all but confirmed the futility of this Court's insisting on a reversal of completed actions

In any case, despite the withdrawal, this Court finds no lesser protection of human rights within our system of laws. Neither do we agree with petitioners' implied statements that without the treaty, the judiciary will not be able to fulfill its mandate to protect human rights.

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[1] The Petition in G.R. No. 238875 was filed on May 16, 2018; the Petition in G.R. No. 293483 on June 7, 2018; and the Petition in G.R. No. 240954 on August 14, 2018.

Moreover, the Senate never sought to enforce what would have been its prerogative to require its concurrence for withdrawal. To date, Resolution No. 249, which seeks to express the chamber's position on the need for concurrence, has yet to be tabled and voted on.[2] Individual senators have standing to question the constitutionality of the actions of their chamber. Yet, in this case, as shown by the Resolution which petitioners co-authored, they acknowledged that an action by the Senate was necessary before coming to this Court. Thus, no actual conflict or constitutional impasse has yet arisen even as implied by their actions.

This Court cannot compel or annul actions where the relevant incidents are moot. Neither can this Court, without due deference to the actions of a co-equal constitutional branch, act before the Senate has acted.

Nonetheless, the President's discretion on unilaterally withdrawing from any treaty or international agreement is not absolute.

As primary architect of foreign policy, the president enjoys a degree of leeway to withdraw from treaties. However, this leeway cannot go beyond the president's authority under the Constitution and the laws. In appropriate cases, legislative involvement is imperative. The president cannot unilaterally withdraw from a treaty if there is subsequent legislation which affirms and implements it.

Conversely, a treaty cannot amend a statute. When the president enters into a treaty that is inconsistent with a prior statute, the president may unilaterally withdraw from it, unless the prior statute is amended to be consistent with the treaty. A statute enjoys primacy over a treaty. It is passed by both the House of Representatives and the Senate, and is ultimately signed into law by the president. In contrast, a treaty is negotiated by the president, and legislative participation is limited to Senate concurrence. Thus, there is greater participation by the sovereign's democratically elected representatives in the enactment of statutes.

The extent of legislative involvement in withdrawing from treaties is further determined by circumstances attendant to how the treaty was entered into or came into effect. Where legislative imprimatur impelled the president's action to enter into a treaty, a withdrawal cannot be effected without concomitant legislative sanction. Similarly, where the Senate's concurrence imposes as a condition the same concurrence for withdrawal, the president enjoys no unilateral authority to withdraw, and must then secure Senate concurrence.

Thus, the president can withdraw from a treaty as a matter of policy in

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[2] Oral Arguments, TSN dated September 4, 2018, p. 14.

keeping with our legal system, if a treaty is unconstitutional or contrary to provisions of an existing prior statute. However, the president may not unilaterally withdraw from a treaty: (a) when the Senate conditionally concurs, such that it requires concurrence also to withdraw; or (b) when the withdrawal itself will be contrary to a statute, or to a legislative authority to negotiate and enter into a treaty, or an existing law which implements a treaty.

This Court resolves consolidated Petitions for Certiorari and Mandamus under Rule 65 of the 1997 Rules of Civil Procedure, seeking to: (a) declare the Philippines' withdrawal from the Rome Statute as invalid or ineffective, since it was done without the concurrence of at least two-thirds of all the Senate's members; and (b) compel the executive branch to notify the United Nations Secretary-General that it is cancelling, revoking, and withdrawing the Instrument of Withdrawal.[3] Petitioners maintain that the Instrument of Withdrawal is inconsistent with the Constitution.

The Rome Statute is a multilateral treaty that established the International Criminal Court, where the gravest crimes under international law are prosecuted.[4]

Since 1996, under Fidel V. Ramos's (President Ramos) presidency, the Philippines has participated in the court's establishment, taking an active role in the deliberations as a member of the Drafting Committee.[5]

On December 28, 2000, the Philippines, through then President Joseph Ejercito Estrada (President Estrada), signed the Rome Statute of the International Criminal Court.[6]

President Estrada's act of signing the Rome Statute signified the Philippines' intent to be bound by the provisions of the treaty, subject to the domestic requirements for its validity and enforceability.[7] Particularly, Article VII, Section 21 of the 1987 Constitution[8] requires the concurrence by at least two-thirds of all members of the Senate for a treaty to be valid, binding, effective, and enforceable.

In the meantime, on July 1, 2002, the International Criminal Court's

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3 *Rollo* (G.R. No. 238875), p. 16, Petition.
4 *Rollo* (G.R. No. 239483), p. 8, Petition.
5 *Rollo* (G.R. No. 238875), p. 8, Petition.
6 *See* United Nations Treaty Collection, available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en#2> (last accessed on March 3, 2021).
7 *Rollo* (G.R. No. 239483), p. 11, Petition.
8 CONST., art. VII, sec. 21 provides:
SECTION 21. No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.

Rome Statute entered into force.[9]

On December 11, 2009, with Senate concurrence to the Rome Statute still pending, then President Gloria Macapagal-Arroyo (President Macapagal-Arroyo) signed into law Republic Act No. 9851, otherwise known as the Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity. Republic Act No. 9851 replicated many of the Rome Statute's provisions.[10]

Senate concurrence to the Rome Statute was obtained following President Benigno Aquino III's (President Aquino) election. On August 23, 2011, the Senate, with a vote of 17-1, passed Resolution No. 546—enabling the Philippines' consummate accession to the Rome Statute.[11]

On August 30, 2011, the Philippines deposited the instrument of ratification of the Rome Statute. On November 1, 2011, the Rome Statute entered into force in the Philippines. The country was the 16th state party to belong to the Group of Asia-Pacific State Parties in the International Criminal Court.[12]

On June 30, 2016, President Aquino's term ended and President Rodrigo Roa Duterte (President Duterte) took his oath as chief executive.

On April 24, 2017, Atty. Jude Sabio filed a complaint before the International Criminal Court pertaining to alleged summary killings when President Duterte was the mayor of Davao City.[13]

On June 6, 2017, Senator Antonio Trillanes IV and Representative Gary Alejano filed a "supplemental communication" before the International Criminal Court with regard to President Duterte's drug war.[14]

On February 8, 2018, the Office of International Criminal Court Trial Prosecutor Fatou Bensouda (Prosecutor Bensouda) commenced the preliminary examination of the atrocities allegedly committed in the Philippines pursuant to the Duterte administration's "war on drugs."[15]

On March 15, 2018, the Philippines announced that it was withdrawing from the International Criminal Court. President Duterte claimed that the country never became a state party to the Rome Statute

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9 *Rollo* (G.R. No. 238875), p. 8, Petition.
10 Id.
11 *Rollo* (G.R. No. 239483), pp. 12–13, Petition.
12 Id. at 13.
13 Id.
14 Id.
15 Id.

since the treaty was not published in the Official Gazette.[16]

On March 16, 2018, the Philippines formally submitted its Notice of Withdrawal from the International Criminal Court to the United Nations. Enrique Manalo, the Permanent Representative of the Republic of the Philippines to the United Nations in New York, deposited the Note Verbale to Maria Luiza Ribeiro Viotti, Chef de Cabinet of the United Nations' Secretary-General Antonio Guterres.[17]

The full text of this notification reads:

> The Permanent Mission of the Republic of the Philippines to the United Nations presents its compliments to the Secretary-General of the United Nations and has the honor to inform the Secretary-General of the decision of the Government of the Republic of the Philippines to withdraw from the Rome Statute of the International Criminal Court in accordance with the relevant provisions of the Statute.
>
> The Philippines assures the community of nations that the Philippine Government continues to be guided by the rule of law embodied in its Constitution, which also enshrines the country's long-standing tradition of upholding human rights.
>
> The Government affirms its commitment to fight against impunity for atrocity crimes, notwithstanding its withdrawal from the Rome Statute, especially since the Philippines has a national legislation punishing atrocity crimes. The Government remains resolute in effecting its principal responsibility to ensure the long-term safety of the nation in order to promote inclusive national development and secure a decent and dignified life for all.
>
> The decision to withdraw is the Philippines' principled stand against those who politicize and weaponize human rights, even as its independent and well-functioning organs and agencies continue to exercise jurisdiction over complaints, issues, problems and concerns arising from its efforts to protect its people.
>
> The Permanent Mission of the Republic of the Philippines to the United Nations avails itself of this opportunity to renew to the Secretary-General of the United Nations the assurances of its highest consideration.[18]

On March 17, 2018, the Secretary-General of the United Nations received the notification from the Philippine government.[19]

On May 16, 2018, Senators Francis Pangilinan (Senator Pangilinan), Franklin Drilon, Paolo Benigno Aquino, Leila De Lima, Risa Hontiveros,

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16 Id. at 14.
17 Id. at 19.
18 *Rollo* (G.R. No. 238875), p. 18.
19 *Rollo* (G.R. No. 239483), p. 19, Petition.

and Antonio Trillanes IV filed a Petition for Certiorari and Mandamus,[20] assailing the executive's unilateral act of withdrawing from the Rome Statute for being unconstitutional. This Petition was docketed as G.R. No. 238875.

Later, Senator Pangilinan would manifest in the oral arguments incidents relating to Senate Resolution No. 289, a "Resolution Expressing the Sense of the Senate that Termination of, or Withdrawal from, Treaties and International Agreements Concurred in by the Senate shall be Valid and Effective Only Upon Concurrence by the Senate." The Resolution was noted to have not been calendared for agenda in the Senate.[21]

Meanwhile, on June 13, 2018, the Philippine Coalition for the Establishment of the International Criminal Court, and its members, Loretta Ann P. Rosales, Dr. Aurora Corazon A. Parong, Evelyn Balais-Serrano, among others, also filed a Petition for Certiorari and Mandamus, docketed as G.R. No. 239483.[22]

On July 6, 2018, the Office of the Solicitor General filed its Consolidated Comment to the Petitions.[23]

On August 14, 2018, the Integrated Bar of the Philippines filed its own Petition,[24] and an Omnibus *Ex-Parte* Motion for Consolidation and for Inclusion in the Oral Arguments.[25] This Petition was docketed as G.R. No. 240954.

Oral arguments were conducted on August 28, 2018, September 4, 2018, and October 9, 2018. At the termination of oral arguments, this Court required the parties to file their respective memoranda within 30 days.[26]

In his March 18, 2019 press release, the Assembly of State Parties' President Mr. O-Gon Kwon "reiterated his regret regarding the withdrawal of the Philippines, effective as of 17 March 2019, from the Rome Statute[.]"[27] He expressed hope that the country rejoins the treaty in the future.[28]

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20 *Rollo* (G.R. No. 238875), pp. 3–17.
21 Oral Arguments, TSN dated September 4, 2018, p. 14.
22 *Rollo* (G.R. No. 239483), pp. 3–58.
23 *Rollo* (G.R. No. 238875), pp. 51–102.
24 *Rollo* (G.R. No. 240954), pp. 8–36.
25 Id. at 3–7.
26 *Rollo* (G.R. No. 239483), pp. 603–676, 678–718, 719–794, 813–942.
27 International Criminal Court, *President of the Assembly of States Parties regrets withdrawal from the Rome Statute by the Philippines,* available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1443> (last accessed on March 3, 2021).
28 Id.

The three consolidated Petitions before this Court seek similar reliefs.

In G.R. No. 238875, petitioners-senators argue that, as a treaty that the Philippines validly entered into, the Rome Statute "has the same status as an enactment of Congress,"[29] as "a law in the Philippines."[30] They claim that the President "cannot repeal a law."[31] They aver that the country's withdrawal from a treaty requires the concurrence of at least two-thirds of the Senate.[32]

In G.R. No. 239483, petitioner Philippine Coalition for the International Criminal Court and its members assert that their rights to life, personal security, and dignity were impaired by the withdrawal from the Rome Statute.[33] Citing a decision of the South African High Court, they also claim that the ratification of and withdrawal from a multilateral treaty require the Senate's concurrence.[34] According to them, contrary to the President's assertion, the Rome Statute is effective in Philippine jurisdiction by virtue of the Constitution's incorporation clause, despite lack of publication.[35]

Petitioners pray that the notification of withdrawal be declared "invalid or ineffective"[36] or "void *ab initio*"[37] and that the executive, through the Department of Foreign Affairs and the Philippine Permanent Mission to the United Nations, be required to notify the Secretary-General of the United Nations that the notice is cancelled, revoked, or withdrawn.[38]

Respondents, through the Office of the Solicitor General, counter that the petitioners in G.R. No. 238875 do not have *locus standi* as they do not represent "the official stand of the Senate as a body."[39] Neither do the petitioners in G.R. No. 239483 have standing to question "the wisdom of the President's sovereign power to withdraw from the Rome Statute, absent any proof of actual or immediate danger of sustaining a direct injury as a result of said withdrawal."[40]

Respondents claim that a Rule 65 petition is improper because the acts of the President complained of were not in the exercise of judicial or quasi-judicial powers.[41] Moreover, mandamus cannot lie against a discretionary

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29 *Rollo* (G.R. No. 238875), p. 9.
30 Id.
31 Id. at 10.
32 Id. at 11.
33 *Rollo* (G.R. No. 239483), pp. 20–21.
34 Id. at 27–30.
35 Id. at. 38.
36 *Rollo* (G.R. No. 238875), p. 16.
37 *Rollo* (G.R. No. 239483), p. 49.
38 Id.
39 Id. at 80, Consolidated Comment.
40 Id. at 82–83.
41 Id. at. 91.

act of a president, much less an act which is not enjoined as a duty, such as the ratification of a treaty.[42]

They posit that the Petitions do not present a justiciable controversy because the withdrawal from a treaty is a political question, being a policy determination delegated to the "wisdom of the executive."[43] Specifically, the President is the "sole organ of the nation in its external relations, and its sole representative with foreign nations."[44] Respondents assert that the Constitution does not expressly require Senate concurrence in withdrawing from a treaty.[45]

Respondents maintain that the withdrawal was valid for having complied with the Rome Statute, which requires only a written notification of withdrawal.[46]

Respondents also allege that the decision to withdraw from the Rome Statute "was an act to protect national sovereignty from interference and to preserve the judiciary's independence,"[47] which was necessary given Prosecutor Bensouda's preliminary examination. This allegedly violates the complementarity principle under the Rome Statute.[48]

Lastly, respondents aver that the rights being protected under the Rome Statute are adequately safeguarded by domestic laws.[49] The withdrawal's only effect, they say, is that the "Philippines will no longer be under the jurisdiction of the International Criminal Court."[50]

Respondents pray that the consolidated Petitions be denied for lack of merit.[51]

For this Court's resolution are the following issues:

First, whether or not petitioners have sufficiently discharged their burden of showing that this case is justiciable. Subsumed under this issue are the following:

1. Whether or not the consolidated Petitions present an actual, justiciable controversy;

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42 Id. at 92–93.
43 Id. at 88.
44 Id.
45 Id. at 89.
46 Id. at 110.
47 Id. at 95.
48 Id. at 96-98.
49 Id. at 110–116.
50 Id. at 116.
51 Id. at 117.

2. Whether or not each of the consolidated Petitions were timely filed;

3. Whether or not petitioners have the requisite standing to file their respective Petitions;

4. Whether or not the consolidated Petitions were filed in violation of the principle of hierarchy of courts;

5. Whether or not the issues raised by the consolidated Petitions pertain to political questions; and

6. Whether or not petitioners' resort to the procedural vehicles of petitions for certiorari and mandamus is proper.

Second, whether or not the Philippines' withdrawal from the Rome Statute through a Note Verbale delivered to the Secretary-General of the United Nations is valid, binding, and effectual. This involves the following issues:

1. Whether or not the Philippines complied with all the requisites for withdrawal from the Rome Statute;

2. Whether or not the executive can unilaterally withdraw from a treaty. This encompasses:

    a. Whether or not the executive had valid grounds to withdraw from the Rome Statute;

    b. Whether or not withdrawing from a treaty requires legislative action;

    c. Whether or not the executive's withdrawal from the Rome Statute violated any legislative act or prerogative; and

    d. Whether or not withdrawing from a treaty demands the concurrence of at least two-thirds of all the members of the Senate.

Third, whether or not the Philippines' withdrawal from the Rome Statute places the Philippines in breach of its obligations under international law.

Lastly, whether or not the Philippines' withdrawal from the Rome

statute will diminish the Filipino people's protection under international law; and even if it does, whether or not this is a justiciable question.

## I

Through Article VII, Section 21 of the Constitution, the Rome Statute, an international instrument, was transformed and made part of the law of the land. Entry into the Rome Statute represented the Philippines' commitment to the international community to prosecute individuals accused of international crimes. Its validity and effectivity hinged on the passage of Senate Resolution No. 546, which embodied the Senate's concurrence to the Philippines' accession to the Rome Statute.

Petitioners believe that President Duterte's unilateral withdrawal from the Rome Statute transgressed legislative prerogatives.

Ultimately, this Court may only rule in an appropriate, justiciable controversy raised by a party who suffers from direct, substantial, and material injury. Once again, we clarify our role within the constitutional order. We take this occasion to emphasize the need for this Court to exercise restraint in cases that fail to properly present justiciable controversies, brought by parties who fail to demonstrate their standing. This is especially true when our pronouncements will cause confusion in the diplomatic sphere and undermine our international standing and repute.

Petitioners are before us through the vehicles of petitions for certiorari and mandamus under Rule 65 of the Rules of Court, praying that the Philippine Notice of Withdrawal be declared void *ab initio*, and that the withdrawal itself be declared invalid. They also pray for a writ of *mandamus* to direct the Executive Secretary to recall and revoke the Notice of Withdrawal, and to submit the issue before the Senate for its deliberation.[52]

These Petitions fail on significant procedural grounds.

It is true that this Court, in the exercise of its judicial power, can craft a framework to interpret Article VII, Section 21 of the Constitution and determine the extent to which Senate concurrence in treaty withdrawal is imperative. However, it will be excessive for any such framework to be imposed on the circumstances surrounding these present Petitions, seeing as how the incidents here are *fait accompli*.

Petitioners insist that the protection of human rights will be weakened,

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[52] *Rollo* (G.R. No. 239483), p. 49 and *rollo* (G.R. No. 238875), p. 16.

yet their contentions are mere surmises. Ample protection for human rights within the domestic sphere remain formally in place. It is a canon of adjudication that "the court should not form a rule of constitutional law broader than is required by the precise facts to which it is applied."[53]

Contrary to petitioners' claim, these cases do not deal with the results of the ongoing preliminary examination by Prosecutor Bensouda. Article 127 of the Rome Statute covers that.[54] Neither at issue here is whether a future president may decide to re-enter the Rome Statute and secure the requisite Senate concurrence. It is possible that whatever the results in these cases are, a future administration under a new president can make that decision.

Petitioners want a different political result from what the President has done, and so they implore this Court to veto his action, raising serious policy implications in so doing. This Court must exercise restraint in the face of political posturing, and must anchor its determinations not on political results, but on principles and the text found in the Constitution and law. The most basic of these principles are parameters that determine the justiciability of cases. Judicial office impels capacity to rule in keeping with what the Constitution or law mandates, even when potentially contrary to what a magistrate may prefer politically.

## II

To understand the implications of these cases, a brief overview of the Rome Statute is necessary.

On July 17, 1998, the Rome Statute of the International Criminal Court was adopted in a conference participated in by 120 states.[55] It created the International Criminal Court, a permanent autonomous institution,[56] that

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53 *Francisco, Jr. v. House of Representatives,* 460 Phil. 830, 915 (2003) [Per J. Carpio Morales, En Banc], *citing* the Concurring Opinion of Justice Vicente Mendoza in *Estrada v. Desierto*, 406 Phil. 1 (2001) [Per J. Puno, En Banc]; *Demetria v. Alba*, 232 Phil. 222 (1987) [Per J. Fernan, En Banc], *citing Ashwander v. TVA*, 297 U.S. 288 (1936).

54 Rome Statute, art. 127 provides:

**Article 127**

*Withdrawal*

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. *Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.* (Emphasis supplied)

55 The International Criminal Court, *Understanding the International Criminal Court,* 1, available at <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> (last accessed on March 3, 2021).

56 Id. at 4.

was given jurisdiction to "investigate, prosecute, and try" individuals accused of international crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.[57]

On the heels of World War I, during the 1919 Paris Peace Conference, an international tribunal that will prosecute leaders accused of international crimes was first proposed in modern times. In 1937, the League of Nations held a conference in Geneva, where 13 states signed the first convention aiming to establish a permanent international court. However, none of the states ratified it and its aims failed to materialize.[58]

Following World War II and the Axis Powers' aggressive military campaigns[59] in Europe and Asia,[60] the allied powers established ad hoc tribunals to try Axis leaders accused of international crimes.[61]

Consequently, a draft of the charter of an international tribunal was prepared in a meeting in London among representatives from France, the United Kingdom, the United States, and the Union of Soviet Socialist Republics. On August 8, 1945, the London Agreement was signed. It established the Nuremburg International Military Tribunal.[62] The tribunal sat in Nuremberg, Germany and tried the most notorious Nazi war criminals.[63] Its jurisdiction was limited to crimes against peace, war crimes, and crimes against humanity.[64] Nineteen other states subsequently supported the London Agreement.[65]

In January 1946, the Supreme Commander of the Allied Powers, General Douglas MacArthur, established the International Military Tribunal for the Far East, more commonly known as the Tokyo International Military Tribunal.[66] The Tokyo Trial was conducted from May 3, 1946 to November 12, 1948.[67]

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57 Id. at 3.

58 DR MIŠA ZGONEC-ROŽEJ, ET.AL., INTERNATIONAL CRIMINAL LAW MANUAL 48–49 (2010), available at <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=AAD84F6F-8058-4A1F-91CE-BE0EBA974D3E> (last accessed on March 3, 2021).

59 LAURA BARNETT, THE INTERNATIONAL CRIMINAL COURT: HISTORY AND ROLE 2 (2013).

60 DR MIŠA ZGONEC-ROŽEJ, ET.AL., INTERNATIONAL CRIMINAL LAW MANUAL 50 (2010), available at <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=AAD84F6F-8058-4A1F-91CE-BE0EBA974D3E> (last accessed on March 3, 2021).

61 ROBERT CRYER, HAKAN FRIMAN, DARRYL ROBINSON, ELIZABETH WILMSHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 111 (2nd ed., 2010).

62 Id.

63 DR MIŠA ZGONEC-ROŽEJ, ET.AL., INTERNATIONAL CRIMINAL LAW MANUAL 50 (2010), available at <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=AAD84F6F-8058-4A1F-91CE-BE0EBA974D3E> (last accessed on March 3, 2021).

64 WILLIAM A. SCHABAS, INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 6 (2nd ed., 2004).

65 ROBERT CRYER, HAKAN FRIMAN, DARRYL ROBINSON, ELIZABETH WILMSHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 111 (2nd ed., 2010).

66 Id. at 115.

67 DR MIŠA ZGONEC-ROŽEJ, ET.AL., INTERNATIONAL CRIMINAL LAW MANUAL 52 (2010), available at <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=AAD84F6F-8058-4A1F-91CE-BE0EBA974D3E> (last accessed on March 3, 2021).

Upon termination of their respective trials, the Nuremburg and Tokyo International Military Tribunals also ceased to operate.[68]

The United Nations General Assembly later put to task the International Law Commission, a committee of legal experts who worked for the development and codification of international law. The commission was asked to look into the possibility of establishing a permanent international criminal court. Drafts were subsequently produced, but the Cold War impeded its progress.[69]

As work continued on the draft, the United Nations Security Council established two more ad hoc tribunals in the early 1990s. To address large-scale atrocities involving the Yugoslavian wars of dissolution and the Rwandan genocide of 1994,[70] the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda were established. These temporary tribunals underscored the need for a permanent international court.

In 1994, the International Law Commission submitted a proposal to the United Nations General Assembly, creating a permanent international criminal court.[71] The year after, a Preparatory Committee was convened.[72]

In April 1998, the amended draft treaty was presented to the United Nations General Assembly, and the Rome Conference commenced in June 1998.[73]

On July 17, 1998, 120 states voted in favor of the draft treaty, resulting in its adoption.[74]

On July 1, 2002, the Rome Statute of the International Criminal Court entered into force upon ratification by 60 states.[75] This formally constituted the International Criminal Court.

