

JEFFREY LIANG (HUEFENG), PETITIONER, VS. PEOPLE OF THE PHILIPPINES, RESPONDENT.

G.R. No. 125865. March 26, 2001

Ponente: YNARES-SANTIAGO, J.

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YNARES-SANTIAGO, J.:

This resolves petitioner's Motion for Reconsideration of our Decision dated January 28, 2000, denying the petition for review.

The Motion is anchored on the following arguments:

1)

THE DFA'S DETERMINATION OF IMMUNITY IS A POLITICAL QUESTION TO BE MADE BY THE EXECUTIVE BRANCH OF THE GOVERNMENT AND IS CONCLUSIVE UPON THE COURTS.

2)

THE IMMUNITY OF INTERNATIONAL ORGANIZATIONS IS ABSOLUTE.

3)

THE IMMUNITY EXTENDS TO ALL STAFF OF THE ASIAN DEVELOPMENT BANK (ADB).

4)

DUE PROCESS WAS FULLY AFFORDED THE COMPLAINANT TO REBUT THE DFA PROTOCOL.

5)

THE DECISION OF JANUARY 28, 2000 ERRONEOUSLY MADE A FINDING OF FACT ON THE MERITS, NAMELY, THE SLANDERING OF A PERSON WHICH PREJUDGED PETITIONER'S CASE BEFORE THE METROPOLITAN TRIAL COURT (MTC)-MANDALUYONG.

6)

THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS IS NOT APPLICABLE TO THIS CASE.

This case has its origin in two criminal Informations[1] for grave oral defamation filed against petitioner, a Chinese national who was employed as an Economist by the Asian Development Bank (ADB), alleging that on separate occasions on January 28 and January 31, 1994, petitioner allegedly uttered defamatory words to Joyce V. Cabal, a member of the clerical staff of ADB. On April 13, 1994, the Metropolitan Trial Court of Mandaluyong City, acting pursuant to an advice from the Department of Foreign Affairs that petitioner enjoyed immunity from legal processes, dismissed the criminal Informations against him. On a petition for certiorari and mandamus filed by the People, the Regional Trial Court of Pasig City, Branch 160, annulled and set aside the order of the Metropolitan Trial Court dismissing the criminal cases.[2]

Petitioner, thus, brought a petition for review with this Court. On January 28, 2000, we rendered the assailed Decision denying the petition for review. We ruled, in essence, that the immunity granted to officers and staff of the ADB is not absolute; it is limited to acts performed in an official capacity. Furthermore, we held that the immunity cannot cover the commission of a crime such as slander or oral defamation in the name of official duty.

On October 18, 2000, the oral arguments of the parties were heard. This Court also granted the Motion for Intervention of the Department of Foreign Affairs. Thereafter, the parties were directed to submit their respective memorandum.

For the most part, petitioner's Motion for Reconsideration deals with the diplomatic immunity of the ADB, its officials and staff, from legal and judicial processes in the Philippines, as well as the constitutional and political bases thereof. It should be made clear that nowhere in the assailed Decision is diplomatic immunity denied, even remotely. The issue in this case, rather, boils down to whether or not the statements allegedly made by petitioner were uttered while in the performance of his official functions, in order for this case to fall squarely under the provisions of Section 45 (a) of the "Agreement Between the Asian Development Bank and the Government of the Republic of the Philippines Regarding the Headquarters of the Asian Development Bank," to wit:

Officers and staff of the Bank, including for the purpose of this Article experts and consultants performing missions for the Bank, shall enjoy the following privileges and immunities:

(a) Immunity from legal process with respect to acts performed by them in their official capacity except when the Bank waives the immunity.

After a careful deliberation of the arguments raised in petitioner's and intervenor's Motions for Reconsideration, we find no cogent reason to disturb our Decision of January 28, 2000. As we have stated therein, the slander of a person, by any stretch, cannot be considered as falling within the purview of the immunity granted to ADB officers and personnel. Petitioner argues that the Decision had the effect of prejudging the criminal case for oral defamation against him. We wish to stress that it did not. What we merely stated therein is that slander, in general, cannot be considered as an act performed in an official capacity. The issue of whether or not petitioner's utterances constituted oral defamation is still for the trial court to determine.

WHEREFORE, in view of the foregoing, the Motions for Reconsideration filed by petitioner and intervenor Department of Foreign Affairs are DENIED with FINALITY.

SO ORDERED.