The International Criminal Court has an international legal personality,[76] and sits at The Hague in the Netherlands.[77] It may exercise its

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68 Id. at 53.

69 LAURA BARNETT, THE INTERNATIONAL CRIMINAL COURT: HISTORY AND ROLE 3 (2013).

70 ROBERT CRYER, HAKAN FRIMAN, DARRYL ROBINSON, ELIZABETH WILMSHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 122 (2nd ed., 2010).

71 LAURA BARNETT, THE INTERNATIONAL CRIMINAL COURT: HISTORY AND ROLE 5 (2013).

72 DR MIŠA ZGONEC-ROŽEJ, ET.AL., INTERNATIONAL CRIMINAL LAW MANUAL 62 (2010), available at <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=AAD84F6F-8058-4A1F-91CE-BE0EBA974D3E> (last accessed on March 3, 2021).

73 Id.

74 Id. at 63.

75 Id.

76 Rome Statute, art. 4 provides:
**Article 4**

functions and powers "on the territory of any [s]tate [p]arty and, by special agreement, on the territory of any other [s]tate."[78]

State parties to the Rome Statute recognize the jurisdiction of the International Criminal Court over the following:

> **ARTICLE 5**
> *Crimes within the jurisdiction of the Court*
>
> 1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
>
> (a) The crime of genocide;
>
> (b) Crimes against humanity;
>
> (c) War crimes;
>
> (d) The crime of aggression.

The International Criminal Court's jurisdiction is "complementary to national criminal jurisdictions."[79] Complementarity means that the International Criminal Court may only exercise jurisdiction if domestic courts were "unwilling or unable" to prosecute.[80] Article 17 of the Rome Statute contemplates these situations:

> 2. In order to determine *unwillingness* in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
>
> (a) The proceedings were or are being undertaken or the national decision was made *for the purpose of shielding the person concerned from criminal responsibility* for crimes within the jurisdiction of the Court referred to in article 5;

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*Legal status and powers of the Court.*
The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions a nd the fulfilment of its purposes. 2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

77 The International Criminal Court, *Understanding the International Criminal Court,* 4, available at <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> (last accessed on March 7, 2021).

78 Rome Statute, art. 4.

79 Rome Statute, art. 1 provides:
**Article 1**
*The Court*
An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

80 WILLIAM A. SCHABAS, INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 154 (2nd ed., 2004).

(b) There has been an *unjustified delay in the proceedings* which in the circumstances is *inconsistent with an intent to bring the person concerned to justice*;

(c) The *proceedings were not or are not being conducted independently or impartially*, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine *inability* in a particular case, the Court shall consider whether, due to a *total or substantial collapse or unavailability of its national judicial system*, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings. (Emphasis supplied)

The International Criminal Court has jurisdiction over natural persons. Criminal liability shall attach to one who:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

i. Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

ii. Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for

> punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.[81]

Individual criminal responsibility under the Rome Statute does not affect state responsibility in international law.[82] Further, the Rome Statute provides additional grounds of criminal responsibility for commanders and other superiors.[83]

In determining liability under the Rome Statute, a person's official capacity is irrelevant:

> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.[84]

The Rome Statute provides that state parties are obliged to give their *full cooperation* toward the International Criminal Court's investigation and prosecution of crimes within its jurisdiction.[85] The International Criminal

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81 Rome Statute, art. 25.

82 Rome Statute, art. 25(4) provides:

> ....
> (4) No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

83 Rome Statute, art. 28 provides:

> **Article 28**
> *Responsibility of commanders and other superiors*
> In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
> (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
> (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
> (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

84 Rome Statute, art. 27.

85 Rome Statute, art. 86.

Court may request, "through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession," state parties to cooperate.[86] It may employ measures to "ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families."[87]

The International Criminal Court may also ask for cooperation and assistance from any intergovernmental organization pursuant to an agreement with the organization and in accordance with its competence and mandate.[88] State parties are required to ensure that their national law provides a procedure "for all of the forms of cooperation" specified in Part 9 of the treaty.[89]

A state party's failure to comply with the International Criminal Court's request to cooperate would warrant the International Criminal Court's finding to that effect. It will then "refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the International Criminal Court, to the Security Council."[90]

The Assembly of States Parties is the International Criminal Court's management oversight and legislative body, comprised of representatives of all the states that ratified and acceded to the Rome Statute.[91]

Upon a finding of conviction, the International Criminal Court may impose any of the following penalties:

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86 Rome Statute, art. 87.

87 Rome Statute, art. 87(4) provides:

**Article 87**

*Requests for cooperation: general provisions*

. . . .

4. In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.

88 Rome Statute, art. 87(6) provides:

. . . .

6. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.

89 Id. at art. 88.

90 Rome Statute, art. 87(7) provides:

. . . .

7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

91 International Criminal Court, *President of the Assembly of States Parties regrets withdrawal from the Rome Statute by the Philippines,* available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1443> (last accessed on March 3, 2021).

> (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
> (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.
>
> 2. In addition to imprisonment, the Court may order:
>
> (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
> (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.[92]

All disputes involving the International Criminal Court's judicial functions are settled by its decision.[93] Disputes of at least two state parties which relate to the application of the Rome Statute, and which are unsettled by "negotiations within three months of their commencement, shall be referred to the Assembly of States Parties." The Assembly may "settle the dispute or may make recommendations on further means of settlement of the dispute."[94]

Article 127 of the Rome Statute provides mechanisms on how a state party may withdraw from it:

> 1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.
>
> 2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

Burundi is, thus far, the only other state party to withdraw from the Rome Statute. In accordance with Article 127(1) of the Rome Statute, it sent a written notification of withdrawal to the Secretary-General of the International Criminal Court on October 27, 2016. Burundi's withdrawal was effected on October 26, 2017.[95]

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92 Rome Statute, art. 77.
93 Rome Statute, art. 119(1).
94 Rome Statute, art. 119(2).
95 United Nations Treaty Collection, *Rome Statute of the International Criminal Court*, available at <https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=XVIII-10&chapter=18&lang=en#2> (last accessed on March 3, 2021).

Following Burundi, South Africa, Gambia, and the Philippines manifested their intent to withdraw. Nonetheless, Gambia and South Africa rescinded their notifications of withdrawal on February 10, 2017 and March 7, 2017, respectively.[96]

## III

On March 24, 1998, President Ramos issued Administrative Order No. 387, which created a task force on the proposed establishment of the International Criminal Court. The task force was composed of the following:

| | |
|---|---|
| Department of Foreign Affairs | Chairman |
| Department of Justice | Co-Chairman |
| Office of the Solicitor General | Member |
| Office of the Executive Secretary/(Office of the Chief Presidential Legal Counsel) | Member |
| Department of Interior and Local Government | Member |
| University of the Philippines College of Law | Member[97] |

The task force had the following duties:

1. Undertake studies and researches pertaining to the proposed establishment of the International Criminal Court;
2. Formulate policy recommendations to serve as inputs in the review and consolidation of the Philippine Government's position in the Preparatory Committee meetings of the ICC and the United Nations General Assembly;
3. Identify and recommend legislative measures necessary in the furtherance of the foregoing;
4. Serve as a forum for the resolution of issues and concerns pertaining to the establishment of the ICC;
5. Pursue other related functions which may be deemed necessary by the President.[98]

From June 15, 1998 to July 17, 1998, the Philippines participated in the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome. Then Foreign

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96 Id.
97 Administrative Order No. 387 (1998), sec. 2.
98 Administrative Order No. 387 (1998), sec. 3.

Affairs Undersecretary Lauro L. Baja, the Philippine Head of Delegation,[99] delivered a speech that explained the country's position, commitment, and historical participation on the establishment of the International Criminal Court. His points are summarized, as follows:

> 7. Mr. Baja (Philippines) said that his country aspired to the establishment of an international criminal court that would dispense justice efficiently and effectively; an institution that was ineffective in addressing the problem of impunity of the perpetrators of the most heinous violations of the laws of humanity would not serve justice or help to maintain international peace and security. *The position of the Philippines, consistent with its constitutional and legal traditions,* was based on those considerations and on its desire to uphold the current evolution of international law.
>
> 8. National judicial systems should have primacy in trying crimes and punishing the guilty. The International Criminal Court should complement those systems and seek action only when national institutions did not exist, could not function or were otherwise unavailable. The Court should have jurisdiction over the core crimes of genocide, war crimes, crimes against humanity and aggression, but its Statute should contain an additional provision allowing for the future inclusion of other crimes that affect the very fabric of the international system.
>
> 9. The Prosecutor should be independent and be entitled to investigate complaints *proprio motu*, subject to the safeguards provided by a supervisory pre-trial chamber. The use of weapons of mass destruction, including nuclear weapons, must be considered a war crime. The definition of war crimes and crimes against humanity should include special consideration of the interests of minors and of gender sensitivity. The Statute should provide for an age below which there was exemption from criminal responsibility, and persons under 18 years of age should not be recruited into the armed forces. The sexual abuse of women committed as an act of war or in a way that constituted a crime against humanity should be deemed particularly reprehensible. The crime of rape should be gender-neutral and classified as a crime against persons. A schedule of penalties should be prescribed for each core crime defined in the Statute, following the principle that there was no crime if there was no penalty, which would also meet the due process requirement that the accused should be fully apprised of the charges against them and of the penalties attaching to the alleged crimes.
>
> 10. The Philippines supported the positions set out by the States members of the Movement of Non-Aligned Countries at the Ministerial Meeting of the Coordinating Bureau of the Movement of Non-Aligned Countries, held in Cartagena de Indias, Colombia, in May 1998, *and was prepared to make the necessary changes to its national laws required by the establishment of the Court.*[100] (Emphasis supplied)

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[99] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Vol. II (June 15 – July 17, 1998), p. 30, available at <https://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf> (last accessed on March 3, 2021).

[100] Id. at 82.

In the same conference, the Philippines, through its Alternate Head of Delegation, Hon. Franklin M. Ebdalin,[101] voted to adopt the Rome Statute, and explained its vote:

> [T]he Statute contained the vital elements of an international criminal court, with jurisdiction over genocide, crimes against humanity and war crimes, gender-based and sex-related crimes and acts committed in non-international armed conflicts. *The Prosecutor could initiate proceedings proprio motu, independently of the Security Council.*
>
> 22. The restrictions on admissibility had been reduced to an acceptable minimum. The principle of complementarity was assured, giving due regard to the national jurisdiction and sovereignty of States parties. *Finally, there were provisions for restitution, compensation and rehabilitation for victims.*
>
> 23. On the other hand, some provisions detracted from those strengths. Some new definitions of war crimes constituted a retrograde step in the development of international law. The applicability of the aggression provisions had been postponed pending specific definition of the crime, and States parties had the option of reservations on the applicability of war crimes provisions. Finally, the Security Council could seek deferral of prosecution for a one-year period, renewable for an apparently unlimited number of times.
>
> *24. Nevertheless, he was confident that the International Criminal Court could succeed with the support of the international community and had therefore decided to vote in favour of the Statute.*[102] (Emphasis supplied)

On December 28, 2000, the Philippines[103] signed the Rome Statute. However, it was still "subject to ratification, acceptance or approval by signatory [s]tates."[104] It was also necessary that instruments of ratification be deposited with the Secretary-General of the United Nations.[105]

Later, Senator Aquilino Pimentel, Jr., Representative Loretta Ann Rosales, the Philippine Coalition for the Establishment of the International Criminal Court, the Task Force Detainees of the Philippines, and the Families of Victims of Involuntary Disappearances, among others, filed a petition for mandamus before this Court to compel the Office of the Executive Secretary and the Department of Foreign Affairs to transmit the signed copy of the Rome Statute to the Senate for its concurrence.[106]

Their petition was dismissed. In *Pimentel, Jr. v. Executive*

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101 United Nations Diplomatic Conference of Plenitpotentiaries on the Establishment of an International Criminal Court, Official Records, Vol. II (June 15 – July 17, 1998), p. 30, available at <https://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf> (last accessed on March 3, 2021).

102 Id. at 122.

103 *Pimentel, Jr. v. Executive Secretary*, 501 Phil. 303, 309 (2005) [Per J. Puno, En Banc].

104 Rome Statute, art. 125.

105 Rome Statute, art. 125.

106 *Pimentel, Jr. v. office of the Executive Secretary*, 501 Phil. 303, 310 (2005) [Per J. Puno, En Banc].

*Secretary*,[107] this Court noted that it was beyond its "jurisdiction to compel the executive branch of the government to transmit the signed text of the Rome Statute to the Senate."[108] *Pimentel Jr.* quoted Justice Isagani A. Cruz, who had earlier explained the following concerning the treaty-making process:

> The usual steps in the treaty-making process are: negotiation, signature, ratification, and exchange of the instruments of ratification. The treaty may then be submitted for registration and publication under the U.N. Charter, although this step is not essential to the validity of the agreement as between the parties.
>
> *Negotiation* may be undertaken directly by the head of state but he now usually assigns this task to his authorized representatives. These representatives are provided with credentials known as full powers, which they exhibit to the other negotiators at the start of the formal discussions. It is standard practice for one of the parties to submit a draft of the proposed treaty which, together with the counter-proposals, becomes the basis of the subsequent negotiations. The negotiations may be brief or protracted, depending on the issues involved, and may even "collapse" in case the parties are unable to come to an agreement on the points under consideration.
>
> If and when the negotiators finally decide on the terms of the treaty, the same is opened for *signature*. This step is primarily intended as a means of authenticating the instrument and for the purpose of symbolizing the good faith of the parties; but, significantly, *it does not indicate the final consent of the state in cases where ratification of the treaty is required.* The document is ordinarily signed in accordance with the *alternat*, that is, each of the several negotiators is allowed to sign first on the copy which he will bring home to his own state.
>
> *Ratification*, which is the next step, is the formal act by which a state confirms and accepts the provisions of a treaty concluded by its representatives. *The purpose of ratification is to enable the contracting states to examine the treaty more closely and to give them an opportunity to refuse to be bound by it should they find it inimical to their interests. It is for this reason that most treaties are made subject to the scrutiny and consent of a department of the government other than that which negotiated them.*
>
> . . . .
>
> The last step in the treaty-making process is the *exchange of the instruments of ratification*, which usually also signifies the effectivity of the treaty unless a different date has been agreed upon by the parties. Where ratification is dispensed with and no effectivity clause is embodied in the treaty, the instrument is deemed effective upon its signature.[109] (Emphasis in the original)

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[107] 501 Phil. 303 (2005) [Per J. Puno, En Banc].
[108] Id. at 318.
[109] Id. at 314–315.

This Court declared that submission to ratification is "generally held to be an executive act,"[110] and it binds the state to the signed statute. It concluded that upon signature through a representative, the president exercises discretion on whether to ratify the statute or not:

> After the treaty is signed by the state's representative, the President, being accountable to the people, is burdened with the responsibility and the duty to carefully study the contents of the treaty and ensure that they are not inimical to the interest of the state and its people. Thus, the President has the discretion even after the signing of the treaty by the Philippine representative whether or not to ratify the same. The Vienna Convention on the Law of Treaties does not contemplate to defeat or even restrain this power of the head of states. If that were so, the requirement of ratification of treaties would be pointless and futile. It has been held that a state has no legal or even moral duty to ratify a treaty which has been signed by its plenipotentiaries. There is no legal obligation to ratify a treaty, but it goes without saying that the refusal must be based on substantial grounds and not on superficial or whimsical reasons. Otherwise, the other state would be justified in taking offense.
>
> It should be emphasized that under our Constitution, the power to ratify is vested in the President, subject to the concurrence of the Senate. The role of the Senate, however, is limited only to giving or withholding its consent, or concurrence, to the ratification. Hence, it is within the authority of the President to refuse to submit a treaty to the Senate or, having secured its consent for its ratification, refuse to ratify it. Although the refusal of a state to ratify a treaty which has been signed in its behalf is a serious step that should not be taken lightly, such decision is within the competence of the President alone, which cannot be encroached by this Court *via* a writ of *mandamus*. This Court has no jurisdiction over actions seeking to enjoin the President in the performance of his official duties.[111] (Citations omitted)

In 2009, President Macapagal-Arroyo signed into law Republic Act No. 9851, which replicated many of the then unratified Rome Statute's provisions.

Some provisions, however, are significantly different. In some aspects, the law went beyond the Rome Statute. It broadened the definition of torture, added the conscription of child soldiers as a war crime,[112] and stipulated jurisdiction over crimes against humanity anywhere in the world, as long as the offender or victim is Filipino.[113] This removes complementarity as a requirement for prosecution of crimes against humanity under the ratified treaty. While the treaty's language had to be refined to take the interests of other countries into consideration,[114] the law

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[110] Id. at 316.
[111] Id. at 317–318.
[112] Republic Act No. 9851 (2009), sec. 4(c)(24).
[113] Republic Act No. 9851 (2009), sec. 17.
[114] For instance, the Philippines advocated that "the use of weapons of mass destruction, including nuclear weapons, must be considered a war crime." *See* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Vol. II

was independently passed considering all our interests. This independent, voluntary initiative strengthened our own criminal justice system.

On February 28, 2011, President Aquino sent the signed Rome Statute to the Senate for concurrence.[115] On August 23, 2011, the Senate passed Resolution No. 546, which embodied the country's accession to the Rome Statute.[116]

On August 30, 2011, the Philippines deposited its instrument of ratification to the United Nations Secretary-General. Thus, the Rome Statute took effect in the Philippines on November 1, 2011.[117]

## IV

The Vienna Convention on the Law of Treaties (Vienna Convention) defines treaties as "international agreement[s] concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[118]

In our jurisdiction, we characterize treaties as "international agreements entered into by the Philippines which require legislative concurrence after executive ratification. This term may include compacts like conventions, declarations, covenants and acts."[119]

Treaties under the Vienna Convention include all written international agreements, regardless of their nomenclature. In international law, no difference exists in the agreements' binding effect on states, notwithstanding how nations opt to designate the document.

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(June 15 – July 17, 1998), p. 82, available at <https://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf> (last accessed on March 3, 2021).
However, as the Rome Statute defined the various acts involving violations of International Humanitarian Laws, it removed nuclear weapons in terms of proportionality requirement in deference to a debate among the delegate-countries since some are capable of developing them. *See* Kara Allen with Scott Spence and Rocío Escauriaza Leal, *The use of chemical or biological weapons in armed conflict is a serious crime of international concern that should be explicitly prohibited by the Rome Statute*, VERTIC BRIEF (2011), available at <http://www.vertic.org/media/assets/Publications/VB%2014.pdf> (last accessed March 3, 2021).

115 PH ratifies International Criminal Court Statute available at <https://news.abs-cbn.com/nation/03/06/11/ph-ratifies-international-criminal-court-statute> (last accessed on March 3, 2021)

116 S. No. 546, 15th Cong., 2nt Sess. (2011).

117 International Criminal Court, *ICC Statement on The Philippines' notice of withdrawal: State participation in Rome Statute system essential to international rule of law,* available at < https://www.icc-cpi.int/Pages/item.aspx?name=pr1371> (last accessed on March 7, 2021).

118 Vienna Convention on the Law of Treaties, art. 2(1). The treaty was signed May 23, 1969,

119 Executive Order No. 459 (1997), sec. 2(b).

However, Philippine law distinguishes treaties from executive agreements.

## V

Treaties and executive agreements are equally binding on the Philippines. However, an executive agreement: "(a) does not require legislative concurrence; (b) is usually less formal; and (c) deals with a narrower range of subject matters."[120] Executive agreements dispense with Senate concurrence "because of the legal mandate with which they are concluded."[121] They simply *implement* existing policies, and are thus entered into:

> (1) to adjust the details of a treaty;
>
> (2) pursuant to or upon confirmation by an act of the Legislature; or
>
> (3) in the exercise of the President's independent powers under the Constitution.
>
> The *raison d'être* of *executive agreements hinges on prior constitutional or legislative authorizations*.[122] (Emphasis supplied, citations omitted)

However, this Court had previously stated that this difference in form is immaterial in international law:

> The special nature of an executive agreement is not just a domestic variation in international agreements. International practice has accepted the use of various forms and designations of international agreements, ranging from the traditional notion of a treaty — which connotes a formal, solemn instrument — to engagements concluded in modern, simplified forms that no longer necessitate ratification. An international agreement may take different forms: treaty, act, protocol, agreement, *concordat*, *compromis d'arbitrage*, convention, covenant, declaration, exchange of notes, statute, pact, charter, agreed minute, memorandum of agreement, *modus vivendi*, or some other form. Consequently, under international law, the distinction between a treaty and an international agreement or even an executive agreement is irrelevant for purposes of determining international rights and obligations.[123] (Citations omitted, emphasis in the original)

This Court also cautioned that this local affectation does not mean that

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[120] *China National Machinery & Equipment Corp. v. Santamaria*, 681 Phil. 198–227 (2012). [Per J. Sereno, En Banc], *citing Bayan v. Romulo,* 641 SCRA 244, 258–259 (2011) [Per J. Velasco, Jr., En Banc].

[121] *Saguisag v. Ochoa*, 777 Phil. 280, 396 (2016) [Per C.J. Sereno, En Banc].

[122] Id. at 387.

[123] Id. at 387–388.

the constitutionally required Senate concurrence may be conveniently disregarded:

> However, this principle does not mean that the domestic law distinguishing *treaties*, *international agreements*, and *executive agreements* is relegated to a mere variation in form, or that the constitutional requirement of Senate concurrence is demoted to an optional constitutional directive. There remain two very important features that distinguish *treaties* from *executive agreements* and translate them into terms of art in the domestic setting.
>
> *First*, executive agreements must remain traceable to an express or implied authorization under the Constitution, statutes, or treaties. The absence of these precedents puts the validity and effectivity of executive agreements under serious question for the main function of the Executive is to enforce the Constitution and the laws enacted by the Legislature, not to defeat or interfere in the performance of these rules. In turn, executive agreements cannot create new international obligations that are not expressly allowed or reasonably implied in the law they purport to implement.
>
> *Second*, treaties are, by their very nature, considered superior to executive agreements. Treaties are products of the acts of the Executive and the Senate unlike executive agreements, which are solely executive actions. Because of legislative participation through the Senate, a treaty is regarded as being on the same level as a statute. If there is an irreconcilable conflict, a later law or treaty takes precedence over one that is prior. An executive agreement is treated differently. Executive agreements that are inconsistent with either a law or a treaty are considered ineffective. *Both types of international agreement are nevertheless subject to the supremacy of the* Constitution.
>
> This rule does not imply, though, that the President is given *carte blanche* to exercise this discretion. Although the Chief Executive wields the exclusive authority to conduct our foreign relations, *this power must still be exercised within the context and the parameters set by the* Constitution, *as well as by existing domestic and international laws[.]*[124] (Emphasis supplied, citations omitted)

International agreements[125] fall under these two general categories, and are outlined in Executive Order No. 459, which provides guidelines on how these agreements enter into force in the domestic sphere.[126]

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[124] Id. at 388–389.

[125] Executive Order No. 459 (1997), sec. 2(a) provides:
SECTION 2. *Definition of Terms.* —
a. International agreement — shall refer to a contract or understanding, regardless of nomenclature, entered into between the Philippines and another government in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments[.]

[126] Executive Order No. 459 (1997), sec. 7 provides:
SECTION 7. *Domestic Requirements for the Entry into Force of a Treaty or an Executive Agreement.* — The domestic requirements for the entry into force of a treaty or an executive agreement, or any amendment thereto, shall be as follows:
A. *Executive Agreements.*
i. All executive agreements shall be transmitted to the Department of Foreign Affairs after their signing for the preparation of the ratification papers. The transmittal shall include the highlights of the agreements and the benefits which will accrue to the Philippines arising from them.

## VI

Though both are sources of international law, treaties must be distinguished from generally accepted principles of international law.

Article 38 of the Statute of the International Court of Justice enumerates the sources of international law:[127]

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Two constitutional provisions incorporate or transform portions of international law into the domestic sphere, namely: (1) Article II, Section 2, which embodies the *incorporation method*; and (2) Article VII, Section 21, which covers *the transformation method.* They state:

> **ARTICLE II**
> Declaration of Principles and State Policies
> Principles
>
> . . . .
>
> SECTION 2. The Philippines renounces war as an instrument of national policy, ***adopts the generally accepted principles of international law as part of the law of the land*** and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.