Davide, Jr., C.J., join the concurring opinion of Mr. Justice Puno.

Kapunan, and Pardo, JJ., concur.

Puno, J., Pls. See concurring opinion.

[1] Criminal Cases Nos. 53170 & 53171 of the Metropolitan Trial Court of Mandaluyong City, Branch 60, presided by Hon. Ma. Luisa Quijano- Padilla.

[2] SCA Case No. 743 of the Regional Trial Court of Pasig City, Branch 160, presided by Hon. Mariano M. Umali.

CONCURRING OPINION

PUNO, J.:

For resolution is the Motion for Reconsideration filed by petitioner Jeffrey Liang of this Court's decision dated January 28, 2000 which denied the petition for review. We there held that: the protocol communication of the Department of Foreign Affairs to the effect that petitioner Liang is covered by immunity is only preliminary and has no binding effect in courts; the immunity provided for under Section 45(a) of the Headquarters Agreement is subject to the condition that the act be done in an "official capacity"; that slandering a person cannot be said to have been done in an "official capacity" and, hence, it is not covered by the immunity agreement; under the Vienna Convention on Diplomatic Relations, a diplomatic agent, assuming petitioner is such, enjoys immunity from criminal jurisdiction of the receiving state except in the case of an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions; the commission of a crime is not part of official duty; and that a preliminary investigation is not a matter of right in cases cognizable by the Metropolitan Trial Court.

Petitioner's motion for reconsideration is anchored on the following arguments:

- The DFA's determination of immunity is a political question to be made by the executive branch of the government and is conclusive upon the courts;
- The immunity of international organizations is absolute;
- The immunity extends to all staff of the Asian Development Bank (ADB);
- Due process was fully accorded the complainant to rebut the DFA protocol;
- The decision of January 28, 2000 erroneously made a finding of fact on the merits, namely, the slandering of a person which prejudged petitioner's case before the Metropolitan Trial Court (MTC)-Mandaluyong; and
- The Vienna Convention on diplomatic relations is not applicable to this case.

Petitioner contends that a determination of a person's diplomatic immunity by the Department of Foreign Affairs is a political question. It is solely within the prerogative of the executive department and is conclusive upon the courts. In support of his submission, petitioner cites the following cases: WHO vs. Aquino;^[1] International Catholic Migration Commission vs. Calleja;^[2] The Holy See vs. Rosario, Jr.;^[3] Lasco vs. United Nations;^[4] and DFA vs. NLRC.^[5]

It is further contended that the immunity conferred under the ADB Charter and the Headquarters Agreement is absolute. It is designed to safeguard the autonomy and independence of international organizations against interference from any authority external to the organizations. It is necessary to allow such organizations to discharge their entrusted functions effectively. The only exceptions to this immunity is when there is an implied or express waiver or when the immunity is expressly limited by statute. The exception allegedly has no application to the case at bar.

Petitioner likewise urges that the international organization's immunity from local jurisdiction empowers the ADB alone to determine what constitutes "official acts" and the same cannot be subject to different interpretations by the member states. It asserts that the Headquarters Agreement provides for remedies to check abuses against the exercise of the immunity. Thus, Section 49 states that the "Bank shall waive the immunity accorded to any person if, in its opinion, such immunity would impede the course of justice and the waiver would not prejudice the purposes for which the immunities are accorded." Section 51 allows for consultation between the government and the Bank should the government consider that an abuse has occurred. The same section provides the mechanism

for a dispute settlement regarding, among others, issues of interpretation or application of the agreement.

Petitioner's argument that a determination by the Department of Foreign Affairs that he is entitled to diplomatic immunity is a political question binding on the courts, is anchored on the ruling enunciated in the case of WHO, et al. vs. Aquino, et al.,[6] viz:

"It is a recognized principle of international law and under our system of separation of powers that diplomatic immunity is essentially a political question and courts should refuse to look beyond a determination by the executive branch of the government, and where the plea of diplomatic immunity is recognized and affirmed by the executive branch of the government as in the case at bar, it is then the duty of the courts to accept the claim of immunity upon appropriate suggestion by the principal law officer of the government, the Solicitor General in this case, or other officer acting under his direction. Hence, in adherence to the settled principle that courts may not so exercise their jurisdiction by seizure and detention of property, as to embarrass the executive arm of the government in conducting foreign relations, it is accepted doctrine that in such cases the judicial department of the government follows the action of the political branch and will not embarrass the latter by assuming an antagonistic jurisdiction."