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ii. The Department of Foreign Affairs, pursuant to the endorsement by the concerned agency, shall transmit the agreements to the President of the Philippines for his ratification. The original signed instrument of ratification shall then be returned to the Department of Foreign Affairs for appropriate action.

B. *Treaties*.

i. All treaties, regardless of their designation, shall comply with the requirements provided in sub-paragraph 1 and 2, item A (Executive Agreements) of this Section. In addition, the Department of Foreign Affairs shall submit the treaties to the Senate of the Philippines for concurrence in the ratification by the President. A certified true copy of the treaties, in such numbers as may be required by the Senate, together with a certified true copy of the ratification instrument, shall accompany the submission of the treaties to the Senate.

ii. Upon receipt of the concurrence by the Senate, the Department of Foreign Affairs shall comply with the provision of the treaties in effecting their entry into force.

[127] Justice Carpio Morales opined that this is "[t]he most authoritative enumeration of the sources of international law." *See Separate Opinion in Rubrico v. Arroyo,* 627 Phil. 37, 80 (2010) [Per J. Velasco, Jr., En Banc].

**ARTICLE VII**
Executive Department

. . . .

SECTION 21. No treaty or international agreement ***shall be valid and effective*** unless concurred in by at least two-thirds of all the Members of the Senate. (Emphasis supplied)

The sources of international law—international conventions, international custom, general principles of law, and judicial decisions—are treated differently in our jurisdiction.

Article II, Section 2 of the Constitution declares that international custom and general principles of law are adopted *as part of the law of the land.* No further act is necessary to facilitate this:

> "Generally accepted principles of international law" refers to norms of general or customary international law which are binding on all states, *i.e.*, renunciation of war as an instrument of national policy, the principle of sovereign immunity, a person's right to life, liberty and due process, and *pacta sunt servanda*, among others. The concept of "generally accepted principles of law" has also been depicted in this wise:
>
> > Some legal scholars and judges look upon certain "general principles of law" as a primary source of international law because *they have the "character of jus rationale" and are "valid through all kinds of human societies."* O'Connell holds that certain principles are part of international law because *they are "basic to legal systems generally" and hence part of the jus gentium.* These principles, he believes, are established by a process of reasoning based on the common identity of all legal systems. If there should be doubt or disagreement, one must look to state practice and determine whether the municipal law principle provides a just and acceptable solution.[128] (Citations omitted, emphasis supplied)

In his separate opinion in *Government of the United States of America v. Purganan*,[129] Justice Jose C. Vitug (Justice Vitug) underscored that as a source of international law, general principles of law are only secondary to international conventions *and* international customs. He stressed that while international conventions and customs are "based on the consent of nations,"[130] general principles of law have yet to have a binding definition:[131]

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[128] *Pharmaceutical and Health Care Association of the Philippines v. Duque III*, 561 Phil. 386, 399–400 (2007) [Per J. Austria-Martinez, En Banc].

[129] G.R. No. 148571, December 17, 2002 (Resolution) [En Banc].

[130] *See* J. Vitug, Separate Opinion in *Government of the United States of America v. Purganan,* G.R. No. 148571, December 17, 2002 (Resolution) [En Banc] *citing* Ian Brownlie, "Principles of Public International Law," Claredon Press, Oxford, (5th ed., 1998), p. 15.

[131] Id., *citing* RESTATEMENT (THIRD), OF THE FOREIGN RELATIONS LAW OF THE UNITED

> Article 38 (1) (c) is identified as being a "secondary source" of international law and, therefore, not ranked at par with treaties and customary international law. The phrase is innately vague; and its exact meaning still eludes any general consensus. The widely preferred opinion, however, appears to be that of Oppenheim which views "general principles of law" as being inclusive of principles of private or municipal law when these are applicable to international relations. Where, in certain cases, there is no applicable treaty nor a generality of state practice giving rise to customary law, the international court is expected to rely upon certain legal notions of justice and equity in order to deduce a new rule for application to a novel situation. This reliance or "borrowing" by the international tribunal from general principles of municipal jurisprudence is explained in many ways by the fact that municipal or private law has a higher level of development compared to international law. Brownlie submits that the term "generally-accepted principles of international law" could also refer to rules of customary law, to general principles of law, or to logical propositions resulting from judicial reasoning on the basis of existing international law and municipal law analogies.
>
> *In order to qualify as a product of the subsidiary law-creating process, a principle of law must fulfill three requirements: (1) it must be a general principle of law as distinct from a legal rule of more limited functional scope, (2) it must be recognized by civilized nations, and (3) it must be shared by a fair number of states in the community of nations.*
>
> ....
>
> Clarifying the term "generally-accepted principles of international law" during the deliberations of the 1987 Constitutional Commission, Commissioner Adolfo S. Azcuna points out that "when we talk of ***generally-accepted principles of international law*** as part of the law of the land, we mean that it ***is part of the statutory part of laws, not of the Constitution.["]***
>
> The remark is shared by Professor Merlin M. Magallona who expresses that the phrase "as part of the law of the land" in the incorporation clause refers to the levels of legal rules below the Constitution such as legislative acts and judicial decisions. Thus, he contends, it is incorrect to so interpret this phrase as including the Constitution itself because it would mean that the "generally-accepted principles of international law" falls in parity with the Constitution.[132] (Emphasis supplied, citations omitted)

In *Rubrico v. Arroyo*,[133] Justice Conchita Carpio Morales (Justice Carpio Morales) refined Justice Vitug's proposed framework. She conceded that the Constitution's mention of generally accepted principles of international law was "not quite the same" as, and was *not* specifically included in Article 38's "general principles of law recognized by civilized nations[.]"[134] Yet, she noted:

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STATES S102 (2) (1987).

[132] Id.

[133] *See* J. Carpio Morales, Separate Opinion in *Rubrico v. Arroyo*, 627 Phil. 37, 80 (2010) [Per J. Velasco, Jr., En Banc].

[134] Id.

> Renowned publicist Ian Brownlie suggested, however, that "general principles of international law" *may refer to rules of customary law, to general principles of law as in Article 38 (1) (c), or to logical propositions resulting from judicial reasoning* on the basis of existing international law and municipal analogies.
>
> Indeed, ***judicial reasoning*** *has been the bedrock of Philippine jurisprudence on the determination of generally accepted principles of international law and consequent application of the incorporation clause.*
>
> In *Kuroda v. Jalandoni*, the Court held that while the Philippines was not a signatory to the Hague Convention and became a signatory to the Geneva Convention only in 1947, a Philippine Military Commission had jurisdiction over war crimes committed in violation of the two conventions before 1947. The Court reasoned that the rules and regulations of the Hague and Geneva Conventions formed part of generally accepted principles of international law. *Kuroda* thus recognized that principles of customary international law do not cease to be so, and are in fact reinforced, when codified in multilateral treaties.
>
> In *International School Alliance of Educators v. Quisumbing,* the Court invalidated as discriminatory the practice of International School, Inc. of according foreign hires higher salaries than local hires. The Court found that, among other things, there was a general principle against discrimination evidenced by a number of international conventions proscribing it, which had been incorporated as part of national laws through the Constitution.
>
> *The Court thus subsumes within the rubric of "generally accepted principles of international law" both "international custom" and "general principles of law," two distinct sources of international law recognized by the ICJ Statute.*[135] (Citations omitted, emphasis supplied)

In other words, Justice Carpio Morales opined that, per jurisprudence, international customs and general principles of law recognized by civilized nations form part of the law of the land.

Justice Antonio T. Carpio, in his dissent in *Bayan Muna v. Romulo*,[136] echoed Justice Carpio Morales's supposition and further discussed:

> [T]he doctrine of incorporation which mandates that the Philippines is bound by generally accepted principles of international law which automatically form part of Philippine law by operation of the Constitution.
>
> In *Kuroda v. Jalandoni*, this Court held that this constitutional provision "is not confined to the recognition of rules and principles of international law as contained in treaties to which our government may have been or shall be a signatory." The pertinent portion of Kuroda states:
>
> *It cannot be denied that the rules and regulations of*

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[135] Id. at 80–81.

[136] *See* J. Carpio, Dissenting Opinion in *Bayan Muna v. Romulo*, 656 Phil. 246 (2011) [Per J. Velasco, Jr., En Banc].

> *The Hague and Geneva Conventions form part of and are wholly based on the generally accepted principles of international law. . . . Such rule and principles, therefore, form part of the law of our nation even if the Philippines was not a signatory to the conventions embodying them*, for our Constitution has been deliberately general and extensive in its scope and is not confined to the recognition of rules and principles of international law as contained in treaties to which our government may have been or shall be a signatory.

Hence, generally accepted principles of international law form part of Philippine laws even if they do not derive from treaty obligations of the Philippines.

> *Generally accepted principles of international law, as referred to in the Constitution, include customary international law.* Customary international law is one of the primary sources of international law under Article 38 of the Statute of the International Court of Justice. Customary international law consists of acts which, by repetition of States of similar international acts for a number of years, occur out of a sense of obligation, and taken by a significant number of States. It is based on custom, which is a clear and continuous habit of doing certain actions, which has grown under the aegis of the conviction that these actions are, according to international law, obligatory or right. Thus, customary international law requires the concurrence of two elements: "[1] the established, wide-spread, and consistent practice on the part of the States; and [2] a psychological element known as *opinion juris sive necessitatis* (opinion as to law or necessity). Implicit in the latter element is a belief that the practice in question is rendered obligatory by the existence of a rule of law requiring it."[137] (Emphasis supplied, citations omitted)

Thus, generally accepted principles of international law include international customs and general principles of law. Under the incorporation clause, these principles form part of the law of the land. And, "by mere constitutional declaration, international law is deemed to have the force of domestic law."[138]

Pursuant to Article VII, Section 21 of the Constitution, treaties become "*valid and effective*" upon the Senate's concurrence:

> The Senate's ratification of a treaty makes it legally effective and binding by transformation. It then has the force and effect of a statute enacted by Congress. In *Pharmaceutical and Health Care Association of the Philippines v. Duque III, et al.*:
>
> > Under the 1987 Constitution, international law can become part of the sphere of domestic law either by transformation or incorporation. *The transformation method requires that an international law be transformed*

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137 Id. at 325–326.

138 *Pharmaceutical and Health Care Association of the Philippines v. Duque III*, 561 Phil. 386, 397–398 (2007) [Per J. Austria-Martinez, En Banc].

> *into a domestic law through a constitutional mechanism such as local legislation.* The incorporation method applies when, by mere constitutional declaration, international law is deemed to have the force of domestic law.
>
> *Treaties become part of the law of the land through transformation pursuant to Article VII, Section 21 of the Constitution...Thus, treaties or conventional international law must go through a process prescribed by the Constitution for it to be transformed into municipal law that can be applied to domestic conflicts.*[139]

As discussed in *Bayan v. Zamora*,[140] concurring in a treaty or international agreement is:

> . . . essentially legislative in character; the Senate, as an independent body possessed of its own erudite mind, has the prerogative to either accept or reject the proposed agreement, and whatever action it takes in the exercise of its wide latitude of discretion, pertains to the wisdom rather than the legality of the act.[141]

Thus, in doing so:

> . . . the Senate partakes a principal, yet delicate, role in keeping the principles of separation of powers and of checks and balances alive and vigilantly ensures that these cherished rudiments remain true to their form in a democratic government such as ours.[142]

However, the provision on treaty-making is under Article VII of the Constitution, which concerns the executive department. A review of the evolution of this constitutional provision may aid this Court in interpreting its text.

In his concurring opinion in *Intellectual Property Association of the Philippines v. Ochoa*,[143] Justice Arturo D. Brion (Justice Brion) discussed the antecedents of the transformation method:

> Under the 1935 Constitution, *the President has the "power, with the concurrence of a majority of all the members of the National Assembly, to make treaties . . . ."* The provision, Article VII, Section 11, paragraph 7 is part of the enumeration of the President's powers under Section 11, Article VII of the 1935 Constitution. This recognition clearly marked treaty making to be an executive function, but its exercise was nevertheless subject to the concurrence of the National Assembly. A subsequent amendment to the 1935 Constitution, which divided the

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139 *David v. Senate Electoral Tribunal*, 795 Phil. 529 (2016) [Per J. Leonen, En Banc].
140 396 Phil. 623 (2000) [Per J. Buena, En Banc].
141 Id. at 629.
142 Id.
143 790 Phil. 276 (2016) [Per J. Bersamin, En Banc].

country's legislative branch into two houses, transferred the function of treaty concurrence to the Senate, and required that two-thirds of its members assent to the treaty.

By 1973, the Philippines adopted a presidential parliamentary system of government, which merged some of the functions of the Executive and Legislative branches of government in one branch. Despite this change, concurrence was still seen as necessary in the treaty-making process, as Article VIII, Section 14 required that a treaty should be first concurred in by a majority of all Members of the Batasang Pambansa before they could be considered valid and effective in the Philippines, thus:

> SEC. 14. (1) Except as otherwise provided in this Constitution, no treaty shall be valid and effective unless concurred in by a majority of all the Members of the Batasang Pambansa.

This change in the provision on treaty ratification and concurrence is significant for the following reasons:

*First*, the change *clarified the effect of the lack of concurrence to a treaty*, that is, a treaty without legislative concurrence shall not be valid and effective in the Philippines.

Second, the change of wording also reflected the dual nature of the Philippines' approach in international relations. Under this approach, the Philippines sees international law and its international obligations from two perspectives: first, from the *international plane*, where international law reigns supreme over national laws; and second, from the *domestic plane*, where the international obligations and international customary laws are considered in the same footing as national laws, and do not necessarily prevail over the latter. The Philippines' treatment of international obligations as statutes in its domestic plane also means that they cannot contravene the Constitution, including the mandated process by which they become effective in Philippine jurisdiction.

Thus, while a treaty ratified by the President is binding upon the Philippines in the international plane, it would need the concurrence of the legislature before it can be considered as valid and effective in the Philippine domestic jurisdiction. *Prior to and even without concurrence, the treaty, once ratified, is valid and binding upon the Philippines in the international plane. But in order to take effect in the Philippine domestic plane, it would have to first undergo legislative concurrence as required under the Constitution.*

*Third*, that the provision had been couched in the negative emphasizes the mandatory nature of legislative concurrence before a treaty may be considered valid and effective in the Philippines.

The phrasing of Article VIII, Section 14 of the 1973 Constitution has been retained in the 1987 Constitution, except for three changes: *First*, the Batasang Pambansa has been changed to the Senate to reflect the current setup of our legislature and our tripartite system of government. *Second*, the vote required has been increased to two-thirds, reflective of the practice under the amended 1935 Constitution. *Third*, the term *"international agreement"* has been added, aside from the term treaty.

> Thus, aside from treaties, "international agreements" now need concurrence before being considered as valid and effective in the Philippines.[144] (Emphasis supplied, citations omitted)

The 1935[145] and 1973[146] Constitutions used the same words as Article II, Section 2[147] of the present Constitution does, and adopted "the generally accepted principles of international law as part of the law of the land."[148] However, there have been significant changes in constitutional provisions on treaty-making.

Article VII, Section 10(7) of the 1935 Constitution reads:

> **ARTICLE VII**
> Executive Department
>
> SECTION 10. . . .
>
> . . . .
>
> (7) *The President shall have the power, with the concurrence of two-thirds of all the Members of the Senate to make treaties*, and with the consent of the Commission on Appointments, he shall appoint ambassadors, other public ministers, and consuls. He shall receive ambassadors and other public ministers duly accredited to the Government of the Philippines.

Under the 1935 Constitution, the power to *make treaties* was lodged in the President, subject to the Senate's concurrence. Although the 1973 Constitution shifted our system of government from presidential to parliamentary, its provision on treaty-making still required the concurrence of the Batasang Pambansa, the body on which legislative power rested:

> **ARTICLE VIII**
> Batasang Pambansa
>
> SECTION 14. (1) Except as otherwise provided in this Constitution, no treaty *shall be valid and effective* unless concurred in by

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144 Id. at 307–309..

145 1935 CONST., art. II, sec. 3 provides:
**ARTICLE II**
*Declaration of Principles*
....
SECTION 3. The Philippines renounces war as an instrument of national policy, and adopts the generally accepted principles of international law as part of the law of the *Nation*. (Emphasis supplied)

146 1973 CONST., art. II, sec. 3 provides:
**ARTICLE II**
*Declaration of Principles and State Policies*
....
SECTION 3. The Philippines renounces war as an instrument of national policy, *adopts the generally accepted principles of international law as part of the law of the land,* and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations. (Emphasis supplied)

147 The 1935 Constitution used "nation" instead of "land," an immaterial change for our purposes.

148 CONST., art. II, sec. 2.

a majority of all the Members of the Batasang Pambansa. (Emphasis supplied)

On this note, it has been previously surmised that:

> The concurrence of the Batasang Pambansa was duly limited to treaties.
>
> However, the first clause of this provision, "except as otherwise provided," leaves room for the exception to the requirement of legislative concurrence. Under Article XIV, Section 15 of the 1973 Constitution, requirements of national welfare and interest allow the President to enter into not only treaties but also international agreements without legislative concurrence, thus:
>
> ARTICLE XIV THE NATIONAL ECONOMY AND THE PATRIMONY OF THE NATION
> xxx xxx xxx
>
> > SECTION 15. Any provision of paragraph one, Section fourteen, Article Eight and of this Article notwithstanding, the Prime Minister may enter into international treaties or agreements as the national welfare and interest may require.
>
> This Court, in the recent case of *Saguisag v. Executive Secretary*, characterized this exception as having "left a large margin of discretion that the President could use to bypass the Legislature altogether." This Court noted this as "a departure from the 1935 Constitution, which explicitly gave the President the power to enter into treaties only with the concurrence of the National Assembly."
>
> As in the 1935 Constitution, this exception is no longer present in the current formulation of the provision. ***The power and responsibility to enter into treaties is now shared by the executive and legislative departments***. Furthermore, the role of the legislative department is expanded to cover not only treaties but international agreements in general as well, thus:
>
> ARTICLE VII Executive Department
> xxx xxx xxx
>
> > SECTION 21. No treaty ***or international agreement*** shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.
>
> In discussing the power of the Senate to concur with treaties entered into by the President, this Court in *Bayan v. Zamora* remarked on the significance of this legislative power:
>
> > For the role of the Senate in relation to treaties is essentially legislative in character; the Senate, as an independent body possessed of its own erudite mind, has the prerogative to either accept or reject the proposed

> agreement, and whatever action it takes in the exercise of its wide latitude of discretion, pertains to the wisdom rather than the legality of the act. *In this sense, the Senate partakes a principal, yet delicate, role in keeping the principles of* ***separation of powers*** *and of* ***checks and balances*** *alive and vigilantly ensures that these cherished rudiments remain true to their form in a democratic government such as ours. The Constitution thus animates, through this treaty-concurring power of the Senate, a healthy system of checks and balances indispensable toward our nation's pursuit of political maturity and growth.* True enough, rudimentary is the principle that matters pertaining to the wisdom of a legislative act are beyond the ambit and province of the courts to inquire.

Therefore, having an option does not necessarily mean absolute discretion on the choice of international agreement. There are certain national interest issues and policies covered by all sorts of international agreements, which may not be dealt with by the President alone. *An interpretation that the executive has unlimited discretion to determine if an agreement requires senate concurrence not only runs counter to the principle of checks and balances; it may also render the constitutional requirement of senate concurrence meaningless*:

> ***If executive-agreement authority is un-contained, and if what may be the proper subject-matter of a treaty may also be included within the scope of executive-agreement power, the constitutional requirement of Senate concurrence could be rendered meaningless. The requirement could be circumvented by an expedient resort to executive agreement.***
>
> The definite provision for Senate concurrence in the Constitution indomitably signifies that there must be a regime of national interests, policies and problems which the Executive branch of the government cannot deal with in terms of foreign relations except through treaties concurred in by the Senate under Article VII, Section 21 of the Constitution. The problem is how to define that regime, *i.e.*, that which is outside the scope of executive-agreement power of the President and which exclusively belongs to treaty-making as subject to Senate concurrence.

***Article VII, Section 21 does not limit the requirement of senate concurrence to treaties alone. It may cover other international agreements, including those classified as executive agreements, if: (1) they are more permanent in nature; (2) their purposes go beyond the executive function of carrying out national policies and traditions; and (3) they amend existing treaties or statutes.***

As long as the subject matter of the agreement covers political issues and national policies of a more permanent character, the international agreement must be concurred in by the Senate.[149] (Emphasis supplied, citations omitted)

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[149] J. Leonen, Concurring Opinion in *Intellectual Property Association of the Philippines v. Ochoa*, 790 Phil. 276 (2016) [Per J. Bersamin, En Banc].

The constitutional framers were not linguistically ignorant. Treaties follow a different process to become part of the law of the land. Their delineation from generally accepted principles of international law was deliberate. So was the use of different terminologies and mechanisms in rendering them valid and effective.

In consonance with the Constitution and existing laws, presidents act within their competence when they enter into treaties. However, for treaties to be *effective* in this jurisdiction, Senate concurrence must be obtained. *The president may not engage in foreign relations in direct contravention of the Constitution and our laws*:

> After the treaty is signed by the state's representative, the President, being accountable to the people, is burdened with the responsibility and the duty to carefully study the contents of the treaty and ensure that they are not inimical to the interest of the state and its people.[150]

As explained in *Pimentel, Jr.*:

> In our system of government, the President, being the head of state, is regarded as the sole organ and authority in external relations and is the country's sole representative with foreign nations. As the chief architect of foreign policy, the President acts as the country's mouthpiece with respect to international affairs. Hence, the President is vested with the authority to deal with foreign states and governments, extend or withhold recognition, maintain diplomatic relations, enter into treaties, and otherwise transact the business of foreign relations. In the realm of treaty-making, the President has the sole authority to negotiate with other states.
>
> Nonetheless, while the President has the sole authority to negotiate and enter into treaties, *the* Constitution *provides a limitation to his power* by requiring the concurrence of 2/3 of all the members of the Senate for the validity of the treaty entered into by him. . . .
>
> . . . .
>
> *The participation of the legislative branch in the treaty-making process was deemed essential to provide a check on the executive in the field of foreign relations. By requiring the concurrence of the legislature in the treaties entered into by the President, the* Constitution *ensures a healthy system of checks and balance necessary in the nation's pursuit of political maturity and growth.*[151] (Emphasis supplied, citations omitted)

The context of the provision in question, alongside others, provides enlightenment. Under Article VI of the Constitution, legislative power is checked by the executive:

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[150] *Pimentel, Jr. v. Executive Secretary,* 501 Phil. 303, 317 (2005) [Per J. Puno, En Banc].
[151] Id. at 313–314.

SECTION 23. (1) The Congress, by a vote of two-thirds of both Houses in joint session assembled, voting separately, shall have the sole power to declare the existence of a state of war.

(2) In times of war or other national emergency, the Congress may, by law, authorize the President, for a limited period and subject to such restrictions as it may prescribe, to exercise powers necessary and proper to carry out a declared national policy. Unless sooner withdrawn by resolution of the Congress, such powers shall cease upon the next adjournment thereof.

SECTION 28. (1) The rule of taxation shall be uniform and equitable. The Congress shall evolve a progressive system of taxation.

(2) The Congress may, by law, authorize the President to fix within specified limits, and subject to such limitations and restrictions as it may impose, tariff rates, import and export quotas, tonnage and wharfage dues, and other duties or imposts within the framework of the national development program of the Government.

(3) Charitable institutions, churches and parsonages or convents appurtenant thereto, mosques, non-profit cemeteries, and all lands, buildings, and improvements, actually, directly, and exclusively used for religious, charitable, or educational purposes shall be exempt from taxation.

(4) No law granting any tax exemption shall be passed without the concurrence of a majority of all the Members of the Congress.

Conversely, some executive powers under Article VII of the Constitution are checked by the legislature, by one of its chambers, by legislative committees, or by other bodies attached to the legislature:

SECTION 16. The President shall nominate and, *with the consent of the Commission on Appointments*, appoint the heads of the executive departments, ambassadors, other public ministers and consuls, or officers of the armed forces from the rank of colonel or naval captain, and other officers whose appointments are vested in him in this Constitution. He shall also appoint all other officers of the Government whose appointments are not otherwise provided for by law, and those whom he may be authorized by law to appoint. The Congress may, by law, vest the appointment of other officers lower in rank in the President alone, in the courts, or in the heads of departments, agencies, commissions, or boards.

. . . .

SECTION 18. The President shall be the Commander-in-Chief of all armed forces of the Philippines and whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion or rebellion. In case of invasion or rebellion, when the public safety requires it, he may, for a period not exceeding sixty days, suspend the privilege of the writ of habeas corpus or place the Philippines or any part thereof under martial law. Within forty-eight hours from the

> proclamation of martial law or the suspension of the privilege of the writ of habeas corpus, the President shall submit a report in person or in writing *to the Congress. The Congress, voting jointly, by a vote of at least a majority of all its Members in regular or special session*, may revoke such proclamation or suspension, which revocation shall not be set aside by the President. Upon the initiative of the President, *the Congress may, in the same manner, extend such proclamation or suspension* for a period to be determined by the Congress, if the invasion or rebellion shall persist and public safety requires it.
>
> The Congress, if not in session, shall, within twenty-four hours following such proclamation or suspension, convene in accordance with its rules without any need of a call.
>
> The Supreme Court may review, in an appropriate proceeding filed by any citizen, the sufficiency of the factual basis of the proclamation of martial law or the suspension of the privilege of the writ or the extension thereof, and must promulgate its decision thereon within thirty days from its filing.
>
> . . . .
>
> SECTION 19. Except in cases of impeachment, or as otherwise provided in this Constitution, the President may grant reprieves, commutations and pardons, and remit fines and forfeitures, after conviction by final judgment.
>
> *He shall also have the power to grant amnesty with the concurrence of a majority of all the Members of the Congress.*
>
> . . . .
>
> SECTION 21. No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate. (Emphasis supplied)

In sum, treaty-making is a function lodged in the executive branch, which is headed by the president. Nevertheless, a treaty's effectivity depends on the Senate's concurrence, in accordance with the Constitution's system of checks and balances.

## VII

While Senate concurrence is expressly required to make treaties valid and effective, no similar express mechanism concerning withdrawal from treaties or international agreements is provided in the Constitution or any statute. Similarly, no constitutional or statutory provision grants the president the unilateral power to terminate treaties. This vacuum engenders the controversy around which the present consolidated Petitions revolve.

Frameworks in evaluating executive action, vis-à-vis legislative

prerogatives, have been formulated in other jurisdictions. Judicious discernment makes these frameworks worthy of consideration.

To be clear, however, while legal principles in a legal system similar to ours may hold persuasive value in our courts, we will not adopt such principles without considering our own unique cultural, political, and economic contexts. The Philippines has long struggled against colonialism. We will not betray efforts at evolving our own just but unique modalities for judicial review by summarily adopting foreign notions.

In *Goldwater v. Carter*,[152] a case resolved by the United States Supreme Court, certain members of Congress assailed then President Jimmy Carter's (President Carter) unilateral abrogation of the Sino-American Mutual Defense Treaty. Relevant events were chronicled in a Yale Law journal article:

> On December 15, 1978, President Carter announced his intention to recognize and establish diplomatic relations with the People's Republic of China and to terminate, as of January 1, 1980, the 1954 Mutual Defense Treaty between the United States and Taiwan. Seven U.S. Senators and eight Members of the House of Representatives sued the President and the Secretary of State in the U.S. District Court for the District of Columbia. They sought an injunction and a declaration that the President's attempt to unilaterally terminate the treaty was "unconstitutional, illegal, null and void" unless "made by and with the full consultation of the entire Congress, and with either the advice and consent of the Senate, or the approval of both Houses of Congress."
>
> When the 96th Congress opened, several Senators introduced resolutions asserting that the President had encroached on Congress's constitutional role with respect to treaty termination generally and the Taiwan Mutual Defense Treaty in particular. In October 1979, the district court held that to be effective under the Constitution, the President's notice of termination had to receive the approval of either two-thirds of the Senate or a majority of both houses of Congress.
>
> A fragmented D.C. Circuit, sitting en banc, heard the case on an expedited basis on November 13 and just seventeen days later ruled for the President. Declining to treat the matter as a political question, the circuit court instead held on the merits that the President had not exceeded his authority in terminating the bilateral treaty in accordance with its terms. Pressed to decide the case before the designated January 1, 1980 termination date, the Supreme Court issued no majority opinion. Instead, in a 6-3 *per curiam* decision, the Court dismissed the complaint without oral argument as nonjusticiable.[153] (Citations omitted)

Even back in 1979, before the case reached the United States Supreme

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[152] *Goldwater v. Carter*, 444 U.S. 996 (1979).

[153] Koh, Harold Hongju, *Presidential Power to Terminate International Agreements*, November 12, 2018, The Yale Law Journal Forum, pp. 437–439.

Court, Circuit Court Judge MacKinnon[154] had previously cautioned that a grant of absolute power of unilateral termination to the president may be easily used in the future to "develop other excuses to feed upon congressional prerogatives that a Congress lacking in vigilance allows to lapse into desuetude."[155] The District Court eventually ruled that President Carter did not exceed his authority in terminating the bilateral agreement without Senate concurrence.

In a Resolution, the United States Supreme Court granted the petition for certiorari, vacated the Court of Appeals judgment, and remanded the case to the District Court, "with directions to dismiss the complaint."[156]

Four justices observed that there is an "absence of any constitutional provision governing the termination of a treaty" and that "different termination procedures may be appropriate for different treaties."[157]

Observations articulated in *Goldwater* reveal stark similarities between the American and the Philippine legal systems concerning ensuing debates on the necessity of Senate concurrence in abrogating treaties:

> No constitutional provision explicitly confers upon the President the power to terminate treaties. Further, Art. II, 2, of the Constitution authorizes the President to make treaties with the advice and consent of the Senate. Article VI provides that treaties shall be a part of the supreme law of the land. These provisions add support to the view that *the text of the Constitution does not unquestionably commit the power to terminate treaties to the President alone*....
>
> We are asked to decide whether the President may terminate a treaty under the Constitution without congressional approval. Resolution of the question may not be easy, but it only requires us to apply normal principles of interpretation to the constitutional provisions at issue.... The present case involves neither review of the President's activities as Commander in Chief nor impermissible interference in the field of foreign affairs. Such a case would arise if we were asked to decide, for example, whether a treaty required the President to order troops into a foreign country. But "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."... This case "touches" foreign relations, but the question presented to us concerns only the constitutional division of power between Congress and the President.[158] (Citations omitted, emphasis supplied)

Yale Law School Professor Harold Hongju Koh[159] (Professor Koh)

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

155 Id.

156 Id.

157 J. Rehnquist, Concurring Opinion, joined by Chief Justice Burger, Justice Stewart, and Justice Stevens, in *Goldwater v. Carter*, 444 U.S. 996 (1979).

158 J. Powell, Concurring Opinion in *Goldwater v. Carter*, 444 U.S. 996 (1979).

159 Sterling Professor of International Law, Yale Law School; Legal Adviser to the U.S. Department of State, 2009-13; Assistant Secretary of State for Democracy, Human Rights and Labor, 1998-2001.

opined that a president has no general unilateral power to terminate treaties; instead, Senate concurrence on treaty abrogation is imperative.[160] He posited:

> In future cases, the constitutional requirements for termination should be decided based on the *type of agreement* in question, the *degree of congressional approval* and *subject matter in question*, and Congress's effort to guide the termination and withdrawal process by framework legislation.[161] (Emphasis supplied)

Professor Koh proposed the operation of what he dubbed as the "mirror principle," where "the degree of legislative approval needed to exit an international agreement must parallel the degree of legislative approval originally required to enter it."[162] He further said:

> Under the mirror principle, the Executive may terminate, without congressional participation, genuinely "sole" executive agreements that have lawfully been made without congressional input. But the President may not entirely exclude Congress from the withdrawal or termination process regarding congressional-executive agreements or treaties that were initially concluded with considerable legislative input. That principle would make Congress's input necessary for disengagement even from such international agreements as the Paris Climate Agreement, which broadly implicate Congress's commerce powers, and which—while never subjected to an up-or-down vote—were nevertheless enacted against a significant background of congressional awareness and support that implicitly authorized the presidential making, but not the unmaking, of climate change agreements. Congress also should participate in an attempt to withdraw the United States even from such political agreements as the Iran Nuclear Deal (also known as the JCPOA), where the President is exercising plenary foreign commerce powers that were delegated by Congress and where the U.S. termination has now triggered actionable claims of violation of international law.[163] (Citations omitted)

Professor Koh considered that, as a functional matter, overboard unilateral executive power to terminate treaties risks presidents making "overly hasty, partisan, or parochial withdrawals," thus weakening systemic stability, as well as the credibility and negotiating leverage of all presidents.[164]

The mirror principle echoes the points raised by Justice Robert H. Jackson's renowned concurrence[165] in the separation-of-powers case,

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160 Koh, Harold Hongju, *Presidential Power to Terminate International Agreements*, November 12, 2018, The Yale Law Journal Forum, p. 481.

161 Id.

162 Id. at 432.

163 Id. at 436.

164 Id. at 432.

165 *See* Michael J. Turner, *Fade to Black: The Formalization of Jackson's Youngstown Taxonomy by Hamdan and Medellin,* American University Law Review 58, no. 3 (February 2009).

*Youngstown Sheet & Tube Co. v. Sawyer*.[166] There, he laid down three categories of executive action as regards the necessity of concomitant legislative action:

> Category One: "when the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate";
>
> Category Two: "when the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain"; and
>
> Category Three: "when the President takes measures incompatible with the expressed or implied will of Congress, his power is at his lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." [167]

This framework has since been dubbed as the *Youngstown* framework,[168] and was adopted in subsequent American cases, among them *Medellin v. Texas*.[169]

*Medellin* involved a review of the president's power in foreign affairs. In turn, *Medellin* was considered in our jurisdiction by Chief Justice Reynato S. Puno (Chief Justice Puno) in examining the constitutionality of the Visiting Forces Agreement.[170] Chief Justice Puno, opined:

> An examination of *Bayan v. Zamora*, which upheld the validity of the VFA, is necessary in light of a recent change in U.S. policy on treaty enforcement. *Of significance is the case of Medellin v. Texas, where it was held by the U.S. Supreme Court that while treaties entered into by the President with the concurrence of the Senate are binding international commitments, they are not domestic law unless Congress enacts implementing legislation or unless the treaty itself is "self-executing".*
>
> **An *Examination* of *Medellin v. Texas***
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> In *Medellin v. Texas*, Jose Ernesto Medellin (Medellin), a Mexican national, was convicted of capital murder and sentenced to death in Texas for the gang rape and brutal murders of two Houston teenagers. His conviction and sentence were affirmed on appeal.

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166 343 U.S. 579 (1952).

167 Koh, Harold Hongju, *Presidential Power to Terminate International Agreements*, November 12, 2018, The Yale Law Journal Forum, p. 462.

168 Id.

169 552 U.S. 491 (2008).

170 *See* C.J. Puno, Dissenting Opinion in *Nicolas v. Romulo*, 598 Phil. 262 (2009) [Per J. Azcuna, En Banc].

Medellin then filed an application for post-conviction relief and claimed that the Vienna Convention on Consular Relations (Vienna Convention) accorded him the right to notify the Mexican consulate of his detention; and because the local law enforcement officers failed to inform him of this right, he prayed for the grant of a new trial.

The trial court, as affirmed by the Texas Court of Criminal Appeals, rejected the Vienna Convention claim. It was ruled that Medellin failed to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment. Medellin then filed his first *habeas corpus* petition in the Federal District Court, which also rejected his petition. It held that Medellin failed to show prejudice arising from the Vienna Convention.

While Medellin's petition was pending, the International Court of Justice (ICJ) issued its decision in the *Case Concerning Avena and Other Mexican Nationals (Avena).* The ICJ held that the U.S. violated Article 36 (1) (b) of the Vienna Convention by failing to inform 51 named Mexican nationals, including Medellin, of their Vienna Convention rights. The ICJ ruled that those named individuals were entitled to a review and reconsideration of their U.S. state court convictions and sentences regardless of their failure to comply with generally applicable state rules governing challenges to criminal convictions.

In *Sanchez-Llamas v. Oregon* — issued after *Avena* but involving individuals who were not named in the *Avena* judgment, contrary to the ICJ's determination — the U.S. Federal Supreme Court held that the Vienna Convention did not preclude the application of state default rules. The U.S. President, George W. Bush, then issued a Memorandum (President's Memorandum) stating that the United States would discharge its international obligations under *Avena* by having State courts give effect to the decision.

Relying on *Avena* and the President's Memorandum, Medellin filed a second Texas state-court *habeas corpus* application, challenging his state capital murder conviction and death sentence on the ground that he had not been informed of his Vienna Convention rights. The Texas Court of Criminal Appeals dismissed Medellin's application as an abuse of the writ, since under Texas law, a petition for *habeas corpus* may not be filed successively, and neither *Avena* nor the President's Memorandum was binding federal law that could displace the State's limitations on filing successive *habeas* applications.

Medellin repaired to the U.S. Supreme Court. In his petition, Medellin contends that the Optional Protocol, the United Nations Charter, and the ICJ Statute supplied the "relevant obligation" to give the *Avena* judgment binding effect in the domestic courts of the United States.

The Supreme Court of the United States ruled that neither *Avena* nor the President's Memorandum constitutes directly enforceable federal law that pre-empts state limitations on the filing of successive *habeas corpus* petitions. *It held that while an international treaty may constitute an international commitment, it is not binding domestic law unless Congress has enacted statutes implementing it or unless the treaty itself is "self-executing". It further held that decisions of the ICJ are not binding domestic law; and that, absent an act of Congress or Constitutional*

*authority, the U.S. President lacks the power to enforce international treaties or decisions of the ICJ.*

**Requirements for Domestic Enforceability of Treaties in the U.S.**

The new ruling is clear-cut: "while a treaty may constitute an international commitment, it is not binding domestic law unless Congress has enacted statutes implementing it or the treaty itself conveys an intention that it be "self-executing" and is ratified on that basis."

The *Avena* judgment creates an international law obligation on the part of the United States, *but it is not automatically binding* domestic law because none of the relevant treaty sources — the Optional Protocol, the U.N. Charter, or the ICJ Statute — creates binding federal law in the absence of implementing legislation, and no such legislation has been enacted.

The Court adopted a *textual approach* in determining whether the relevant treaty sources are self-executory[.][171] (Emphasis supplied, citations omitted)

Later, *Saguisag v. Ochoa*[172] reviewed the constitutionality of the Enhanced Defense Cooperation Agreement between the Republic of the Philippines and the United States of America. In *Saguisag*, Justice Brion found the *Youngstown* framework to be a better approach than simply anchoring this Court's position in one constitutional provision. He proposed the examination of the president's act in the context of how our system of government works:

[E]ntry into international agreements is a *shared function* among the three branches of government. In this light and in the context that the President's actions should be viewed under our tripartite system of government, *I cannot agree with the ponencia's assertion that the case should be examined solely and strictly through the constitutional limitation found in Article XVIII, Section 25 of the Constitution.*

**IV.B (2) *Standards in Examining the President's Treaty-Making Powers***

Because the Executive's foreign relations power operates within the larger constitutional framework of separation of powers, I find the examination of the President's actions through this larger framework to be the better approach in the present cases. This analytical framework, incidentally, is not the result of my original and independent thought; it was devised by U.S. Supreme Court Associate Justice Robert Jackson in his Concurring Opinion in *Youngstown Sheet & Tube Co. v. Sawyer.*

Justice Jackson's framework for evaluating executive action categorizes the President's actions into three: *first*, when the President acts ***with authority from the Congress***, his authority is at its maximum, as it includes all the powers he possesses in his own right and everything that Congress can delegate.

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171 Id. at 239–296.

172 777 Phil. 280 (2016) [Per C.J. Sereno, En Banc].

> *Second*, "when the President acts *in the absence of either a congressional grant or denial of authority*, he can only rely on his own independent powers, but there is a [twilight zone where] he and Congress may have concurrent authority, or where its distribution is uncertain." In this situation, presidential authority can derive support from "congressional inertia, indifference or quiescence."
>
> *Third*, "when the President takes *measures* ***incompatible with the expressed or implied will of Congress***, his power is at its lowest ebb," and the Court can sustain his actions "only by disabling the Congress from acting upon the subject."
>
> This framework has been recently adopted by the U.S. Supreme Court in *Medellin v. Texas,* a case involving the President's foreign affairs powers and one that can be directly instructive in deciding the present case.
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> In examining the validity of an executive act, the Court takes into consideration the varying degrees of authority that the President possesses. Acts of the President with the authorization of Congress should have the "widest latitude of judicial interpretation" and should be "supported by the strongest of presumptions." For the judiciary to overrule the executive action, it must decide that the government itself lacks the power. In contrast, *executive acts that are without congressional imprimatur would have to be very carefully examined.*[173] (Emphasis in the original, citations omitted)

The *Youngstown* framework was favorably considered and employed by this Court in its discussions in *Gonzales v. Marcos*[174] penned by Chief Justice Enrique M. Fernando.

In *Gonzales*, Ramon A. Gonzales alleged that in issuing Executive Order No. 30, the President encroached on the legislative prerogative when it created:

> [A] trust for the benefit of the Filipino people under the name and style of the Cultural Center of the Philippines entrusted with the task to construct a national theatre, a national music hall, an arts building and facilities, to awaken our people's consciousness in the nation's cultural heritage and to encourage its assistance in the preservation, promotion, enhancement and development thereof, with the Board of Trustees to be appointed by the President, the Center having as its estate the real and personal property vested in it as well as donations received, financial commitments that could thereafter be collected, and gifts that may be forthcoming in the future[.][175] (Citation omitted)

However, during the pendency of the case, Presidential Decree No. 15 was promulgated, creating the Cultural Center of the Philippines. This

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173 Id. at 564–565.
174 160 Phil 637 (1975) [Per J. Fernando, En Banc].
175 Id. at 639.

development prompted this Court to dismiss the appeal. In so doing, this Court proceeded to explain:

> It would be an unduly narrow or restrictive view of such a principle if the public funds that accrued by way of donation from the United States and financial contributions for the Cultural Center project could not be legally considered as "governmental property." They may be acquired under the concept of *dominium,* the state as a *persona* in law not being deprived of such an attribute, thereafter to be administered by virtue of its prerogative of *imperium*. What is a more appropriate agency for assuring that they be not wasted or frittered away than the Executive, the department precisely entrusted with management functions? It would thus appear that for the President to refrain from taking positive steps and await the action of the then Congress could be tantamount to dereliction of duty. He had to act; time was of the essence. Delay was far from conducive to public interest. It was as simple as that. Certainly then, it could be only under the most strained construction of executive power to conclude that in taking the step he took, he transgressed on terrain constitutionally reserved for Congress.
>
> *This is not to preclude legislative action in the premises*. While to the Presidency under the 1935 Constitution was entrusted the responsibility for administering public property, the then Congress could provide guidelines for such a task. *Relevant in this connection is the excerpt from an opinion of Justice Jackson in Youngstown Sheet & Tube Co. v. Sawyer "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.* Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperative of events and contemporary imponderables rather than on abstract theories of law." To vary the phraseology, to recall Thomas Reed Powell, if Congress would continue to keep its peace notwithstanding the action taken by the executive department, it may be considered as silently *vocal*. In plainer language, it could be an instance of silence meaning consent. The Executive Order assailed was issued on June 25, 1966. Congress until the time of the filing of the petition on August 26, 1969 remained quiescent. Parenthetically, it may be observed that petitioner waited until almost the day of inaugurating the Cultural Center on September 11, 1969 before filing his petition in the lower court. However worthy of commendation was his resolute determination to keep the Presidency within the bounds of its competence, it cannot be denied that the remedy, if any, could be supplied by Congress asserting itself in the premises. Instead, there was apparent conformity on its part to the way the President saw fit to administer such governmental property [176] (Emphasis supplied, citations omitted)

The *Youngstown* framework was also employed by Chief Justice Puno in evaluating the situations subject of *Bayan v. Zamora*[177] and *Akbayan v.*

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[176] Id. at 644–645.

[177] 396 Phil. 623 (2000) [Per J. Buena, En Banc].

*Aquino*.[178]

In *Bayan*, Chief Justice Puno, citing the *Youngstown* framework, stated: "The U.S. Supreme Court itself has 'intimated that the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress.'"[179] He reiterated this in *Akbayan*.

Thus, in appropriate cases, the validity of the president's actions—when there are countervailing legislative prerogatives—may be appraised in light of the *Youngstown* framework.

All told, the president, as primary architect of foreign policy, negotiates and enters into international agreements. However, the president's power is not absolute, but is checked by the Constitution, which requires Senate concurrence. Treaty-making is a power lodged in the executive, and is balanced by the legislative branch. The textual configuration of the Constitution hearkens both to the basic separation of powers and to a system of checks and balances. Presidential discretion is recognized, but it is not absolute. While no constitutional mechanism exists on how the Philippines withdraws from an international agreement, the president's unbridled discretion vis-à-vis treaty abrogation may run counter to the basic prudence underlying the entire system of entry into and domestic operation of treaties.

## VIII

The mirror principle and the *Youngstown* framework are suitable starting points in reviewing the president's acts in the exercise of a power shared with the legislature. However, their concepts and methods cannot be adopted mechanically and indiscriminately. A compelling wisdom underlies them, but operationalizing them domestically requires careful consideration and adjustment in view of circumstances unique to the Philippine context.

The mirror principle is anchored on balancing executive action with the extent of legislative participation in entering into treaties. It is sound logic to maintain that the same constitutional requirements of congressional approval—which attended the effecting of treaties following original entry into them—must also be followed in their termination.

As proposed by Chief Justices Fernando and Puno, along with Justice Brion, the *Youngstown* framework may also guide us in reviewing executive

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[178] *See* C.J. Puno, Dissenting Opinion in *Akbayan v. Aquino*, 580 Phil. 422 (2008) [Per J. Carpio Morales, En Banc].

[179] *See* C.J. Puno, Dissenting Opinion in *Bayan v. Zamora*, 396 Phil. 623, 687–688 (2000) [Per J. Buena, En Banc].

action vis-à-vis the necessity of concomitant legislative action in withdrawing from treaties. When the president clearly shares power with the legislature, and yet disavows treaties despite no accompanying action by Congress, the *Youngstown* framework considers this an instance when the president relies exclusively on their limited independent powers. Thus, the validity of the withdrawal, the exercise of which should have been concurrent with Congress, must be critically examined. The basic, underlying fact of powers being shared makes it difficult to sustain the president's unilateral action.

Having laid out the parameters and underlying principles of relevant foreign concepts, and considering our own historical experience and prevailing legal system, this Court adopts the following guidelines as the modality for evaluating cases concerning the president's withdrawal from international agreements.

*First, the president enjoys some leeway in withdrawing from agreements which he or she determines to be contrary to the Constitution or statutes.*

The Constitution is the fundamental law of the land. It mandates the president to "ensure that the laws be faithfully executed."[180] Both in negotiating and enforcing treaties, the president must ensure that all actions are in keeping with the Constitution and statutes. Accordingly, during negotiations, the president can insist on terms that are consistent with the Constitution and statutes, or refuse to pursue negotiations if those negotiations' direction is such that the treaty will turn out to be repugnant to the Constitution and our statutes. Moreover, the president should not be bound to abide by a treaty previously entered into, should it be established that such treaty runs afoul of the Constitution and our statutes.

There are treaties that implement mandates provided in the Constitution, such as human rights. Considering the circumstances of each historical period our nation encounters, there will be many means to acknowledge and strengthen existing constitutional mandates. Participating in and adhering to the creation of a body such as the International Criminal Court by becoming a party to the Rome Statute is one such means, but so is passing a law that, regardless of international relations, replicates many of the Rome Statute's provisions and even expands its protections. In such instances, it is not for this Court—absent concrete facts creating an actual controversy—to make policy judgments as to which between a treaty and a statute is more effective, and thus, preferable.

Within the hierarchy of the Philippine legal system—that is, as instruments akin to statutes—treaties cannot contravene the Constitution.