This ruling was reiterated in the subsequent cases of International Catholic Migration Commission vs. Calleja;[7] The Holy See vs. Rosario, Jr;[8] Lasco vs. UN;[9] and DFA vs. NLRC.[10]

The case of WHO vs. Aquino involved the search and seizure of personal effects of petitioner Leonce Verstuyft, an official of the WHO. Verstuyft was certified to be entitled to diplomatic immunity pursuant to the Host Agreement executed between the Philippines and the WHO.

ICMC vs. Calleja concerned a petition for certification election filed against ICMC and IRRI. As international organizations, ICMC and IRRI were declared to possess diplomatic immunity. It was held that they are not subject to local jurisdictions. It was ruled that the exercise of jurisdiction by the Department of Labor over the case would defeat the very purpose of immunity, which is to shield the affairs of international organizations from political pressure or control by the host country and to ensure the unhampered performance of their functions.

In Holy See v. Rosario, Jr. involved an action for annulment of sale of land against the Holy See, as represented by the Papal Nuncio. The Court upheld the petitioner's defense of sovereign immunity. It ruled that where a diplomatic envoy is granted immunity from the civil and administrative jurisdiction of the receiving state over any real action relating to private immovable property situated in the territory of the receiving state, which the envoy holds on behalf of the sending state for the purposes of the mission, with all the more reason should immunity be recognized as regards the sovereign itself, which in that case is the Holy See.

In Lasco vs. United Nations, the United Nations Revolving Fund for Natural Resources Exploration was sued before the NLRC for illegal dismissal. The Court again upheld the doctrine of diplomatic immunity invoked by the Fund.

Finally, DFA v. NLRC involved an illegal dismissal case filed against the Asian Development Bank. Pursuant to its Charter and the Headquarters Agreement, the diplomatic immunity of the Asian Development Bank was recognized by the Court.

It bears to stress that all of these cases pertain to the diplomatic immunity enjoyed by international organizations. Petitioner asserts that he is entitled to the same diplomatic immunity and he cannot be prosecuted for acts allegedly done in the exercise of his official functions.

The term "international organizations" -

"is generally used to describe an organization set up by agreement between two or more states. Under

contemporary international law, such organizations are endowed with some degree of international legal personality such that they are capable of exercising specific rights, duties and powers. They are organized mainly as a means for conducting general international business in which the member states have an interest."[11]

International public officials have been defined as:

"x x x persons who, on the basis of an international treaty constituting a particular international community, are appointed by this international community, or by an organ of it, and are under its control to exercise, in a continuous way, functions in the interest of this particular international community, and who are subject to a particular personal status."[12]

"Specialized agencies" are international organizations having functions in particular fields, such as posts, telecommunications, railways, canals, rivers, sea transport, civil aviation, meteorology, atomic energy, finance, trade, education and culture, health and refugees.[13]

Issues

- Whether petitioner Liang, as an official of an international organization, is entitled to diplomatic immunity;
- Whether an international official is immune from criminal jurisdiction for all acts, whether private or official;
- Whether the authority to determine if an act is official or private is lodged in the courts;
- Whether the certification by the Department of Foreign Affairs that petitioner is covered by immunity is a political question that is binding and conclusive on the courts.

Discussion

I

A perusal of the immunities provisions in various international conventions and agreements will show that the nature and degree of immunities vary depending on who the recipient is. Thus:

- Charter of the United Nations

"Article 105 (1): The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.

Article 105(2): Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization."

- Convention on the Privileges and Immunities of the United Nations

"Section 2: The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

x x x

Section 11 (a): Representatives of Members to the principal and subsidiary organs of the United Nations x x shall x x x enjoy x x x immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind.

x x x

Section 14: Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently, a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.

x x x

Section 18 (a): Officials of the United Nations shall be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity.

x x x

Section 19: In addition to the immunities and privileges specified in Section 18, the Secretary-General and all Assistant Secretaries-General shall be accorded in respect of themselves, their spouses and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

Section 20: Privileges and immunities are granted to officials in the interest of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations.

x x x

Section 22: Experts x x x performing missions for the United Nations x x x shall be accorded: (a) immunity from personal arrest or detention and from seizure of their personal baggage; (b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind."

- Vienna Convention on Diplomatic Relations

"Article 29: The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom, or dignity.

x x x

Article 31(1): A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in certain cases.

x x x

Article 38 (1): Except in so far as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently a resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions."