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[180] CONST. art VII, sec. 17.

Moreover, when repugnant to statues enacted by Congress, treaties and international agreements must give way.

Article VII, Section 21 provides for legislative involvement in making treaties and international agreements valid and effective, that is, by making Senate concurrence a necessary condition. From this, two points are discernible: (1) that there is a difference in the extent of legislative participation in enacting laws as against rendering a treaty or international agreement valid and effective; and (2) that Senate concurrence, while a necessary condition, is not in itself a sufficient condition for the validity and effectivity of treaties.

In enacting laws, both houses of Congress participate. A bill undergoes three readings in each chamber. A bill passed by either chamber is scrutinized by the other, and both chambers consolidate their respective versions through a bicameral conference. Only after extensive participation by the people's elected representatives—members of the Senate who are elected at large, and, those in the House of Representatives who represent districts or national, regional, or sectoral party-list organizations—is a bill presented to the president for signature.

In contrast, in the case of a treaty or international agreement, the president, or those acting under their authority, negotiates its terms. It is merely the finalized instrument that is presented to the Senate alone, and only for its concurrence. Following the president's signature, the Senate may either agree or disagree to the entirety of the treaty or international agreement. It cannot refine or modify the terms. It cannot improve what it deems deficient, or tame apparently excessive stipulations.

The legislature's highly limited participation means that a treaty or international agreement did not weather the rigors that attend regular lawmaking. It is true that an effective treaty underwent a special process involving one of our two legislative chambers, but this also means that it bypassed the conventional republican mill.

Having passed scrutiny by hundreds of the people's elected representatives in two separate chambers which are committed—by constitutional dictum—to adopting legislation, statutes enacted by Congress necessarily carry greater democratic weight than an agreement negotiated by a single person. This is true, even if that person is the chief executive who acts with the aid of unelected subalterns. This nuancing between treaties and international agreements, on one hand, and statutes on the other, is an imperative borne by the Philippines' basic democratic and republican nature: that the sovereignty that resides in the people is exercised through elected representatives.[181]

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[181] *See* CONST. art. II, sec. 1.

Thus, a valid treaty or international agreement may be effective just as a statute is effective. It has the force and effect of law. Still, statutes enjoy preeminence over international agreements. In case of conflict between a law and a treaty, it is the statute that must prevail.

The second point proceeds from the first. The validity and effectivity of a treaty rests on its being in harmony with the Constitution and statutes. The Constitution was ratified through a direct act of the sovereign Filipino people voting in a plebiscite; statutes are adopted through concerted action by their elected representatives. Senate concurrence is the formal act that renders a treaty or international agreement effective, but it is not, in substance, the sole criterion for validity and effectivity. Ultimately, a treaty must conform to the Constitution and statutes.

These premises give the president leeway in withdrawing from treaties that he or she determines to be contrary to the Constitution or statutes.

In the event that courts determine the unconstitutionality of a treaty, the president may unilaterally withdraw from it.

Owing to the preeminence of statutes enacted by elected representatives and hurdling the rigorous legislative process, the subsequent enactment of a law that is inconsistent with a treaty likewise allows the president to withdraw from that treaty.

As the chief executive, the president swore to preserve and defend the Constitution, and faithfully execute laws. This includes the duty of appraising executive action, and ensuring that treaties and international agreements are not inimical to public interest. The abrogation of treaties that are inconsistent with the Constitution and statutes is in keeping with the president's duty to uphold the Constitution and our laws.

Thus, even sans a judicial determination that a treaty is unconstitutional, the president also enjoys much leeway in withdrawing from an agreement which, in his or her judgment, runs afoul of prior existing law or the Constitution. In ensuring compliance with the Constitution and laws, the president performs his or her sworn duty in abrogating a treaty that, per his or her bona fide judgment, is not in accord with the Constitution or a law. Between this and withdrawal owing to a prior judicial determination of unconstitutionality or repugnance to statute however, withdrawal under this basis may be relatively more susceptible of judicial challenge. This may be the subject of judicial review, on whether there was grave abuse of discretion concerning the president's arbitrary, baseless, or whimsical determination of

unconstitutionality or repugnance to statute.

*Second, the president cannot unilaterally withdraw from agreements which were entered into pursuant to congressional imprimatur.*

The Constitution devised a system of checks and balances in the exercise of powers among the branches of government. For instance, as a legislative check on executive power, Congress may authorize the president to fix tariff rates, import and export quotas, tonnage and wharfage dues, and other duties or imposts subject to limitations and restrictions it may impose.[182] The president can likewise grant amnesty, but with the concurrence of a majority of all members of Congress.[183]

Considering that effecting treaties is a shared function between the executive and the legislative branches,[184] Congress may expressly authorize the president to enter into a treaty with conditions or limitations as to negotiating prerogatives.

Similarly, a statute subsequently passed to implement a prior treaty signifies legislative approbation of prior executive action. This lends greater weight to what would otherwise have been a course of action pursued through executive discretion. When such a statute is adopted, the president cannot withdraw from the treaty being implemented unless the statute itself is repealed.

When a treaty was entered into upon Congress's express will, the president may not unilaterally abrogate that treaty. In such an instance, the president who signed the treaty simply implemented the law enacted by Congress. While the president performed his or her function as primary architect of international policy, it was in keeping with a statute. The president had no sole authority, and the treaty negotiations were premised not only upon his or her own diplomatic powers, but on the specific investiture made by Congress. This means that the president negotiated not entirely out of his or her own volition, but with the express mandate of Congress, and more important, within the parameters that Congress has set.

While this distinction is immaterial in international law, jurisprudence has treated this as a class of executive agreements. To recall, an executive agreement implements an existing policy, and is entered "to adjust the details of a treaty . . . pursuant to or upon confirmation by an act of the Legislature; executive agreements [hinge] on prior constitutional or legislative authorizations."[185] Executive agreements "inconsistent with

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[182] CONST. art. VI, sec. 28(6).
[183] CONST. art. VII, sec. 19.
[184] CONST. art. VII, sec. 21.
[185] *Saguisag v. Ochoa*, 777 Phil. 280, 387 (2016) [Per C.J. Sereno, En Banc].

either a law or a treaty are considered ineffective."[186]

Consistent with the mirror principle, any withdrawal from an international agreement must reflect how it was entered into. As the agreement was entered pursuant to congressional imprimatur, withdrawal from it must likewise be authorized by a law.

Here, Congress passed Republic Act No. 9851 well ahead of the Senate's concurrence to the Rome Statute. Republic Act No. 9851 is broader than the Rome Statute itself. This reveals not only an independent, but even a more encompassing legislative will—even overtaking the course—of international relations. Our elected representatives have seen it fit to enact a municipal law that safeguards a broader scope of rights, regardless of whether the Philippines formally joins the International Criminal Court through accession to the Rome Statute.

*Third, the President cannot unilaterally withdraw from international agreements where the Senate concurred* ***and*** *expressly declared that any withdrawal must also be made with its concurrence.*

The Senate may concur with a treaty or international agreement expressly indicating a condition that withdrawal from it must likewise be with its concurrence. It may be embodied in the same resolution in which it expressed its concurrence. It may also be that the Senate *eventually* indicated such a condition in a subsequent resolution. Encompassing legislative action may also make it a general requirement for Senate concurrence to be obtained in any treaty abrogation. This may mean the Senate invoking its prerogative through legislative action taken in tandem with the House of Representatives—through a statute or joint resolution—or by adopting, on its own, a comprehensive resolution. Regardless of the manner by which it is invoked, what controls is the Senate's exercise of its prerogative to impose concurrence as a condition.

As effecting treaties is a shared function between the executive and the legislative branches, the Senate's power to concur with treaties necessarily includes the power to impose conditions for its concurrence. The requirement of Senate concurrence may then be rendered meaningless if it is curtailed.

Petitioner Senator Pangilinan manifested that the Senate has adopted this condition in other resolutions through which the Senate concurred with treaties. However, the Senate imposed no such condition when it concurred in the Philippines' accession to the Rome Statute. Likewise, the Senate has yet to pass a resolution indicating that its assent should have been obtained

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[186] Id. at 389.

in withdrawing from the Rome Statute. While there was an attempt to pass such a resolution, it has yet to be calendared, and thus, has no binding effect on the Senate as a collegial body.

In sum, at no point and under no circumstances does the president enjoy unbridled authority to withdraw from treaties or international agreements. Any such withdrawal must be anchored on a determination that they run afoul of the Constitution or a statute. Any such determination must have clear and definite basis; any wanton, arbitrary, whimsical, or capricious withdrawal is correctible by judicial review. Moreover, specific circumstances attending Congress's injunction on the executive to proceed in treaty negotiation, or the Senate's specification of the need for its concurrence to be obtained in a withdrawal, binds the president and may prevent him or her from proceeding with withdrawal.

## IX

It is wrong to state that matters of foreign relations are political questions, and thus, beyond the judiciary's reach.

The Constitution expressly states that this Court, through its power of judicial review, may declare any treaty or international agreement unconstitutional:

> SECTION 5. The Supreme Court shall have the following powers:
>
> . . . .
>
> (2) Review, revise, reverse, modify, or affirm on appeal or certiorari, as the law or the Rules of Court may provide, final judgments and orders of lower courts in:
>
> (a) All cases in which the ***constitutionality or validity of any treaty, international or executive agreement,*** law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question.[187] (Emphasis supplied)

We take this opportunity to clarify the pronouncements made in *Secretary of Justice v. Lantion*,[188] where this Court summarized the rules when courts are confronted with a conflict between a rule of international law and municipal law. It stated:

> The doctrine of incorporation is applied whenever municipal tribunals (or local courts) are confronted with situations in which there

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[187] CONST., art. VIII, sec. 5.

[188] 379 Phil. 165 (2000) [Per J. Melo, En Banc].

> appears to be a conflict between a rule of international law and the provisions of the constitution or statute of the local state. Efforts should first be exerted to harmonize them, so as to give effect to both since it is to be presumed that municipal law was enacted with proper regard for the generally accepted principles of international law in observance of the observance of the Incorporation Clause in the above-cited constitutional provision[.] In a situation, however, where the conflict is irreconcilable and a choice has to be made between a rule of international law and municipal law, jurisprudence dictates that municipal law should be upheld by the municipal courts. . . for the reason that such courts are organs of municipal law and are accordingly bound by it in all circumstances[.] The fact that international law has been made part of the law of the land does not pertain to or imply the primacy of international law over national or municipal law in the municipal sphere. The doctrine of incorporation, as applied in most countries, decrees that rules of international law are given equal standing with, but are not superior to, national legislative enactments. Accordingly, the principle *lex posterior derogat priori* takes effect — a treaty may repeal a statute and a statute may repeal a treaty. In states where the constitution is the highest law of the land, such as the Republic of the Philippines, both statutes and treaties may be invalidated if they are in conflict with the constitution[.][189] (Citations omitted)

*Lantion* discussed the incorporation doctrine embodied in Article II, Section 2 of the Constitution. Through incorporation, the Philippines adopts international custom and general principles of law as part of the law of the land. *Lantion* clarified that despite being part of the legal system, this "does not pertain to or imply the primacy of international law over national or municipal law in the municipal sphere."[190] However, it goes on to state that "*lex posterior derogat priori* takes effect—a treaty may repeal a statute and a statute may repeal a treaty."[191]

Previously, we have extensively discussed how, despite being both sources of international law, treaties must be distinguished from generally accepted principles of international law. Article II, Section 2 automatically *incorporates* generally accepted principles of international law into the domestic sphere. On the other hand, Article VII, Section 21 operates differently and concerns an entirely distinct source of international law. It signifies that treaties and international agreements are not automatically incorporated to the Philippine legal system, but are *transformed* into domestic law by Senate concurrence.

Thus, *Lantion's* pronouncement that—"*lex posterior derogat priori* takes effect—a treaty may repeal a statute and a statute may repeal a treaty"[192]—is misplaced and unsupported by its internal logic. Its fallacy frustrates its viability as precedent. Besides, it was mere *obiter dictum* as

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189 Id. at 212–213.
190 Id. at 212.
191 Id. at 213. The Latin maxim means "a later law repeals an earlier law."
192 Id.

this Court did not even rule on the constitutionality of the assailed Republic of the Philippines-United States Extradition Treaty.

Courts, in which judicial power is vested, may void executive and legislative acts when they violate the Constitution.[193]

The president is the head of state and chief executive. The Constitution mandates that in performing his or her functions, the president must "ensure that the laws be faithfully executed."[194] Thus, upon assuming office, a president swears to "faithfully and conscientiously fulfill my duties. . . preserve and defend [the] Constitution, execute. . . laws, do justice to every man, and consecrate myself to the service of the Nation."[195]

Accordingly, in fulfilling his or her functions as primary architect of foreign policy, and in negotiating and enforcing treaties, all of the president's actions must always be within the bounds of the Constitution and our laws. This mandate is exceeded when acting outside what the Constitution or our laws allow. When any such excess is so grave, whimsical, arbitrary, or attended by bad faith, it can be invalidated through judicial review.

## X

The Petitions here raise interesting legal questions. However, the factual backdrop of these consolidated cases renders inopportune a ruling on the issues presented to this Court.

Separation of powers is fundamental in our legal system. The Constitution delineated the powers among the legislative, executive, and judicial branches of the government, with each having autonomy and supremacy within its own sphere.[196] This is moderated by a system of checks and balances "carefully calibrated by the Constitution to temper the official acts" of each branch.[197]

Among the three branches, the judiciary was designated as the arbiter in allocating constitutional boundaries.[198] Judicial power is defined in Article VIII, Section 1 of the Constitution as:

> SECTION 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

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193 *Angara v. Electoral Commission*, 63 Phil. 139, 157 (1936) [Per J. Laurel, En Banc].
194 CONST. art VII, sec. 17.
195 CONST. art VII, sec. 5.
196 *Angara v. Electoral Commission*, 63 Phil. 139 (1936) [Per J. Laurel, En Banc].
197 *Francisco, Jr. v. House of Representatives*, 460 Phil. 830, 863 (2003) [Per J. Carpio Morales, En Banc].
198 *Angara v. Electoral Commission*, 63 Phil. 139 (1936) [Per J. Laurel, En Banc].

> Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government.

A plain reading of the Constitution identifies two instances when judicial power is exercised: (1) in *settling actual controversies* involving rights which are legally demandable and enforceable; and (2) in determining *whether or not there has been a grave abuse of discretion* amounting to a lack or excess of jurisdiction on the part of any branch or instrumentality of the government.

In justifying judicial review in its traditional sense, Justice Jose P. Laurel in *Angara v. Electoral Commission*[199] underscored that when this Court allocates constitutional boundaries, it neither asserts supremacy nor annuls the legislature's acts. It simply carries out the obligations that the Constitution imposed upon it to determine conflicting claims and to establish the parties' rights in an actual controversy:

> The Constitution is a definition of the powers of government. Who is to determine the nature, scope and extent of such powers? The Constitution itself has provided for the instrumentality of the judiciary as the rational way. And when the judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments; it does not in reality nullify or invalidate an act of the legislature, but only asserts the solemn and sacred obligation assigned to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which that instrument secures and guarantees to them. This is in truth all that is involved in what is termed "judicial supremacy" which properly is the power of judicial review under the Constitution.[200]

The latter conception of judicial power that jurisprudence refers to as the "expanded certiorari jurisdiction"[201] was an innovation of the 1987 Constitution:[202]

> This situation changed after 1987 when the new Constitution "expanded" the scope of judicial power[.]
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> . . . .
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> In *Francisco v. The House of Representatives*, we recognized that this expanded jurisdiction was meant "to ensure the potency of the power

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199 63 Phil. 139 (1936) [Per J. Laurel, En Banc].

200 Id. at 158.

201 *Francisco, Jr. v. House of Representatives*, 460 Phil. 830, 883 (2003) [Per J. Carpio Morales, En Banc].

202 *Association of Medical Clinics for Overseas Workers, Inc. v. GCC Approved Medical Centers Association, Inc.*, 802 Phil. 116 (2016) [Per J. Brion, En Banc].

> of judicial review to curb grave abuse of discretion by 'any branch or instrumentalities of government.'" Thus, the second paragraph of Article VIII, Section 1 engraves, for the first time in its history, into black letter law the "expanded certiorari jurisdiction" of this Court, whose nature and purpose had been provided in the sponsorship speech of its proponent, former Chief Justice Constitutional Commissioner Roberto Concepcion.
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> . . . .
>
> Meanwhile that no specific procedural rule has been promulgated to enforce this "expanded" constitutional definition of judicial power and because of the commonality of "grave abuse of discretion" as a ground for review under Rule 65 and the courts' expanded jurisdiction, the Supreme Court based on its power to relax its rules allowed Rule 65 to be used as the medium for petitions invoking the courts' expanded jurisdiction based on its power to relax its Rules. This is however an ad hoc approach that does not fully consider the accompanying implications, among them, that Rule 65 is an essentially distinct remedy that cannot simply be bodily lifted for application under the judicial power's expanded mode. The terms of Rule 65, too, are not fully aligned with what the Court's expanded jurisdiction signifies and requires.
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> On the basis of almost thirty years' experience with the courts' expanded jurisdiction, the Court should now fully recognize the attendant distinctions and should be aware that the continued use of Rule 65 on an ad hoc basis as the operational remedy in implementing its expanded jurisdiction may, in the longer term, result in problems of uneven, misguided, or even incorrect application of the courts' expanded mandate.[203]

*Tañada v. Angara*[204] characterized this not only as a power, but as a duty ordained by the Constitution:

> It is an innovation in our political law. As explained by former Chief Justice Roberto Concepcion, "the judiciary is the final arbiter on the question of whether or not a branch of government or any of its officials has acted without jurisdiction or in excess of jurisdiction or so capriciously as to constitute an abuse of discretion amounting to excess of jurisdiction. *This is not only a judicial power but a duty to pass judgment on matters of this nature.*"
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> As this Court has repeatedly and firmly emphasized in many cases, it will not shirk, digress from or abandon its sacred duty and authority to uphold the Constitution in matters that involve grave abuse of discretion brought before it in appropriate cases, committed by any officer, agency, instrumentality or department of the government.[205] (Emphasis supplied, citations omitted)

Despite its expansion, judicial review has its limits. In deciding matters involving grave abuse of discretion, courts cannot brush aside the

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[203] *Association of Medical Clinics for Overseas Workers, Inc. v. GCC Approved Medical Centers Association, Inc.*, 802 Phil. 116, 137–140 (2016) [Per J. Brion, En Banc].

[204] 338 Phil. 546 (1997) [Per J. Panganiban, En Banc].

[205] Id. at 574–575.

requisite of an actual case or controversy. The clause articulating expanded certiorari jurisdiction requires a *prima facie* showing of grave abuse of discretion in the assailed governmental act which, in essence, is the actual case or controversy. Thus, "even now, under the regime of the textually broadened power of judicial review articulated in Article VIII, Section 1 of the 1987 Constitution, the requirement of an actual case or controversy is not dispensed with."[206]

In *Provincial Bus Operators Association of the Philippines v. Department of Labor and Employment*:[207]

> An actual case or controversy is "one which involves a conflict of legal rights, an assertion of opposite legal claims susceptible of judicial resolution." A case is justiciable if the issues presented are "definite and concrete, touching on the legal relations of parties having adverse legal interests." The conflict must be ripe for judicial determination, not conjectural or anticipatory; otherwise, this Court's decision will amount to an advisory opinion concerning legislative or executive action.
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> . . . .
>
> Even the expanded jurisdiction of this Court under Article VIII, Section 1 does not provide license to provide advisory opinions. An advisory opinion is one where the factual setting is conjectural or hypothetical. In such cases, the conflict will not have sufficient concreteness or adversariness so as to constrain the discretion of this Court. After all, legal arguments from concretely lived facts are chosen narrowly by the parties. Those who bring theoretical cases will have no such limits. They can argue up to the level of absurdity. They will bind the future parties who may have more motives to choose specific legal arguments. In other words, for there to be a real conflict between the parties, there must exist actual facts from which courts can properly determine whether there has been a breach of constitutional text.[208]

Thus, whether in its traditional or expanded scope, the exercise of judicial review requires the concurrence of these requisites for justiciability:

> (a) there must be an actual case or controversy calling for the exercise of judicial power; (b) the person challenging the act must have the standing to question the validity of the subject act or issuance . . . ; (c) the question of constitutionality must be raised at the earliest opportunity; and (d) the issue of constitutionality must be the very *lis mota* of the case.[209] (Citations omitted)

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206 *Falcis III v. Civil Registrar General*, G.R. No. 217910, September 3, 2019, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65744> [Per J. Leonen, En Banc] citing Knights of Rizal v. DMCI Homes, Inc., 809 Phil. 453, 529 (2017) [Per J. Carpio, En Banc].

207 G.R. No. 202275, July 17, 2018, 872 SCRA 50 [Per J. Leonen, En Banc].

208 Id. at 98–100.

209 *Ocampo v. Enriquez*, 798 Phil. 227, 288 (2016) [Per J. Peralta, En Banc], citing *Belgica, et al. v. Hon. Exec. Sec. Ochoa, Jr.*, 721 Phil. 416, 518 (2013).

## XI

The Petitions are moot. They fail to present a persisting case or controversy that impels this Court's review.

In resolving constitutional issues, there must be an "existing case or controversy that is appropriate or ripe for determination, not conjectural or anticipatory."[210]

An actual case deals with conflicting rights that are legally demandable and enforceable. It involves definite facts and incidents to be appreciated, and laws to be applied, interpreted and enforced vis-à-vis ascertained facts. It must be "definite and concrete, touching the legal relations of parties having adverse legal interest; a real and substantial controversy admitting of specific relief."[211]

A constitutional question may not be presented to this Court at an inopportune time. When it is premature, this Court's ruling shall be relegated as an advisory opinion for a potential, future occurrence. When belated, concerning matters that are moot, the decision will no longer affect the parties.

Either way, courts must avoid resolving hypothetical problems or academic questions. This exercise of judicial restraint ensures that the judiciary will not encroach on the powers of other branches of government. As *Angara v. Electoral Commission*[212] explained:

> [T]his power of judicial review is limited to actual cases and controversies to be exercised after full opportunity of argument by the parties, and limited further to the constitutional question raised or the very *lis mota* presented. Any attempt at abstraction could only lead to dialectics and barren legal questions and to sterile conclusions of wisdom, justice or expediency of legislation. More than that, courts accord the presumption of constitutionality to legislative enactments, not only because the legislature is presumed to abide by the Constitution but also because the judiciary in the determination of actual cases and controversies must reflect the wisdom and justice of the people as expressed through their representatives in the executive and legislative departments of the government.[213]

The requirement of a bona fide controversy precludes advisory opinions and judicial legislation. For this Court, "only constitutional issues

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210 *Spouses Imbong v. Ochoa, Jr.*, 732 Phil. 1, 123 (2014) [Per J. Mendoza, En Banc], *citing Republic Telecommunications Holding, Inc. v. Santiago*, 556 Phil. 83, 91–92 (2007) [Per J. Tinga, Second Division].

211 *David v. Macapagal-Arroyo*, 522 Phil. 705, 753 (2006) [Per J. Sandoval-Gutierrez, En Banc].

212 63 Phil. 139 (1936) [Per J. Laurel, En Banc].

213 Id. at 158–159.

that are narrowly framed, sufficient to resolve an actual case, may be entertained,"[214] and only when they are raised at the opportune time.

A case is moot when it "ceases to present a justiciable controversy by virtue of supervening events, so that a declaration thereon would be of no practical use or value."[215] There may have been conflicting rights, disputed facts, or meritorious claims warranting this Court's intervention, but a supervening event rendered the issue stale. In *Peñafrancia Sugar Mill, Inc. v. Sugar Regulatory Administration*:[216]

> A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is no actual substantial relief which a petitioner would be entitled to, and which would be negated by the dismissal of the petition. Courts generally decline jurisdiction over such case or dismiss it on the ground of mootness. This is because the judgment will not serve any useful purpose or have any practical legal effect because, in the nature of things, it cannot be enforced.[217] (Citations omitted)

On March 19, 2019, the International Criminal Court itself, through Mr. O-Gon Kwon, the president of the Assembly of States Parties, announced the Philippines' departure from the Rome Statute effective March 17, 2019. It made this declaration with regret and the hope that such departure "is only temporary and that it will re-join the Rome Statute family in the future."[218]

This declaration, coming from the International Court itself, settles any doubt on whether there are lingering factual occurrences that may be adjudicated. No longer is there an unsettled incident demanding resolution. Any discussion on the Philippines' withdrawal is, at this juncture, merely a matter of theory.

However, even prior to the filing of these Petitions,[219] the President had already completed the irreversible act of withdrawing from the Rome Statute.

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[214] *David v. Senate Electoral Tribunal,* 795 Phil. 529, 575 (2016) [Per J. Leonen, En Banc]. In footnote no. 147 of the same, this Court raised, as an example, *In the Matter of: Save the Supreme Court Judicial Independence and Fiscal Autonomy Movement v. Abolition of Judiciary Development Fund,* 751 Phil. 30 (2015) [Per J. Leonen, En Banc].

[215] *Peñafrancia Sugar Mill, Inc. v. Sugar Regulatory Administration*, 728 Phil. 535, 540 (2014) [Per. J. Perlas-Bernabe, Second Division].

[216] 728 Phil. 535 (2014) [Per. J. Perlas-Bernabe, Second Division].

[217] Id. at 540.

[218] *President of the Assembly of States Parties regrets withdrawal from the Rome Statute by the Philippines*, INTERNATIONAL CRIMINAL COURT, March 18, 2019, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1443> (Last accessed on February 22, 2020).

[219] The Petition in G.R. No. 238875 was filed on May 16, 2018; the Petition in G.R. No. 293483 on June 7, 2018; and the Petition in G.R. No. 240954 on August 14, 2018.

To reiterate, Article 127(1) of the Rome Statute provides the mechanism on how its state parties may withdraw:

> A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

***The Philippines announced its withdrawal from the Rome Statute on March 15, 2018, and formally submitted its Notice of Withdrawal through a Note Verbale to the United Nations Secretary-General's Chef de Cabinet on March 16, 2018. The Secretary-General received the notification on March 17, 2018. For all intents and purposes, and in keeping with what the Rome Statute plainly requires, the Philippines had, by then, completed all the requisite acts of withdrawal. The Philippines has done all that were needed to facilitate the withdrawal. Any subsequent discussion would pertain to matters that are fait accompli.***

On March 20, 2018, the International Criminal Court issued a statement on the Philippines' Notice of Withdrawal. The United Nations certified that the Philippines deposited the written notification on March 17, 2018. It stressed that while withdrawal from the Rome Statute is a sovereign decision, it has no impact on any pending proceedings.[220] In any case, the International Criminal Court expressed no reservation on the efficacy of the withdrawal.

At that point, this Court's interference and ruling on what course of action to take would mean an imposition of its will not only on the executive, but also on the International Criminal Court itself. That is not the function of this Court, which takes on a passive role in resolving actual controversies when proper parties raise them at an opportune time. In the international arena, it is the president that has the authority to conduct foreign relations and represent the country. This Court cannot encroach on matters beyond its jurisdiction.

Moreover, while its text provides a mechanism on how to withdraw from it, the Rome Statute does not have any proviso on the reversal of a state party's withdrawal. We fail to see how this Court can revoke—as what petitioners are in effect asking us to do—the country's withdrawal from the Rome Statute, without writing new terms into the Rome Statute.

Petitioners harp on the withdrawal's effectivity, which was one year

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[220] *ICC Statement on The Philippines' notice of withdrawal: State participation in Rome Statute system essential to international rule of law*, INTERNATIONAL CRIMINAL COURT, March 20, 2018 <https://www.icc-cpi.int/Pages/item.aspx?name=pr1371> (last accessed on February 28, 2021).

from the United Nations Secretary-General's receipt of the notification. However, this one-year period only pertains to the *effectivity*, or when exactly the legal consequences of the withdrawal takes effect. It neither concerns approval nor finality of the withdrawal. Parenthetically, this one-year period does not undermine or diminish the International Criminal Court's jurisdiction and power to continue a probe that it has commenced while a state was a party to the Rome Statute.

Here, the withdrawal has been communicated and accepted, and there are no means to retract it. This Court cannot extend the reliefs that petitioners seek. The Philippines's withdrawal from the Rome Statute has been properly received and acknowledged by the United Nations Secretary-General, and has taken effect. These are all that the Rome Statute entails, and these are all that the international community would require for a valid withdrawal. Having been consummated, these actions bind the Philippines.

In G.R. No. 238875, petitioners posit:

> If the Executive can unilaterally withdraw from any treaty or international agreement, he is in a position to abrogate some of the basic norms in our legal system. Thus, the Executive can unilaterally withdraw from the International Covenant on Civil and Political Rights, the Geneva Conventions[,] and the United Nations Convention on the Law of the Sea, without any checking mechanism from Congress. This would be an undemocratic concentration of power in the Executive that could not have been contemplated by the Constitution.[221]

We reiterate that courts may only rule on an actual case. This Court has no jurisdiction to rule on matters that are abstract, hypothetical, or merely potential. Petitioners' fear that the President may unilaterally withdraw from other treaties has not transpired and cannot be taken cognizance of by this Court in this case. We have the duty to determine when we should stay our hand, and refuse to rule on cases where the issues are speculative and theoretical, and consequently, not justiciable.[222]

Legislative and executive powers impel the concerned branches of government into assuming a more proactive role in our constitutional order. Judicial power, on the other hand, limits this Court into taking a passive stance. Such is the consequence of separation of powers. Until an actual case is brought before us by the proper parties at the opportune time, where the constitutional question is the very *lis mota*, we cannot act on an issue, no matter how much it agonizes us.

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221 *Rollo* (G.R. No. 238875), p. 4, Petition.

222 *See* J. Leonen, Dissenting Opinion in *Imbong v. Ochoa*, 732 Phil. 1 (2014) [Per J. Mendoza, En Banc].

## XII

Parties have *standing* if they stand to be benefited if the case is resolved in their favor, or if they shall suffer should the case be decided against them.[223]

In *Falcis III v. Civil Registrar General*,[224] this Court explained:

> Much like the requirement of an actual case or controversy, legal standing ensures that a party is seeking a concrete outcome or relief that may be granted by courts:
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> > Legal standing or *locus standi* is the "right of appearance in a court of justice on a given question." To possess legal standing, parties must show "a personal and substantial interest in the case such that [they have] sustained or will sustain direct injury as a result of the governmental act that is being challenged." The requirement of direct injury guarantees that the party who brings suit has such personal stake in the outcome of the controversy and, in effect, assures "that concrete adverseness which sharpens the presentation of issues upon which the court depends for illumination of difficult constitutional questions."
> >
> > The requirements of legal standing and the recently discussed actual case and controversy are both "built on the principle of separation of powers, sparing as it does unnecessary interference or invalidation by the judicial branch of the actions rendered by its co-equal branches of government." In addition, economic reasons justify the rule. Thus:
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> > A lesser but not insignificant reason for screening the standing of persons who desire to litigate constitutional issues is economic in character. Given the sparseness of our resources, the capacity of courts to render efficient judicial service to our people is severely limited. For courts to indiscriminately open their doors to all types of suits and suitors is for them to unduly overburden their dockets, and ultimately render themselves ineffective dispensers of justice. To be sure, this is an evil that clearly confronts our judiciary today.
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> > Standing in private suits requires that actions be prosecuted or defended in the name of the real party-in-interest, interest being "material interest or an interest in issue to be affected by the decree or judgment of the case[,] [not just] mere curiosity about the question involved." Whether a suit is public or private, the parties must have "a

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223 *See Kilosbayan v. Morato*, 316 Phil. 652 (1995) [Per J. Mendoza, En Banc].

224 G.R. No. 217910, September 3, 2019, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65744> [Per J. Leonen, En Banc].

> present substantial interest," not a "mere expectancy or a future, contingent, subordinate, or consequential interest." Those who bring the suit must possess their own right to the relief sought. . . .
>
> Even for exceptional suits filed by taxpayers, legislators, or concerned citizens, this Court has noted that the party must claim some kind of injury-in-fact.[225] (Citations omitted)

In G.R. No. 238875, petitioners-senators were then incumbent minority senators who allege that the Senate's constitutional prerogative to concur in the government's decision to withdraw from the Rome Statute has been impaired. They add that they were likewise suing as citizens, as this case allegedly involves a "public right and its object . . . is to procure the enforcement of a public duty."[226]

Petitioners-senators also claim that the issue has transcendental importance, which may potentially impact constitutional checks and balances, our domestic legal system, and the country's relations with the international community.[227]

In G.R. No. 239483, petitioner Philippine Coalition for the International Criminal Court and its individual members assert that, as Philippine citizens and as human beings, they have rights to life and personal security. The withdrawal from the Rome Statute, they claim, violates their rights to ample remedies for the protection of their rights, "and of their other fundamental rights, especially the right to life."[228]

They likewise contend that their Petition is a taxpayers' suit, since the executive department spent substantial taxpayer's money in attending negotiations and in participating in the drafting of what would be the Rome Statute.[229]

In G.R. No. 240954, the Integrated Bar of the Philippines comes to this Court on essentially the same ground: as a group of concerned citizens, it invokes its members' right to life and due process that may be affected by the withdrawal. Additionally, it claims that as a body that aims to uphold the rule of law, it has standing to the question whether the withdrawal was proper.[230]

Jurisprudence has consistently recognized each legislator's individual standing and prerogative independent of the House of Representatives or the

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225 Id.
226 *Rollo* (G.R. No. 238875), p. 6, Petition.
227 Id. at 6–7.
228 *Rollo* (G.R. No. 239483), pp. 20–21, Petition.
229 Id. at 21–22.
230 *Rollo* (G.R. No. 240954), p. 14.

Senate as a collegial body.[231] A legislator's individual standing and prerogative remains and is not abandoned in this case. However, the precise circumstances here subvert the otherwise generally recognized standing which anchors the individual legislators' capacity to seek relief. Here, the Senate's inaction makes premature petitioners-senators' capacity to seek relief. The Senate's institutional reticence subverts the capacities otherwise properly accruing to petitioners-senators..

The Senate has refrained from passing a resolution indicating that its assent should have been obtained in withdrawing from the Rome Statute. Senate Resolution No. 289,[232] or the "Resolution Expressing the Sense of the Senate that Termination of, or Withdrawal from, Treaties and International Agreements Concurred in by the Senate shall be Valid and Effective Only Upon Concurrence by the Senate," has been presented to but, thus far, never adopted by the Senate.

During the September 4, 2018 oral arguments, petitioner Senator Pangilinan himself manifested the resolution's pendency, which he claimed was "not rejected . . . but was not calendared for adoption."[233] Thus, Senate Resolution No. 289 has absolutely no legal effect. Such reticence on this matter means that, as a collegial body, and in its wisdom, the Senate has chosen not to assert any right or prerogative which it may feel pertains to it, if any, to limit, balance, or otherwise inhibit the President's act.

The passage of Resolution No. 289 would have been a definite basis on which petitioners-senators can claim a right. However, the Senate itself appears to have not seen the need for it. Thus, petitioners-senators cannot validly come to this Court with a case that is already foreclosed by their own institution's inaction.

Moreover, as discussed, petitioner Senator Pangilinan mentioned during oral arguments that the Senate has passed 17 resolutions concurring on different treaties, each of which came with a clause that specifically required its concurrence for withdrawal.[234] In contrast, no similar clause was contained in Senate Resolution No. 546,[235] through which the Senate ratified the Rome Statute. Thus, the Senate's inaction itself precludes a source from which petitioners-senators could claim a right to require Senate concurrence to withdrawing from the Rome Statute.

Incidentally, in *Goldwater*, the United States Supreme Court also

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231 *See Saguisag v. Ochoa*, 777 Phil. 280 (2016) [Per C.J. Sereno, En Banc]; *Philconsa v. Enriquez*, 305 Phil. 546 (1994) [Per J. Quiason, En Banc]; *Pimentel, Jr. v. Office of the Executive Secretary*, 501 Phil. 303 (2005) [Per J. Puno, En Banc].

232 S. No. 305, 17th Cong., 1st Sess. (2017).

233 TSN, September 4, 2018 Oral Arguments, p. 14.

234 Id. at 15.

235 S. No. 546, 15th Cong., 2nd Sess. (2011).

declined to rule on the substance of the case. There, then Senator Barry Goldwater and other Congress members assailed then President Carter's unilateral nullification of the Sino-American Mutual Defense Treaty, claiming that this should have required Senate concurrence. However, Congress had not formally taken a stance contrary to the president's action through any resolution. There was a draft Senate resolution, but no vote was taken on it.[236] Justice Powell noted:

> This Court has recognized that an issue should not be decided if it is not ripe for judicial review. Prudential considerations persuade me that a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority. Differences between the President and the Congress are commonplace under our system. The differences should, and almost invariably do, turn on political, rather than legal, considerations. *The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a* ***constitutional impasse****. Otherwise, we would encourage small groups, or even individual Members, of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict.*
>
> In this case, a few Members of Congress claim that the President's action in terminating the treaty with Taiwan has deprived them of their constitutional role with respect to a change in the supreme law of the land. *Congress has taken no official action.* In the present posture of this case, we do not know whether there ever will be an actual confrontation between the Legislative and Executive Branches. Although the Senate has considered a resolution declaring that Senate approval is necessary for the termination of any mutual defense treaty, no final vote has been taken on the resolution. Moreover, it is unclear whether the resolution would have retroactive effect. It cannot be said that either the Senate or the House has rejected the President's claim. If the Congress chooses not to confront the President, it is not our task to do so.[237] (Emphasis supplied, citations omitted)

Similarly, this Court should stay its hand when the Senate itself, as a collegial body, has not officially confronted the President's act. This is in keeping with the limits of judicial review.

On the other hand, persons invoking their rights as citizens must satisfy the following requisites to file a suit: (1) they must have "personally suffered some actual or threatened injury as a result of the allegedly illegal conduct of government"; (2) "the injury is fairly traceable to the challenged action"; and (3) "the injury is likely to be redressed by a favorable action."[238]

In G.R. Nos. 239483 and 240954, what petitioners assail is an act of

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[236] *Goldwater v. Carter*, 444 U.S. 996 (1979).

[237] J. Powell, Concurring Opinion in *Goldwater v. Carter*, 444 U.S. 996, 996–997 (1979).

[238] *Telecommunications and Broadcast Attorneys of the Philippines, Inc. v. COMELEC*, 352 Phil. 153, 168 (1998) [Per J. Mendoza, En Banc].

the President, in the exercise of his executive power. They failed to show the actual or imminent injury that they sustained as a result of the President's withdrawal from the Rome Statute. Again, "whether a suit is public or private, the parties must have 'a present substantial interest,' not a 'mere expectancy or a future, contingent, subordinate, or consequential interest.'"[239]

Similarly, petitioners have no standing as taxpayers. In cases involving expenditure of public funds, also known as a taxpayer's suit, "there must be a claim of illegal disbursement of public funds or that the tax measure is unconstitutional[.]"[240]

Petitioners here failed to show any illegal expenditure of public funds. To allow these petitioners who suffer no injury to invoke this Court's discretion would be to allow everyone to come to courts on the flimsiest of grounds.

Parties must possess their own right to the relief sought, and a general invocation of citizen's or a taxpayer's rights is insufficient. This Court must not indiscriminately open its doors to every person urging it to take cognizance of a case where they have no demonstrable injury. This may ultimately render this Court ineffective to dispense justice as cases clog its docket.[241]

This Court has also recognized that an association may file petitions on behalf of its members on the basis of third party standing. However, to do so, the association must meet the following requirements: (1) "the [party bringing suit] must have suffered an 'injury-in-fact,' thus giving [it] a 'sufficiently concrete interest' in the outcome of the issue in dispute"; (2) "the party must have a close relation to the third party"; and (3) "there must exist some hindrance to the third party's ability to protect his or her own interests."[242]

In *Pharmaceutical and Health Care Association of the Philippines v. Secretary of Health*,[243] this Court found that an association "has the legal personality to represent its members because the results of the case will affect their vital interests":[244]

> The modern view... fuses the legal identity of an association with

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239 *Provincial Bus Operators Association of the Philippines v. Department of Labor and Employment*, G.R. No. 202275, July 17, 2018, 872 SCRA 50, 105 [Per J. Leonen, En Banc].

240 Id. at 103.

241 *Kilosbayan v. Guingona*, 302 Phil. 107 (1994) [Per J. Davide, Jr. En Banc].

242 *Provincial Bus Operators Association of the Philippines v. Department of Labor and Employment*, G.R. No. 202275, July 17, 2018, 872 SCRA 50, 106 [Per J. Leonen, En Banc].

243 561 Phil. 386 (2007) [Per J. Austria-Martinez, En Banc].

244 Id. at 396.

> that of its members. An association has standing to file suit for its workers despite its lack of direct interest if its members are affected by the action. An organization has standing to assert the concerns of its constituents.
>
> . . . .
>
> We note that, under its Articles of Incorporation, the respondent was organized... to act as the representative of any individual, company, entity or association on matters related to the manpower recruitment industry, and to perform other acts and activities necessary to accomplish the purposes embodied therein. The respondent is, thus, the appropriate party to assert the rights of its members, because it and its members are in every practical sense identical. . . . The respondent [association] is but the medium through which its individual members seek to make more effective the expression of their voices and the redress of their grievances.[245]

In *Provincial Bus Operators Association of the Philippines*,[246] this Court did not allow the association of bus operators to represent its members. There were no board resolutions or articles of incorporation presented to show that it was authorized to file the petition on the members' behalf. Some of the associations even had their certificates of incorporation revoked. This Court ruled that it is insufficient to simply allege that the petitioners are associations that represent their members who will be directly injured by the implementation of a law:

> The associations in *Pharmaceutical and Health Care Association of the Philippines, Holy Spirit Homeowners Association, Inc.*, and *The Executive Secretary* were allowed to sue on behalf of their members because they sufficiently established who their members were, that their members authorized the associations to sue on their behalf, and that the members would be directly injured by the challenged governmental acts.
>
> The liberality of this Court to grant standing for associations or corporations whose members are those who suffer direct and substantial injury depends on a few factors.
>
> In all these cases, there must be *an actual controversy*. Furthermore, there should also be a *clear and convincing demonstration of special reasons why the truly injured parties may not be able to sue*.
>
> Alternatively, there must be a similarly clear and convincing demonstration that the representation of the association is more efficient for the petitioners to bring. They must further show that it is more efficient for this Court to hear only one voice from the association. In other words, the association should show special reasons for bringing the action themselves rather than as a class suit, allowed when the subject matter of the controversy is one of common or general interest to many persons. In a class suit, a number of the members of the class are permitted to sue and to defend for the benefit of all the members so long

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[245] Id. at 395–396 citing *Executive Secretary v. Court of Appeals*, 473 Phil. 27 (2004) [Per J. Callejo, Sr., Second Division].

[246] G.R. No. 202275, July 17, 2018, 872 SCRA 50 [Per J. Leonen, En Banc].

as they are sufficiently numerous and representative of the class to which they belong.

> In some circumstances similar to those in *White Light*, the third parties represented by the petitioner would have special and legitimate reasons why they may not bring the action themselves. Understandably, the cost to patrons in the *White Light* case to bring the action themselves—i.e., the amount they would pay for the lease of the motels—will be too small compared with the cost of the suit. But viewed in another way, whoever among the patrons files the case even for its transcendental interest endows benefits on a substantial number of interested parties without recovering their costs. This is the free rider problem in economics. It is a negative externality which operates as a disincentive to sue and assert a transcendental right.[247] (Citation omitted, emphasis supplied)

Here, both petitioners-associations, the Integrated Bar of the Philippines and the Philippine Coalition for the International Criminal Court, failed to convince this Court why they must be heard as associations. Advocating human rights as an institution is insufficient. No special reason was alleged, let alone proved, why its allegedly injured members may not file the case themselves.

Worse, the members of the Philippine Coalition for the International Criminal Court joined the case as petitioners, albeit likewise failing to exhibit actual or imminent injury from which they stand to suffer.

## XIII

Transcendental importance is often invoked in instances when the petitioners fail to establish standing in accordance with customary requirements. However, its general invocation cannot negate the requirement of *locus standi*. Facts must be undisputed, only legal issues must be present, and proper and sufficient justifications why this Court should not simply stay its hand must be clear.

*Falcis* explained:

> *Diocese of Bacolod* recognized transcendental importance as an exception to the doctrine of hierarchy of courts. In cases of transcendental importance, imminent and clear threats to constitutional rights warrant a direct resort to this Court. This was clarified in *Gios-Samar*. There, this Court emphasized that transcendental importance — originally cited to relax rules on legal standing and not as an exception to the doctrine of hierarchy of courts — applies only to cases with purely legal issues. We explained that the decisive factor in whether this Court should permit the invocation of transcendental importance is not merely the presence of "special and important reasons[,]" but the nature of the question presented

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247 Id. at 110–111.

by the parties. This Court declared that there must be no disputed facts, and the issues raised should only be questions of law:

> [W]hen a question before the Court involves determination of a factual issue indispensable to the resolution of the legal issue, the Court will refuse to resolve the question regardless of the allegation or invocation of compelling reasons, such as the transcendental or paramount importance of the case. Such question must first be brought before the proper trial courts or the CA, both of which are specially equipped to try and resolve factual questions.

Still, it does not follow that this Court should proceed to exercise its power of judicial review just because a case is attended with purely legal issues. Jurisdiction ought to be distinguished from justiciability. Jurisdiction pertains to competence "to hear, try[,] and decide a case." On the other hand,

> [d]etermining whether the case, or any of the issues raised, is justiciable is an exercise of the power granted to a court with jurisdiction over a case that involves constitutional adjudication. Thus, even if this Court has jurisdiction, the canons of constitutional adjudication in our jurisdiction allow us to disregard the questions raised at our discretion.

Appraising justiciability is typified by constitutional avoidance. This remains a matter of enabling this Court to act in keeping with its capabilities. Matters of policy are properly left to government organs that are better equipped at framing them. Justiciability demands that issues and judicial pronouncements be properly framed in relation to established facts:

> Angara v. Electoral Commission imbues these rules with its libertarian character. Principally, *Angara* emphasized the liberal deference to another constitutional department or organ given the majoritarian and representative character of the political deliberations in their forums. It is not merely a judicial stance dictated by courtesy, but is rooted on the very nature of this Court. Unless congealed in constitutional or statutory text and imperatively called for by the actual and non-controversial facts of the case, this Court does not express policy. This Court should channel democratic deliberation where it should take place.
>
> . . . .
>
> Judicial restraint is also founded on a policy of conscious and deliberate caution. This Court should refrain from speculating on the facts of a case and should allow parties to shape their case instead. Likewise, this Court should avoid projecting hypothetical situations where none of the parties can fully argue simply because they have not established the facts or are not interested in the issues raised by the hypothetical situations. In a way, courts are

> mandated to adopt an attitude of judicial skepticism. What we think may be happening may not at all be the case. Therefore, this Court should always await the proper case to be properly pleaded and proved.
>
> Thus, concerning the extent to which transcendental importance carves exceptions to the requirements of justiciability, "[t]he elements supported by the facts of an actual case, and the imperatives of our role as the Supreme Court within a specific cultural or historic context, must be made clear":
>
> > They should be properly pleaded by the petitioner so that whether there is any transcendental importance to a case is made an issue. That a case has transcendental importance, as applied, may have been too ambiguous and subjective that it undermines the structural relationship that this Court has with the sovereign people and other departments under the Constitution. Our rules on jurisdiction and our interpretation of what is justiciable, refined with relevant cases, may be enough.
>
> ***Otherwise, this Court would cede unfettered prerogative on parties. It would enable the parties to impose their own determination of what issues are of paramount, national significance, warranting immediate attention by the highest court of the land.***[248] (Emphasis supplied, citations omitted)

*Chamber of Real Estate and Builders' Associations, Inc. v. Energy Regulatory Commission*[249] lists the following considerations to determine whether an issue is of transcendental importance:

> (1) the character of the funds or other assets involved in the case; (2) the presence of a clear case of disregard of a constitutional or statutory prohibition by the public respondent agency or instrumentality of the government; and (3) the lack of any other party with a more direct and specific interest in the questions being raised.[250] (Citation omitted)

Here, all petitioners invoked the supposed transcendental importance of the constitutional issues. However, none of the exceptional conditions warranting the exercise of this Court's jurisdiction is present here. This case does not involve funds or assets. Neither was there any express disregard of a constitutional or statutory prohibition. Petitioners also failed to show that no other party has a more direct, personal, and material interest. Petitioners failed to invoke any source of right to bring these Petitions.