- Vienna Convention on Consular Relations

"Article 41(1): Consular officials shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority.

x x x

Article 43(1): Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.

Article 43(2): The provisions of paragraph 1 of this Article shall not, however, apply in respect of a civil action

either: (a) arising out of a contract concluded by a consular officer or a consular employee in which he did not contract expressly or impliedly as an agent of the sending State; or (b) by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft."

- Convention on the Privileges and Immunities of the Specialized Agencies

"Section 4: The specialized agencies, their property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

Section 13(a): Representatives of members at meetings convened by a specialized agency shall, while exercising their functions and during their journeys to and from the place of meeting, enjoy immunity from personal arrest or detention and from seizure of their personal baggage, and in respect of words spoken or written and all acts done by them in their official capacity, immunity from legal process of every kind.

x x x

Section 19(a): Officials of the specialized agencies shall be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity.

x x x

Section 21: In addition to the immunities and privileges specified in sections 19 and 20, the executive head of each specialized agency, including any official acting on his behalf during his absence from duty, shall be accorded in respect of himself, his spouse and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law."

- Charter of the ADB

"Article 50(1): The Bank shall enjoy immunity from every form of legal process, except in cases arising out of or in connection with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities, in which cases actions may be brought against the Bank in a court of competent jurisdiction in the territory of a country in which the Bank has its principal or a branch office, or has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.

x x x

Article 55(i): All Governors, Directors, alternates, officers and employees of the Bank, including experts performing missions for the Bank shall be immune from legal process with respect to acts performed by them in their official capacity, except when the Bank waives the immunity."

- ADB Headquarters Agreement

"Section 5: The Bank shall enjoy immunity from every form of legal process, except in cases arising out of or in connection with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities, in which cases actions may be brought against the Bank in a court of competent jurisdiction in the Republic of the Philippines.

x x x

Section 44: Governors, other representatives of Members, Directors, the President, Vice-President and executive officers as may be agreed upon between the Government and the Bank shall enjoy, during their stay in the Republic of the Philippines in connection with their official duties with the Bank: (a) immunity from personal arrest or detention and from seizure of their personal baggage; (b) immunity from legal process of every kind in

respect of words spoken or written and all acts done by them in their official capacity; and (c) in respect of other matters not covered in (a) and (b) above, such other immunities, exemptions, privileges and facilities as are enjoyed by members of diplomatic missions of comparable rank, subject to corresponding conditions and obligations.

Section 45(a): Officers and staff of the Bank, including for the purposes of this Article experts and consultants performing missions for the Bank, shall enjoy x x x immunity from legal process with respect to acts performed by them in their official capacity, except when the Bank waives the immunity."

II

There are three major differences between diplomatic and international immunities. Firstly, one of the recognized limitations of diplomatic immunity is that members of the diplomatic staff of a mission may be appointed from among the nationals of the receiving State only with the express consent of that State; apart from inviolability and immunity from jurisdiction in respect of official acts performed in the exercise of their functions, nationals enjoy only such privileges and immunities as may be granted by the receiving State. International immunities may be specially important in relation to the State of which the official is a national. Secondly, the immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State; in the case of international immunities there is no sending State and an equivalent for the jurisdiction of the Sending State therefore has to be found either in waiver of immunity or in some international disciplinary or judicial procedure. Thirdly, the effective sanctions which secure respect for diplomatic immunity are the principle of reciprocity and the danger of retaliation by the aggrieved State; international immunities enjoy no similar protection.[14]

The generally accepted principles which are now regarded as the foundation of international immunities are contained in the ILO Memorandum, which reduced them in three basic propositions, namely: (1) that international institutions should have a status which protects them against control or interference by any one government in the performance of functions for the effective discharge of which they are responsible to democratically constituted international bodies in which all the nations concerned are represented; (2) that no country should derive any financial advantage by levying fiscal charges on common international funds; and (3) that the international organization should, as a collectivity of States Members, be accorded the facilities for the conduct of its official business customarily extended to each other by its individual member States. The thinking underlying these propositions is essentially institutional in character. It is not concerned with the status, dignity or privileges of individuals, but with the elements of functional independence necessary to free international institutions from national control and to enable them to discharge their responsibilities impartially on behalf of all their members.[15]