This Court is competent to decide legal principles only in properly justiciable cases. That a party must have standing in court is not a mere

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248 G.R. No. 217910, September 3, 2019, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65744> [Per J. Leonen, En Banc].

249 638 Phil. 542 (2010) [Per J. Brion, En Banc].

250 Id. at 556–557.

technical rule that may easily be waived. Courts should be scrupulous in protecting the principles of justiciability, or else their legitimacy may be undermined.[251] Transcendental importance of issues excusing requisite standing should not be so recklessly invoked, and is justified only in extraordinary circumstances.

The alleged transcendental importance of the issues raised here will be better served when there are actual cases with the proper parties suffering an actual or imminent injury. No injury so great and so imminent was shown here, such that this Court cannot instead adjudicate on the occasion of an appropriate case.

## XIV

The writ of certiorari which may be issued under Rule 65 of the Rules of Court must be distinguished from the writ of certiorari that may be issued pursuant to the "expanded certiorari jurisdiction"[252] under Article VIII, Section 1, paragraph 2 of the 1987 Constitution.[253] The latter is a remedy for breaches of constitutional rights by any branch or instrumentality of the government. Meanwhile, the special civil action under Rule 65 is limited to a review of judicial and quasi-judicial acts. The following summarizes the distinctions between the two avenues for certiorari:

| | **Certiorari under Rule 65** | **Expanded Certiorari** |
|---|---|---|
| **Basis** | Rule 65 of the Rules of Court | Article VIII, Section 1, paragraph 2 of the Constitution |
| **Assailed act** | without or in excess of jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction | grave abuse of discretion amounting to lack or excess of jurisdiction |
| **By whom** | any tribunal, board or officer exercising judicial or quasi-judicial functions | any branch or instrumentality of the government |
| **Other requisites** | there is no appeal, or any plain, speedy, and adequate remedy in the ordinary course of law | |

While these two avenues are distinct, this Court has allowed—in view of its power to relax its rules of procedure—recourse to petitions for certiorari under Rule 65 to enable reliefs that invoke expanded certiorari jurisdiction.[254]

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[251] *Imbong v. Ochoa*, 732 Phil. 1, 125 (2014) [Per J. Mendoza, En Banc]. *See* also J. Leonen, Dissenting Opinion.

[252] *See Francisco, Jr. v. House of Representatives*, 460 Phil. 830 (2003) [Per J. Carpio Morales, En Banc].

[253] *See GCC Approved Medical Centers Association, Inc.*, 802 Phil. 116 (2016) [Per J. Brion, En Banc].

[254] *See GSIS Family Bank Employees Union v. Villanueva*, G.R. No. 210773, January 23, 2019, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/64921> [Per J. Leonen, Third Division] citing *Association of Medical Clinics for Overseas Workers, Inc. (AMCOW) v. GCC Approved Medical Centers Association, Inc.*, 802 Phil. 116, 142 (2016) [Per J. Brion, En Banc].

Regardless, "the expansion of this Court's judicial power is by no means an abandonment of the need to satisfy the basic requisites of justiciability."[255] Ultimately, the nature of judicial power means that this Court is competent to decide legal principles only when there is an actual case brought by the proper parties who suffer direct, material, and substantial injury.

## XV

The special civil actions of petitions for certiorari and mandamus cannot afford petitioners the reliefs they seek.

Rule 65 petitions are not per se remedies to resolve constitutional issues. Instead, they "are filed to address the jurisdictional excesses of officers or bodies exercising judicial or quasi-judicial functions."[256] Rule 65, Section 1 of the Rules of Court provides:

> SECTION 1. *Petition for certiorari.* — When any tribunal, board or officer exercising judicial or quasi-judicial functions has acted without or in excess its or his jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, and there is no appeal, or any plain, speedy, and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered annulling or modifying the proceedings of such tribunal, board or officer, and granting such incidental reliefs as law and justice may require.
>
> The petition shall be accompanied by a certified true copy of the judgment, order or resolution subject thereof, copies of all pleadings and documents relevant and pertinent thereto, and a sworn certification of non-forum shopping as provided in the third paragraph of section 3, Rule 46. (1a)
>
> The petition shall also contain a sworn certification of non-forum shopping as provided in the third paragraph of section 3, Rule 46. (3a)

A petition for certiorari under Rule 65 will prosper only when the following requisites are present: (1) the writ "must be directed against a tribunal, a board, or officer exercising judicial or quasi-judicial functions"; (2) "the tribunal, board, or officer must have acted without or in excess of jurisdiction, or with grave abuse of discretion"; and (3) "there is no appeal or

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[255] *Falcis III v. Civil Registrar General*, G.R. No. 217910, September 3, 2019, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65744> [Per J. Leonen, En Banc] citing *Ocampo v. Enriquez*, 798 Phil. 227, 288 (2016) [Per J. Peralta, En Banc], further citing *Belgica v. Hon. Executive Secretary Ochoa, Jr.*, 721 Phil. 416 (2013) [Per J. Perlas-Bernabe, En Banc].

[256] *Falcis III v. Civil Registrar General*, G.R. No. 217910, September 3, 2019, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65744> [Per J. Leonen, En Banc].

any plain, speedy, and adequate remedy in the ordinary course of law."[257]

Not every instance of abuse of discretion should lead this Court to exercise its power of judicial review. The abuse of discretion must be grave, amounting to a lack or excess of jurisdiction. *Sinon v. Civil Service Commission*[258] explains:

> By grave abuse of discretion is meant such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction. The abuse of discretion must be patent and gross as to amount to an evasion of positive duty or a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law, as where the power is exercised in an arbitrary and despotic manner by reason of passion or hostility.[259] (Citation omitted)

A writ of certiorari is unavailing here. The assailed government act is the President's withdrawal from the Rome Statute. This, by any stretch of the imagination, may not be considered an exercise of judicial or quasi-judicial power.

A political question exists when the issue does not call on this Court to determine legality and adjudicate, but to interpret the wisdom of a law or an act.[260] It has been defined as a question "which, under the Constitution, [is] to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the Legislature or executive branch of the Government."[261]

In *Integrated Bar of the Philippines v. Zamora*:[262]

> One class of cases wherein the Court hesitates to rule on are "political questions." The reason is that political questions are concerned with issues dependent upon the wisdom, not the legality, of a particular act or measure being assailed. Moreover, the political question being a function of the separation of powers, the courts will not normally interfere with the workings of another co-equal branch unless the case shows a clear need for the courts to step in to uphold the law and the Constitution.
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> . . . In the classic formulation of Justice Brennan in *Baker v. Carr*, prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent

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257 *Galicto v. Aquino*, 683 Phil. 141, 167 (2012) [Per J. Brion, En Banc].
258 289 Phil. 887 (1992) [Per J. Campos, Jr., En Banc].
259 Id. at 894.
260 *Integrated Bar of the Philippines v. Zamora*, 392 Phil. 618 (2000) [Per J. Kapunan, En Banc].
261 *Tañada v. Cuenco*, 103 Phil. 1051, 1067 (1957) [Per J. Concepcion, En Banc].
262 392 Phil. 618 (2000) [Per J. Kapunan, En Banc].

> resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on the one question.[263] (Citation omitted)

Courts cannot resolve a political question. It is not within the purview of judicial functions, and must be left to the sound discretion of the political agents—the executive or the legislature.

It is true that we have previously said that it is wrong to mistake matters of foreign relations as political questions, which are completely beyond the reach of judicial review. Nevertheless, generally, the pursuit of foreign relations is in the executive domain, and thus, pertains to the president,[264] the primary architect of foreign policy. As explained in *Bayan v. Zamora*:[265]

> By constitutional fiat and by the intrinsic nature of his office, the President, as head of State, is the sole organ and authority in the external affairs of the country. In many ways, the President is the chief architect of the nation's foreign policy; his "dominance in the field of foreign relations is then conceded." Wielding vast powers and influence, his conduct in the external affairs of the nation . . . is "executive altogether."[266] (Citations omitted)

Between the executive and this Court, it is the executive that represents the Philippines in the international sphere. This Court interprets laws, but its determinations are effective only within the bounds of Philippine jurisdiction. Even within these bounds, this Court must caution itself in interpreting the Constitution and our laws, for it can undermine the discretion of the political agencies. This Court's mandate is clear: it is the presence of grave abuse of discretion that sanctions us to act. It is not merely discretion, but *abuse* of that discretion; and it is not only abuse of discretion, but *grave abuse of discretion*.

The President's withdrawal from the Rome Statute was in accordance with the mechanism provided in the treaty. The Rome Statute itself contemplated and enabled a State Party's withdrawal. A state party and its agents cannot be faulted for merely acting within what the Rome Statute expressly allows.

As far as established facts go, all there is for this Court to rely on are the manifest actions of the executive, which have nonetheless all been consistent with the letter of the Rome Statute. Suggestions have been made

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263 Id. at 637–638.
264 CONST., art. VII, sec. 1.
265 396 Phil. 623 (2000) [Per J. Buena, En Banc].
266 Id. at 663.

about supposed political motivations, but they remain just that: suggestions and suppositions.

Were the situation different—where it is shown that the President's exercise of discretion ran afoul of established procedure; or was done in manifest disregard of previously declared periods for rectification, terms, guidelines, or injunctions, belying any rhyme or reason in the course of action hastily and haphazardly taken; or was borne out of vindictiveness, as retaliation, merely out of personal motives, to please personal tastes or to placate personal perceived injuries—whimsical and arbitrary exercise of discretion may be appreciated, impelling this Court to rule on the substance of petitions and grant the reliefs sought.

## XVI

Rule 65, Section 3 of the Rules of Court provides:

> SECTION 3. *Petition for mandamus.* — When any tribunal, corporation, board, officer or person unlawfully neglects the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station, or unlawfully excludes another from the use and enjoyment of a right or office to which such other is entitled, and there is no other plain, speedy and adequate remedy in the ordinary course of law, the person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered commanding the respondent, immediately or at some other time to be specified by the court, to do the act required to be done to protect the rights of the petitioner, and to pay the damages sustained by the petitioner by reason of the wrongful acts of the respondent.

*Lihaylihay v. Treasurer of the Philippines*[267] discussed the requisites for the issuance of a writ of mandamus:

> A writ of mandamus may issue in either of two (2) situations: first, "when any tribunal, corporation, board, officer or person unlawfully *neglects* the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station"; second, "when any tribunal, corporation, board, officer or person . . . *unlawfully excludes another* from the use and enjoyment of a right or office to which such other is entitled."
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> The first situation demands a concurrence between a clear legal right accruing to petitioner and a correlative duty incumbent upon respondents to perform an act, this duty being imposed upon them by law.
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> Petitioner's legal right must have already been clearly established. It cannot be a prospective entitlement that is yet to be settled. In *Lim Tay v. Court of Appeals*, this Court emphasized that "[m]andamus will not

[267] G.R. No. 192223, July 23, 2018, 872 SCRA 277 [Per J. Leonen, Third Division].

issue to establish a right, but only to enforce one that is already established." In *Pefianco v. Moral*, this Court underscored that a writ of mandamus "never issues in doubtful cases."

Respondents must also be shown to have *actually* neglected to perform the act mandated by law. Clear in the text of Rule 65, Section 3 is the requirement that respondents "unlawfully *neglect*" the performance of a duty. The mere existence of a legally mandated duty or the pendency of its performance does not suffice.

The duty subject of mandamus must be ministerial rather than discretionary. A court cannot subvert legally vested authority for a body or officer to exercise discretion. In *Sy Ha v. Galang*:

> [M]andamus will not issue to control the exercise of discretion of a public officer where the law imposes upon him the duty to exercise his judgment in reference to any matter in which he is required to act, because it is his judgment that is to be exercised and not that of the court.

This Court distinguished discretionary functions from ministerial duties, and related the exercise of discretion to judicial and quasi-judicial powers. In *Samson v. Barrios*:

> Discretion, when applied to public functionaries, means a power or right conferred upon them by law of acting officially, under certain circumstances, according to the dictates of their own judgments and consciences, uncontrolled by the judgments or consciences of others. A purely ministerial act or duty, in contradistinction to a discretional act, is one which an officer or tribunal performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment, upon the propriety or impropriety of the act done. If the law imposes a duty upon a public officer, and gives him the right to decide how or when the duty shall be performed, such duty is discretionary and not ministerial. The duty is ministerial only when the discharge of the same requires neither the exercise of official discretion nor judgment. . . . Mandamus will not lie to control the exercise of discretion of an inferior tribunal . . . , when the act complained of is either judicial or quasi-judicial. . . . It is the proper remedy when the case presented is outside of the exercise of judicial discretion. . . .

Mandamus, too, will not issue unless it is shown that "there is no other plain, speedy and adequate remedy in the ordinary course of law." This is a requirement basic to all remedies under Rule 65, i.e., certiorari, prohibition, and mandamus.[268] (Emphasis supplied, citations omitted)

A writ of mandamus lies to compel the performance of duties that are purely ministerial, and not those that are discretionary. Petitioners must

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[268] Id. at 294–297.

show that they have a clear legal right and that there was a neglected duty which was incumbent upon the public officer.

Here, however, there is no showing that the President has the ministerial duty imposed by law to retract his withdrawal from the Rome Statute. Certainly, there is no constitutional or statutory provision granting petitioners the right to compel the executive to withdraw from any treaty. It was discretionary upon the President, as primary architect of our foreign policy, to perform the assailed act.

Moreover, issuing a writ of mandamus will not *ipso facto* restore the Philippines to membership in the International Criminal Court. No provision in the Rome Statute directs how a state party may reverse its withdrawal from the treaty. It cannot be guaranteed that the Note Verbale's depositary, the United Nations Secretary-General, will assent to this Court's compulsion to reverse the country's withdrawal.

This Court is not an international court. It may only rule on the effect of international law on the domestic sphere. What is within its purview is not the effectivity of laws among states, but the effect of international law on the Constitution and our municipal laws. Not only do petitioners pray for a relief directed at a discretionary function, but the relief they seek through this Court's finite authority is ineffectual and futile. Ultimately, mandamus will not lie.

## XVII

*Pacta sunt servanda* is a generally accepted principle of international law that preserves the sanctity of treaties. This principle is expressed in Article 26 of the Vienna Convention:

> Article 26
> "Pacta sunt servanda"
>
> Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

A supplementary provision is found in Article 46:

> Article 46
> Provisions of internal law regarding
> competence to conclude treaties
>
> 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law

of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

A state party may not invoke the provisions of its internal law to justify its failure to perform a treaty. Under international law, we cannot plead our own laws to excuse our noncompliance with our obligations.

The March 15, 2018 Note Verbale submitted by the Department of Foreign Affairs, through our Ambassador to the United Nations, partly reads:

> The Government of the Republic of the Philippines has the honor to inform the Secretary-General, in his capacity as depositary of the Rome Statute of the International Criminal Court, of its decision to withdraw from the Rome Statute of the International Criminal Court *in accordance with the relevant provisions of the Statute.*
>
> The Philippines assures the community of nations that the Philippine Government continues to be guided by the rule of law embodied in its Constitution, which also enshrines the country's *long-standing tradition of upholding human rights.*
>
> The Government *affirms its commitment to fight against impunity* for atrocity crimes, notwithstanding its withdrawal from the Rome Statute, especially since the Philippines has a national legislation punishing atrocity crimes. The Government remains resolute in effecting its principal responsibility to ensure the long-term safety of the nation in order to promote inclusive national development and secure a decent and dignified life for all.
>
> The decision to withdraw is the Philippines' principled stand against those who politicize and weaponize human rights, *even as its independent and well-functioning organs and agencies continue to exercise jurisdiction over complaints, issues, problems and concerns arising from its efforts to protect its people.*[269] (Emphasis supplied)

The Philippines' withdrawal was submitted *in accordance with relevant provisions of the Rome Statute*. The President complied with the provisions of the treaty from which the country withdrew. There cannot be a violation of *pacta sunt servanda* when the executive acted precisely in accordance with the procedure laid out by that treaty. Article 127(1) of the Rome Statute states:

> 1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The

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[269] Note Verbale dated March 15, 2018, "Philippines: Withdrawal", available at <https://treaties.un.org/doc/Publication/CN/2018/CN.138.2018-Eng.pdf> (last accessed on March 5, 2021).

> withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

From its text, the Rome Statute provides no room to reverse the accepted withdrawal from it. While there is a one-year period before the withdrawal takes effect, it is unclear whether we can read into that proviso a permission for a state party to rethink its position, and retreat from its withdrawal.

In any case, this Court has no competence to interpret with finality—let alone bind the International Criminal Court, the Assembly of States Parties, individual state parties, and the entire international community—what this provision means, and conclude that undoing a withdrawal is viable. In the face of how the Rome Statute enables withdrawal but does not contemplate the undoing of a withdrawal, this Court cannot compel external recognition of any prospective undoing which it shall order. To do so could even mean courting international embarrassment.

Just the same, any such potential embarrassment or other unpalatable consequences are risks that we, as a country, are willing to take is better left to those tasked with crafting foreign policy.

The Rome Statute contemplates amendments, and is replete with provisions on it:

> **Article 121**
> **Amendments**
>
> 1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.
> 2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.
> 3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.
> 4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.
> 5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of

ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.
7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

**Article 122**
**Amendments to provisions of an institutional nature**

1. Amendments to provisions of this Statute which are of an exclusively institutional nature, namely, article 35, article 36, paragraphs 8 and 9, article 37, article 38, article 39, paragraphs 1 (first two sentences), 2 and 4, article 42, paragraphs 4 to 9, article 43, paragraphs 2 and 3, and articles 44, 46, 47 and 49, may be proposed at any time, notwithstanding article 121, paragraph 1, by any State Party. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties who shall promptly circulate it to all States Parties and to others participating in the Assembly.
2. Amendments under this article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a two- thirds majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference.

**Article 123**
**Review of Statute**

1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.
2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference.
3. The provisions of article 121, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference.

Generally, *jus cogens* rules of customary international law cannot be amended by treaties. As Articles 121, 122, and 123 allow the amendment of provisions of the Rome Statute, this indicates that the Rome Statute is not *jus cogens*. At best, its provisions are articulations of customary law, or simply, treaty law. Article 121(6) sanctions the immediate withdrawal of a state party if it does not agree with the amending provisions of the Rome Statute. Therefore, withdrawal from the Rome Statute is not aberrant. Precisely, the option is enabled for states parties.

Petitioners' contention—that withdrawing from the Rome Statute effectively repeals a law—is inaccurate. The Rome Statute remained in force for its states parties, and Article 127 specifically allows state parties to withdraw.

In withdrawing from the Rome Statute, the President complied with the treaty's requirements. Compliance with its textual provisions cannot be susceptible of an interpretation that his act violated the treaty. Hence, withdrawal per se from the Rome Statute does not violate *pacta sunt servanda*.

## XVIII

Petitioners in G.R. No. 239483 invoke the case of South Africa, which had previously attempted to withdraw from the Rome Statute. When the withdrawal was challenged by the South African Opposition Democratic Alliance, the South African High Court ruled that the president's withdrawal was premature, procedurally irrational, and may not be done without the approval of the Parliament. It said:

> The matter was argued largely on the basis that there is no provision in the Constitution or in any other legislation for withdrawal from international treaties. . . . However, it appears to us that there is probably a good reason why the Constitution provides for the power of the executive to negotiate and conclude international agreements but is silent on the power to terminate them. The reason is this: As the executing arm of the state, the national executive needs authority to act. That authority will flow from the Constitution or from an act of parliament. The national executive can exercise only those powers and perform those functions conferred upon it by the Constitution, or by law which is consistent with the Constitution. This is a basic requirement of the principle of legality and the rule of law. The absence of a provision in the Constitution or any other legislation of a power for the executive to terminate international agreements is therefore confirmation of the fact that such power does not exist unless and until parliament legislates for it. It is not a lacuna or omission.[270]

The ruling on South Africa's withdrawal cannot be taken as binding

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[270] *Rollo* (G.R. No. 239483), p. 29, Petition.

precedent.

First, foreign judgments are not binding in our jurisdiction. At most, they may hold persuasive value.[271] *Francisco v. House of Representatives*[272] teaches that this Court, in passing upon constitutional questions, "should not be beguiled by foreign jurisprudence some of which are hardly applicable because they have been dictated by different constitutional settings and needs."[273]

Second, a comparison of the Philippines' and South Africa's respective governmental structures and constitutions reveals stark differences.

Our Constitution states: "No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate."[274]

On the other hand, the South African Constitution provides:

> SECTION 231. International Agreements
>
> (1) The negotiating and signing of all international agreements is the responsibility of the national executive.
>
> (2) An international agreement binds the Republic *only after it has been approved by resolution in both the National Assembly and the National Council of Provinces*, unless it is an agreement referred to in subsection (3).[275] (Emphasis supplied)

Our Constitution requires that when the president enters into a treaty, at least two-thirds of all members of the Senate must *concur* for it to be valid and effective. On the other hand, the South African Constitution expressly requires that the entire parliament must *approve* the international agreement.

Per our system of checks and balances, the Senate concurred with entering into the Rome Statute through Senate Resolution No. 546. In contrast, the South African parliament had to enact a law, the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002,[276] for the Rome Statute to be adopted in South Africa. Thus,

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271 *Central Bank Employees Association, Inc. v. Bangko Sentral ng Pilipinas*, 487 Phil. 531-793 (2004) [Per. J. Puno, En Banc].

272 460 Phil. 830, 935 (2003) [Per J. Carpio Morales, En Banc].

273 Id. at 889.

274 CONST., art. VII, sec. 21.

275 1996 Constitution of South Africa, Ch. 14, sec. 231, as found in *rollo* (G.R. No. 239483) p. 106, Petition.

276 Available at <https://justice.gov.za/legislation/acts/2002-027.pdf> (last accessed on March 8, 2021).

treaty-making in South Africa is vested in their parliament, making it a concurrently legislative and not an exclusively executive act. In the Philippines, treaty-making is an executive act, vested in the president; the Senate's involvement is limited to mere concurrence.

While there may be similarities between our constitutions, these are not enough to take South Africa's case as binding precedent. We are under a presidential form of government. The way our system of checks and balances operates is different from how such a system would operate in a parliamentary government.

## XIX

Withdrawing from the Rome Statute does not discharge a state party from the obligations it has incurred as a member. Article 127(2) provides:

> *A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute*, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective. (Emphasis supplied)

A state party withdrawing from the Rome Statute must still comply with this provision. Even if it has deposited the instrument of withdrawal, it shall not be discharged from any criminal proceedings. Whatever process was already initiated before the International Criminal Court obliges the state party to cooperate.

Until the withdrawal took effect on March 17, 2019, the Philippines was committed to meet its obligations under the Rome Statute. Any and all governmental acts up to March 17, 2019 may be taken cognizance of by the International Criminal Court.

Further, as petitioners in G.R. No. 239483 underscored:

> [U]nder this reverse complementarity provision in [Republic Act No. 9851], the Preliminary Examination opened by the [International Criminal Court] on the President's drug war is not exactly *haram* (to borrow a word used in Islam to mean any act forbidden by the Divine). Assuming such a [Preliminary Examination] proceeds . . . when Art 18 (3) of the Rome Statute comes into play, [Republic Act No. 9851] may be invoked as basis

> by Philippine authorities to defer instead to the [International Criminal Court] in respect of any investigation on the same situation.[277]

Consequently, liability for the alleged summary killings and other atrocities committed in the course of the war on drugs is not nullified or negated here. The Philippines remained covered and bound by the Rome Statute until March 17, 2019.

**XX**

Petitioners claim that the country's withdrawal from the Rome Statute violated their right to be provided with ample remedies for the protection of their right to life and security.