III

Positive international law has devised three methods of granting privileges and immunities to the personnel of international organizations. The first is by simple conventional stipulation, as was the case in the Hague Conventions of 1899 and 1907. The second is by internal legislation whereby the government of a state, upon whose territory the international organization is to carry out its functions, recognizes the international character of the organization and grants, by unilateral measures, certain privileges and immunities to better assure the successful functioning of the organization and its personnel. In this situation, treaty obligation for the state in question to grant concessions is lacking. Such was the case with the Central Commission of the Rhine at Strasbourg and the International Institute of Agriculture at Rome. The third is a combination of the first two. In this third method, one finds a conventional obligation to recognize a certain status of an international organization and its personnel, but the status is described in broad and general terms. The specific definition and application of

those general terms are determined by an accord between the organization itself and the state wherein it is located. This is the case with the League of Nations, the Permanent Court of Justice, and the United Nations.[16]

The Asian Development Bank and its Personnel fall under this third category.

There is connection between diplomatic privileges and immunities and those extended to international officials. The connection consists in the granting, by contractual provisions, of the relatively well-established body of diplomatic privileges and immunities to international functionaries. This connection is purely historical. Both types of officials find the basis of their special status in the necessity of retaining functional independence and freedom from interference by the state of residence. However, the legal relationship between an ambassador and the state to which he is accredited is entirely different from the relationship between the international official and those states upon whose territory he might carry out his functions.[17]

The privileges and immunities of diplomats and those of international officials rest upon different legal foundations. Whereas those immunities awarded to diplomatic agents are a right of the sending state based on customary international law, those granted to international officials are based on treaty or conventional law. Customary international law places no obligation on a state to recognize a special status of an international official or to grant him jurisdictional immunities. Such an obligation can only result from specific treaty provisions.[18]

The special status of the diplomatic envoy is regulated by the principle of reciprocity by which a state is free to treat the envoy of another state as its envoys are treated by that state. The juridical basis of the diplomat's position is firmly established in customary international law. The diplomatic envoy is appointed by the sending State but it has to make certain that the agreement of the receiving State has been given for the person it proposes to accredit as head of the mission to that State.[19]

The staff personnel of an international organization - the international officials - assume a different position as regards their special status. They are appointed or elected to their position by the organization itself, or by a competent organ of it; they are responsible to the organization and their official acts are imputed to it. The juridical basis of their special position is found in conventional law,[20] since there is no established basis of usage or custom in the case of the international official. Moreover, the relationship between an international organization and a member-state does not admit of the principle of reciprocity,[21] for it is contradictory to the basic principle of equality of states. An international organization carries out functions in the interest of every member state equally. The international official does not carry out his functions in the interest of any state, but in serving the organization he serves, indirectly, each state equally. He cannot be, legally, the object of the operation of the principle of reciprocity between states under such circumstances. It is contrary to the principle of equality of states for one state member of an international organization to assert a capacity to extract special privileges for its nationals from other member states on the basis of a status awarded by it to an international organization. It is upon this principle of sovereign equality that international organizations are built.

It follows from this same legal circumstance that a state called upon to admit an official of an international organization does not have a capacity to declare him *persona non grata*.

The functions of the diplomat and those of the international official are quite different. Those of the diplomat are functions in the national interest. The task of the ambassador is to represent his state, and its specific interest, at the capital of another state. The functions of the international official are carried out in the international interest. He does not represent a state or the interest of any specific state. He does not usually "represent" the organization in the true sense of that term. His functions normally are administrative, although they may be judicial or executive, but they are rarely political or functions of representation, such as those of the diplomat.

There is a difference of degree as well as of kind. The interruption of the activities of a diplomatic agent is likely to produce serious harm to the purposes for which his immunities were granted. But the interruption of the activities of the international official does not, usually, cause serious dislocation of the functions of an international secretariat.[22]

On the other hand, they are similar in the sense that acts performed in an official capacity by either a diplomatic envoy or an international official are not attributable to him as an individual but are imputed to the entity he represents, the state in the case of the diplomat, and the organization in the case of the international official.[23]

IV

Looking back over 150 years of privileges and immunities granted to the personnel of international organizations, it is clear that they were accorded a wide scope of protection in the exercise of their functions - the Rhine Treaty of 1804 between the German Empire and France which provided "all the rights of neutrality" to persons employed in regulating navigation in the international interest; The Treaty of Berlin of 1878 which granted the European Commission of the Danube "complete independence of territorial authorities" in the exercise of its functions; The Covenant of the League which granted "diplomatic immunities and privileges." Today, the age of the United Nations finds the scope of protection narrowed. The current tendency is to reduce privileges and immunities of personnel of international organizations to a minimum. The tendency cannot be considered as a lowering of the standard but rather as a recognition that the problem on the privileges and immunities of international officials is new. The solution to the problem presented by the extension of diplomatic prerogatives to international functionaries lies in the general reduction of the special position of both types of agents in that the special status of each agent is granted in the interest of function. The wide grant of diplomatic prerogatives was curtailed because of practical necessity and because the proper functioning of the organization did not require such extensive immunity for its officials. While the current direction of the law seems to be to narrow the prerogatives of the personnel of international organizations, the reverse is true with respect to the prerogatives of the organizations themselves, considered as legal entities. Historically, states have been more generous in granting privileges and immunities to organizations than they have to the personnel of these organizations.[24]

Thus, Section 2 of the General Convention on the Privileges and Immunities of the United Nations states that the UN shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. Section 4 of the Convention on the Privileges and Immunities of the Specialized Agencies likewise provides that the specialized agencies shall enjoy immunity from every form of legal process subject to the same exception. Finally, Article 50(1) of the ADB Charter and Section 5 of the Headquarters Agreement similarly provide that the bank shall enjoy immunity from every form of legal process, except in cases arising out of or in connection with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities.

The phrase "immunity from every form of legal process" as used in the UN General Convention has been interpreted to mean absolute immunity from a state's jurisdiction to adjudicate or enforce its law by legal process, and it is said that states have not sought to restrict that immunity of the United Nations by interpretation or amendment. Similar provisions are contained in the Special Agencies Convention as well as in the ADB Charter and Headquarters Agreement. These organizations were accorded privileges and immunities in their charters by language similar to that applicable to the United Nations. It is clear therefore that these organizations were intended to have similar privileges and immunities.[25] From this, it can be easily deduced that international organizations enjoy absolute immunity similar to the diplomatic prerogatives granted to diplomatic envoys.

Even in the United States this theory seems to be the prevailing rule. The Foreign Sovereign Immunities Act was passed adopting the "restrictive theory" limiting the immunity of states under international law essentially to

activities of a kind not carried on by private persons. Then the International Organizations Immunities Act came into effect which gives to designated international organizations the same immunity from suit and every form of judicial process as is enjoyed by foreign governments. This gives the impression that the Foreign Sovereign Immunities Act has the effect of applying the restrictive theory also to international organizations generally. However, aside from the fact that there was no indication in its legislative history that Congress contemplated that result, and considering that the Convention on Privileges and Immunities of the United Nations exempts the United Nations "from every form of legal process," conflict with the United States obligations under the Convention was sought to be avoided by interpreting the Foreign Sovereign Immunities Act, and the restrictive theory, as not applying to suits against the United Nations.[26]

On the other hand, international officials are governed by a different rule. Section 18(a) of the General Convention on Privileges and Immunities of the United Nations states that officials of the United Nations shall be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity. The Convention on Specialized Agencies carries exactly the same provision. The Charter of the ADB provides under Article 55(i) that officers and employees of the bank shall be immune from legal process with respect to acts performed by them in their official capacity except when the Bank waives immunity. Section 45 (a) of the ADB Headquarters Agreement accords the same immunity to the officers and staff of the bank. There can be no dispute that international officials are entitled to immunity only with respect to acts performed in their official capacity, unlike international organizations which enjoy absolute immunity.

Clearly, the most important immunity to an international official, in the discharge of his international functions, is immunity from local jurisdiction. There is no argument in doctrine or practice with the principle that an international official is independent of the jurisdiction of the local authorities for his official acts. Those acts are not his, but are imputed to the organization, and without waiver the local courts cannot hold him liable for them. In strict law, it would seem that even the organization itself could have no right to waive an official's immunity for his official acts. This permits local authorities to assume jurisdiction over and individual for an act which is not, in the wider sense of the term, his act at all. It is the organization itself, as a juristic person, which should waive its own immunity and appear in court, not the individual, except insofar as he appears in the name of the organization. Provisions for immunity from jurisdiction for official acts appear, aside from the aforementioned treaties, in the constitution of most modern international organizations. The acceptance of the principle is sufficiently widespread to be regarded as declaratory of international law.[27]

V

What then is the status of the international official with respect to his private acts?