This fear of imagined diminution of legal remedies must be assuaged. The Constitution, which embodies our fundamental rights, was in no way abrogated by the withdrawal. A litany of statutes that protect our rights remain in place and enforceable.

As discussed, Republic Act No. 9851, or the Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, echoes the substantive provisions of the Rome Statue. It was signed into law on December 11, 2009, two years before the Senate concurred with the Rome Statute. Republic Act No. 9851 covers rights similarly protected under the Rome Statute. Consequently, no new obligations arose from our membership in the International Criminal Court. Given the variances between the Rome Statute and Republic Act No. 9851, it may even be said that the Rome Statute amended Republic Act No. 9851.

Republic Act No. 9851 declares the State policy of valuing "the dignity of every human person and guarantee[ing] full respect for human rights, including the rights of indigenous cultural communities and other vulnerable groups, such as women and children[.]"[278] It guarantees protection against "the most serious crimes of concern to the international community as a whole . . . and their effective prosecution must be ensured by taking measures at the national level, in order to put an end to impunity for the perpetrators of these crimes[.]"[279] It recognizes that the State must "*exercise its criminal jurisdiction over those responsible for international crimes*[.]"[280]

This is enforced by the Republic Act No. 9851's assertion of jurisdiction over crimes committed anywhere in the world:

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277 *Rollo* (G.R. No. 239483), p. 45, Petition.
278 Republic Act No. 9851 (2009), sec. 2(b).
279 Republic Act No. 9851 (2009), sec. 2(e).
280 Republic Act No. 9851 (2009), sec. 2(e).

> SECTION 17. *Jurisdiction.* — The State shall exercise jurisdiction over persons, whether military or civilian, suspected or accused of a crime defined and penalized in this Act, regardless of where the crime is committed, provided, any one of the following conditions is met:
>
> (a) The accused is a Filipino citizen;
> (b) The accused, regardless of citizenship or residence, is present in the Philippines; or
> (c) The accused has committed the said crime against a Filipino citizen.
>
> In the interest of justice, the relevant Philippine authorities may dispense with the investigation or prosecution of a crime punishable under this Act if another court or international tribunal is already conducting the investigation or undertaking the prosecution of such crime. Instead, the authorities may surrender or extradite suspected or accused persons in the Philippines to the appropriate international court, if any, or to another State pursuant to the applicable extradition laws and treaties.
>
> No criminal proceedings shall be initiated against foreign nationals suspected or accused of having committed the crimes defined and penalized in this Act if they have been tried by a competent court outside the Philippines in respect of the same offense and acquitted, or having been convicted, already served their sentence.[281]

Republic Act No. 9851 expressly confers original and exclusive jurisdiction on regional trial courts over the offenses it punishes. It also provides that this Court shall designate special courts to try these cases.[282] *Unlike the Rome Statute, Republic Act No. 9851 dispenses with complementarity as a requirement for prosecution of crimes against humanity.*

Notably, Republic Act No. 9851 proclaims as state policy the protection of human rights of the accused, the victims, and the witnesses, and provides for accessible and gender-sensitive avenues of redress:

> The State shall guarantee persons suspected or accused of having committed grave crimes under international law all rights necessary to ensure that their trial will be fair and prompt in strict accordance with national and international law and standards for fair trial. It shall also protect victims, witnesses and their families, and provide appropriate redress to victims and their families. It shall ensure that the legal systems in place provide accessible and gender-sensitive avenues of redress for victims of armed conflict[.][283]

These State policies are operationalized in the following provisions:

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281 Republic Act No. 9851 (2009), sec. 17.
282 Republic Act No. 9851 (2009), sec. 18.
283 Republic Act No. 9851 (2009), sec. 2(f).

SECTION 13. *Protection of Victims and Witnesses.* – In addition to existing provisions in Philippine law for the protection of victims and witnesses, the following measures shall be undertaken:

(a) The Philippine court shall take appropriate measures to protect the safety, physical and physiological well-being, dignity and privacy of victims and witnesses. In so doing, the court shall have regard of all relevant factors, including age, gender and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and to a fair and impartial trial;
(b) As an exception to the general principle of public hearings, the court may, to protect the victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of the victim of sexual violence or a child who is a victim or is a witness, unless otherwise ordered by the court, having regard to all the circumstances, particularly the views of the victim or witness;
(c) Where the personal interests of the victims are affected, the court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the court in manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the court considers it appropriate in accordance with the established rules of procedure and evidence; and
(d) Where the disclosure of evidence or information pursuant to this Act may lead to the grave endangerment of the security of a witness for his/her family, the prosecution may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and to a fair and impartial trial.

SECTION 14. *Reparations to Victims.* – In addition to existing provisions in Philippine law and procedural rules for reparations to victims, the following measures shall be undertaken:

(a) The court shall follow the principles relating to the reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision, the court may, wither upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and state the principles on which it is acting;
(b) The court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of,

victims, including restitution, compensation and rehabilitation; and

(c) Before making an order under this section, the court may invite and shall take account of representations from or on behalf of the convicted person, victims or other interested persons.

Nothing in this section shall be interpreted as prejudicing the rights of victims under national or international law.[284]

Chapter III[285] of Republic Act No. 9851 defines war crimes, genocide, and other crimes against humanity, as similarly characterized in the Rome Statute.

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[284] Republic Act No. 9851 (2009), secs. 13 and 14.

[285] *Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity*
SECTION 4. *War Crimes.* — For the purpose of this Act, "war crimes" or "crimes against International Humanitarian Law" means:
(a) In case of an international armed conflict, grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
(1) Willful killing;
(2) Torture or inhuman treatment, including biological experiments;
(3) Willfully causing great suffering, or serious injury to body or health;
(4) Extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly;
(5) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
(6) Arbitrary deportation or forcible transfer of population or unlawful confinement;
(7) Taking of hostages;
(8) Compelling a prisoner of war or other protected person to serve in the forces of a hostile power; and
(9) Unjustifiable delay in the repatriation of prisoners of war or other protected persons.
(b) In case of a non-international armed conflict, serious violations of common Article 3 to the four (4) Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:
(1) Violence to life and person, in particular, willful killings, mutilation, cruel treatment and torture;
(2) Committing outrages upon personal dignity, in particular, humiliating and degrading treatment;
(3) Taking of hostages; and
(4) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.
(c) Other serious violations of the laws and customs applicable in armed conflict, within the established framework of international law, namely:
(1) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
(2) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
(3) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions or Additional Protocol III in conformity with international law;
(4) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
(5) Launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be excessive in relation to the concrete and direct military advantage anticipated;
(6) Launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, and causing death or serious injury to body or health;
(7) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives, or making non-defended localities or demilitarized zones the object of attack;

(8) Killing or wounding a person in the knowledge that he/she is *hors de combat,* including a combatant who, having laid down his/her arms or no longer having means of defense, has surrendered at discretion;
(9) Making improper use of a flag of truce, of the flag or the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions or other protective signs under International Humanitarian Law, resulting in death, serious personal injury or capture;
(10) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives. In case of doubt whether such building or place has been used to make an effective contribution to military action, it shall be presumed not to be so used;
(11) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind, or to removal of tissue or organs for transplantation, which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his/her interest, and which cause death to or seriously endanger the health of such person or persons;
(12) Killing, wounding or capturing an adversary by resort to perfidy;
(13) Declaring that no quarter will be given;
(14) Destroying or seizing the enemy's property unless such destruction or seizure is imperatively demanded by the necessities of war;
(15) Pillaging a town or place, even when taken by assault;
(16) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
(17) Transferring, directly or indirectly, by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
(18) Committing outrages upon personal dignity, in particular, humiliating and degrading treatment;
(19) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions or a serious violation of common Article 3 to the Geneva Conventions;
(20) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
(21) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions and their Additional Protocols;
(22) In an international armed conflict, compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
(23) In an international armed conflict, declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
(24) Committing any of the following acts;
(i) Conscripting, enlisting or recruiting children under the age of fifteen (15) years into the national armed forces;
(ii) Conscripting, enlisting or recruiting children under the age of eighteen (18) years into an armed force or group other than the national armed forces; and
(iii) Using children under the age of eighteen (18) years to participate actively in hostilities; and
(25) Employing means of warfare which are prohibited under international law, such as:
(i) Poison or poisoned weapons;
(ii) Asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
(iii) Bullets which expand or flatten easily in the human body, such as bullets with hard envelopes which do not entirely cover the core or are pierced with incisions; and
(iv) Weapons, projectiles and material and methods of warfare which are of the nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict.
Any person found guilty of committing any of the acts specified herein shall suffer the penalty provided under Section 7 of this Act.
SECTION 5. *Genocide.* — (a) For the purpose of this Act, "genocide" means any of the following acts with intent to destroy, in whole or in part, a national, ethnic, racial, religious, social or any other similar stable and permanent group as such:
(1) Killing members of the group;
(2) Causing serious bodily or mental harm to members of the group;
(3) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(4) Imposing measures intended to prevent births within the group; and
(5) Forcibly transferring children of the group to another group.
(b) It shall be unlawful for any person to directly and publicly incite others to commit genocide.

***However, there are significant differences between the Rome Statute and Republic Act No. 9851.***

Republic Act No. 9851 defines torture as "the intentional infliction of severe pain or suffering, whether physical, mental, or psychological, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions."[286] Meanwhile, psychological means of torture are not covered by the Rome Statute. This is also a departure from Republic Act No. 9745, or the Anti-Torture Act of 2009, which limits torture to those "inflicted by or at the instigation of or with the consent or acquiescence of a person in authority or agent of a person in authority"[287] for specific purposes.

Republic Act No. 9851 clustered war crimes or crimes against international humanitarian law into three categories: (1) an international armed conflict; (2) a non-international armed conflict; and (3) other serious violations of laws and customs applicable in armed conflict. It then listed specific acts against protected persons or properties, or against persons taking no active part in hostilities. The broader definition of war crimes

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Any person found guilty of committing any of the acts specified in paragraphs (a) and (b) of this section shall suffer the penalty provided under Section 7 of this Act.

SECTION 6. *Other Crimes Against Humanity.* — For the purpose of this Act, "other crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Willful killing;
(b) Extermination;
(c) Enslavement;
(d) Arbitrary deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, sexual orientation or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime defined in this Act;
(i) Enforced or involuntary disappearance of persons;
(j) Apartheid; and
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Any person found guilty of committing any of the acts specified herein shall suffer the penalty provided under Section 7 of this Act.

286 Republic Act No. 9851 (2009), sec. 3(s).

287 Republic Act No. 9745 (2009), sec. 3(a) provides:

SECTION 3. *Definitions.* — For purposes of this Act, the following terms shall mean:

(a) "Torture" refers to an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him/her or a third person information or a confession; punishing him/her for an act he/she or a third person has committed or is suspected of having committed; or intimidating or coercing him/her or a third person; or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a person in authority or agent of a person in authority. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions[.]

under Republic Act No. 9851 as compared with the Rome Statute is emphasized below:

> SECTION 4. *War Crimes.* — For the purpose of this Act, "war crimes" or "crimes against International Humanitarian Law" means:
>
> (a) In case of an international armed conflict, grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
>
> . . . .
>
> (6) ***Arbitrary*** deportation or forcible transfer of population or unlawful confinement;
> (7) Taking of hostages;
> (8) Compelling a prisoner of war or other protected person to serve in the forces of a hostile power; and
> (9) ***Unjustifiable delay in the repatriation of prisoners of war or other protected persons.***
>
> (b) In case of a non-international armed conflict, serious violations of common Article 3 to the four (4) Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:
>
> (1) Violence to life and person, in particular, ***willful killings***, mutilation, cruel treatment and torture;
>
> . . . .
>
> (3) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions ***or Additional Protocol III*** in conformity with international law;
>
> . . . .
>
> (6) ***Launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, and causing death or serious injury to body or health;***
>
> . . . .
>
> (8) Killing or wounding ***a person in the knowledge that he/she is hors de combat, including*** a combatant who, having laid down his/her arms or no longer having means of defense, has surrendered at discretion;
> (9) Making improper use of a flag of truce, of the flag or the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva

> Conventions or other protective signs under International Humanitarian Law, resulting in death, serious personal injury ***or capture;***
>
> . . . .
>
> (12) Killing, wounding ***or capturing an adversary by resort to perfidy;***
>
> . . . .
>
> (19) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions ***or a serious violation of common Article 3 to the*** Geneva Conventions***;***
>
> . . . .
>
> (21) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions ***and their Additional Protocols;***
>
> . . . .
>
> (24) Committing any of the following acts;
> (i) Conscripting, enlisting ***or recruiting*** children under the age of fifteen (15) years into the national armed forces;
> (ii) Conscripting, enlisting ***or recruiting*** children under the age of ***eighteen (18) years into an armed force or group other than the national armed forces***; and
> (iii) Using children under the age of ***eighteen (18) years*** to participate actively in hostilities; and
>
> . . . .
>
> ***Any person found guilty of committing any of the acts specified herein shall suffer the penalty provided under Section 7 of this Act.***[288]
> (Emphasis supplied)

Acts of willful killing, as opposed to "murder" under the Rome Statute, deportation or forcible transfer of populations, torture, and the sexual offenses under the third category of war crimes are also listed as "other crimes against humanity" under Republic Act No. 9851.

***Unlike the Rome Statute, Republic Act No. 9851 also adds or includes among other crimes against humanity persecution against any individual, group, or collectivity based on their sexual orientation.***

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[288] Republic Act No. 9851 (2009), sec. 4.

***Enforced or "involuntary disappearance of persons" is also a punishable crime against humanity.***[289]

Republic Act No. 9851 holds superiors liable as principals for crimes committed by subordinates under their effective command and control.[290] This provides for command responsibility "as a form of criminal complicity" that jurisprudence has recognized:[291]

> In other words, command responsibility may be loosely applied in *amparo* cases in order *to identify* those accountable individuals that have the power to effectively implement whatever processes an *amparo* court would issue. In such application, the *amparo* court does not impute criminal responsibility but merely pinpoint the superiors it considers to be in the best position to protect the rights of the aggrieved party.
>
> Such identification of the responsible and accountable superiors may well be a preliminary determination of criminal liability which, of course, is still subject to further investigation by the appropriate government agency.
>
> Relatedly, the legislature came up with Republic Act No. 9851 to include command responsibility as a form of criminal complicity in crimes against international humanitarian law, genocide and other crimes. *RA 9851 is thus the substantive law that definitively imputes criminal liability to those superiors who, despite their position, still fail to take all necessary and reasonable measures within their power to prevent or repress the commission of illegal acts or to submit these matters to the competent authorities for investigation and prosecution.*[292] (Emphasis supplied, citations omitted)

All told, the more restrictive Rome Statute may have even weakened the substantive protections already previously afforded by Republic Act No. 9851. In such a case, it may well be beneficial to remove the confusion brought about by maintaining a treaty whose contents are inconsistent with antecedent statutory provisions.

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289 Republic Act No. 9851 (2009), sec. 6.

290 Republic Act No. 9851 (2009), sec. 10 provides:
SECTION 10. *Responsibility of Superiors.* – In addition to other grounds of criminal responsibility for crimes defined and penalized under this Act, a superior shall be criminally responsible as a principal for such crimes committed by subordinates under his/her effective command and control, or effective authority and control as the case may be, as a result of his/her failure to properly exercise control over such subordinates, where:
(a) That superior either knew or, owing to the circumstances at the time, should have known that the subordinates were committing or about to commit such crimes;
(b) That superior failed to take all necessary and reasonable measures within his/her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

291 *Boac v. Cadapan*, 665 Phil. 84 (2011) [Per J. Carpio Morales, En Banc].

292 Id. at 112–113.

**XXI**

It has been opined that the principles of law in the Rome Statute are generally accepted principles of international law. Assuming that this is true and considering the incorporation clause, the Philippines' withdrawal from the Rome Statute would be a superfluity thus, ultimately ineffectual. The Philippines would remain bound by obligations expressed in the Rome Statute:

> [G]enerally accepted principles of international law form part of Philippine laws even if they do not derive from treaty obligations of the Philippines.
>
> . . . .
>
> Some customary international laws have been affirmed and embodied in treaties and conventions. A treaty constitutes evidence of customary law if it is declaratory of customary law, or if it is intended to codify customary law. *In such a case, even a State not party to the treaty would be bound thereby. A treaty which is merely a formal expression of customary international law is enforceable on all States because of their membership in the family of nations.* For instance, the Vienna Convention on Consular Relations is binding even on non-party States because the provisions of the Convention are mostly codified rules of customary international law binding on all States even before their codification into the Vienna Convention. Another example is the Law of the Sea, which consists mostly of codified rules of customary international law, which have been universally observed even before the Law of the Sea was ratified by participating States.
>
> Corollarily, treaties may become the basis of customary international law. While States which are not parties to treaties or international agreements are not bound thereby, such agreements, if widely accepted for years by many States, may transform into customary international laws, in which case, they bind even non-signatory States.
>
> In *Republic v. Sandiganbayan*, this Court held that even in the absence of the Constitution, generally accepted principles of international law remain part of the laws of the Philippines. During the interregnum, or the period after the actual takeover of power by the revolutionary government in the Philippines, following the cessation of resistance by loyalist forces up to 24 March 1986 (immediately before the adoption of the Provisional Constitution), the 1973 Philippine Constitution was abrogated and there was no municipal law higher than the directives and orders of the revolutionary government. Nevertheless, this Court ruled that even during this period, the provisions of the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights, to which the Philippines is a signatory, remained in effect in the country. The Covenant and Declaration are based on generally accepted principles of international law which are applicable in the Philippines even in the absence of a constitution, as during the interregnum. Consequently, applying the provisions of the Covenant and the Declaration, the Filipino people continued to enjoy almost the same rights found in the Bill of Rights despite the abrogation of the 1973 Constitution.

> The Rome Statute of the International Criminal Court was adopted by 120 members of the United Nations (UN) on 17 July 1998. It entered into force on 1 July 2002, after 60 States became party to the Statute through ratification or accession. The adoption of the Rome Statute fulfilled the international community's long-time dream of creating a permanent international tribunal to try serious international crimes. The Rome Statute, which established an international criminal court and formally declared genocide, war crimes and other crimes against humanity as serious international crimes, *codified generally accepted principles of international law, including customary international laws*. The principles of law embodied in the Rome Statute were already generally accepted principles of international law even prior to the adoption of the Statute. Subsequently, the Rome Statute itself has been widely accepted and, as of November 2010, it has been ratified by 114 states, 113 of which are members of the UN.
>
> There are at present 192 members of the UN. Since 113 member states have already ratified the Rome Statute, more than a majority of all the UN members have now adopted the Rome Statute as part of their municipal laws. Thus, the Rome Statute itself is generally accepted by the community of nations as constituting a body of generally accepted principles of international law. *The principles of law found in the Rome Statute constitute generally accepted principles of international law enforceable in the Philippines under the Philippine Constitution.* The principles of law embodied in the Rome Statute are binding on the Philippines even if the Statute has yet to be ratified by the Philippine Senate. In short, the principles of law enunciated in the Rome Statute are now part of Philippine domestic law pursuant to Section 2, Article II of the 1987 Philippine Constitution.[293] (Emphasis in the original, citations omitted)

Chapter VII, Section 15 of Republic Act No. 9851 enumerates the applicable sources of international law that guide its interpretation and implementation:

> SECTION 15. *Applicability of International Law.* — In the application and interpretation of this Act, Philippine courts shall be guided by the following sources:
>
> (a) The 1948 Genocide Convention;
> (b) The 1949 Geneva Conventions I-IV, their 1977 Additional Protocols I and II and their 2005 Additional Protocol III;
> (c) The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, its First Protocol and its 1999 Second Protocol;
> (d) The 1989 Convention on the Rights of the Child and its 2000 Optional Protocol on the Involvement of Children in Armed Conflict;
> (e) The rules and principles of customary international law;
> (f) The judicial decisions of international courts and tribunals;

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[293] J. Carpio, Dissenting Opinion in *Bayan Muna v. Romulo*, 656 Phil. 246, 325-329 (2011) [Per J. Velasco, Jr., En Banc].

(g) Relevant and applicable international human rights instruments;
(h) Other relevant international treaties and conventions ratified or acceded to by the Republic of the Philippines; and
(i) Teachings of the most highly qualified publicists and authoritative commentaries on the foregoing sources as subsidiary means for the determination of rules of international law.

As listed by the Office of the Solicitor General, the Philippines also remained as state party to these international conventions and human rights instruments:

(a) The International Covenant on Civil and Political Rights;
(b) The International Covenant on Economic, Social, and Cultural Rights;
(c) The Convention Against Torture;
(d) The Convention on the Discrimination Against Women; an Elimination of Discrimination; and
(e) The Convention on the Elimination of Racial Discrimination.[294]

Thus, petitioners' concern that the country's withdrawal from the Rome Statute abjectly and reversibly subverts our basic human rights appears to be baseless and purely speculative.

All told, the consolidated Petitions are dismissed for failing to demonstrate justiciability. While we commend the zealousness of petitioners in seeking to ensure that the President acts within the bounds of the Constitution, they had no standing to file their suits. We cannot grant the reliefs they seek. The unfolding of events, including the International Criminal Court's acknowledgment of withdrawal even before the lapse of one year from initial notice, rendered the Petitions moot, removing any potential relief from this Court's sphere.

Mechanisms that safeguard human rights and protect against the grave offenses sought to be addressed by the Rome Statute remain formally in place in this jurisdiction. Further, the International Criminal Court retains jurisdiction over any and all acts committed by government actors until March 17, 2019. Hence, withdrawal from the Rome Statute does not affect the liabilities of individuals charged before the International Criminal Court for acts committed up to this date.

As guide for future cases, this Court recognizes that, as primary architect of foreign policy, the President enjoys a degree of leeway to withdraw from treaties which are bona fide deemed contrary to the Constitution or our laws, and to withdraw in keeping with the national policy adopted pursuant to the Constitution and our laws.

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[294] *Rollo* (G.R. No. 238875), pp. 723–724.

However, the President's discretion to withdraw is qualified by the extent of legislative involvement on the manner by which a treaty was entered into or came into effect. The President cannot unilaterally withdraw from treaties that were entered into pursuant to the legislative intent manifested in prior laws, or subsequently affirmed by succeeding laws. Treaties where Senate concurrence for accession is expressly premised on the same concurrence for withdrawal likewise cannot be the subject of unilateral withdrawal. The imposition of Senate concurrence as a condition may be made piecemeal, through individual Senate resolutions pertaining to specific treaties, or through encompassing legislative action, such as a law, a joint resolution by Congress, or a comprehensive Senate resolution.

Ultimately, the exercise of discretion to withdraw from treaties and international agreements is susceptible to judicial review in cases attended by grave abuse of discretion, as when there is no clear, definite, or reliable showing of repugnance to the Constitution or our statutes, or in cases of inordinate unilateral withdrawal violating requisite legislative involvement. Nevertheless, any attempt to invoke the power of judicial review must conform to the basic requisites of justiciability. Such attempt can only proceed when attended by incidents demonstrating a properly justiciable controversy.

**WHEREFORE**, the consolidated Petitions in G.R. Nos. 238875, 239483, and 240954 are **DISMISSED** for being moot.

**SO ORDERED.**

**MARVIC M.V.F. LEONEN**
Associate Justice

WE CONCUR:

**DIOSDADO M. PERALTA**
Chief Justice

**ESTELA M. PERLAS-BERNABE**
Associate Justice

**ALFREDO BENJAMIN S. CAGUIOA**
Associate Justice

**ALEXANDER G. GESMUNDO**
Associate Justice

**RAMON PAUL L. HERNANDO**
Associate Justice

**ROSMARI D. CARANDANG**
Associate Justice

**AMY C. LAZARO-JAVIER**
Associate Justice

**HENRI JEAN PAUL B. INTING**
Associate Justice

**RODIL V. ZALAMEDA**
Associate Justice

**MARIO V. LOPEZ**
Associate Justice

**EDGARDO L. DELOS SANTOS**
Associate Justice

**SAMUEL H. GAERLAN**
Associate Justice

**RICARDO R. ROSARIO**
Associate Justice

**JHOSEP Y. LOPEZ**
Associate Justice

## CERTIFICATION

I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the court.

**DIOSDADO M. PERALTA**
Chief Justice