Section 18 (a) of the General Convention has been interpreted to mean that officials of the specified categories are denied immunity from local jurisdiction for acts of their private life and empowers local courts to assume jurisdiction in such cases without the necessity of waiver.[28] It has earlier been mentioned that historically, international officials were granted diplomatic privileges and immunities and were thus considered immune for both private and official acts. In practice, this wide grant of diplomatic prerogatives was curtailed because of practical necessity and because the proper functioning of the organization did not require such extensive immunity for its officials. Thus, the current status of the law does not maintain that states grant jurisdictional immunity to international officials for acts of their private lives.[29] This much is explicit from the Charter and Headquarters Agreement of the ADB which contain substantially similar provisions to that of the General Convention.

VI

Who is competent to determine whether a given act is private or official?

This is an entirely different question. In connection with this question, the current tendency to narrow the scope of privileges and immunities of international officials and representatives is most apparent. Prior to the regime of the United Nations, the determination of this question rested with the organization and its decision was final. By the new formula, the state itself tends to assume this competence. If the organization is dissatisfied with the decision, under the provisions of the General Convention of the United States, or the Special Convention for Specialized Agencies, the Swiss Arrangement, and other current dominant instruments, it may appeal to an international tribunal by procedures outlined in those instruments. Thus, the state assumes this competence in the first instance. It means that, if a local court assumes jurisdiction over an act without the necessity of waiver from the organization, the determination of the nature of the act is made at the national level.[30]

It appears that the inclination is to place the competence to determine the nature of an act as private or official in the courts of the state concerned. That the prevalent notion seems to be to leave to the local courts determination of whether or not a given act is official or private does not necessarily mean that such determination is final. If the United Nations questions the decision of the Court, it may invoke proceedings for settlement of disputes between the organization and the member states as provided in Section 30 of the General Convention. Thus, the decision as to whether a given act is official or private is made by the national courts in the first instance, but it may be subjected to review in the international level if questioned by the United Nations.[31]

A similar view is taken by Kunz, who writes that the "jurisdiction of local courts without waiver for acts of private life empowers the local courts to determine whether a certain act is an official act or an act of private life," on the rationale that since the determination of such question, if left in the hands of the organization, would consist in the execution, or non-execution, of waiver, and since waiver is not mentioned in connection with the provision granting immunities to international officials, then the decision must rest with local courts.[32]

Under the Third Restatement of the Law, it is suggested that since an international official does not enjoy personal inviolability from arrest or detention and has immunity only with respect to official acts, he is subject to judicial or administrative process and must claim his immunity in the proceedings by showing that the act in question was an official act. Whether an act was performed in the individual's official capacity is a question for the court in which a proceeding is brought, but if the international organization disputes the court's finding, the dispute between the organization and the state of the forum is to be resolved by negotiation, by an agreed mode of settlement or by advisory opinion of the International Court of Justice.[33]

Recognizing the difficulty that by reason of the right of a national court to assume jurisdiction over private acts without a waiver of immunity, the determination of the official or private character of a particular act may pass from international to national control, Jenks proposes three ways of avoiding difficulty in the matter. The first would be for a municipal court before which a question of the official or private character of a particular act arose to accept as conclusive in the matter any claim by the international organization that the act was official in character, such a claim being regarded as equivalent to a governmental claim that a particular act is an act of State. Such a claim would be in effect a claim by the organization that the proceedings against the official were a violation of the jurisdictional immunity of the organization itself which is unqualified and therefore not subject to delimitation in the discretion of the municipal court. The second would be for a court to accept as conclusive in the matter a statement by the executive government of the country where the matter arises certifying the official character of the act. The third would be to have recourse to the procedure of international arbitration. Jenks opines that it is possible that none of these three solutions would be applicable in all cases; the first might be readily acceptable only in the clearest cases and the second is available only if the executive government of the country where the matter arises concurs in the view of the international organization concerning the official character of the act. However, he surmises that taken in combination, these various possibilities may afford the elements of a

solution to the problem.[34]

One final point. The international official's immunity for official acts may be likened to a consular official's immunity from arrest, detention, and criminal or civil process which is not absolute but applies only to acts or omissions in the performance of his official functions, in the absence of special agreement. Since a consular officer is not immune from all legal process, he must respond to any process and plead and prove immunity on the ground that the act or omission underlying the process was in the performance of his official functions. The issue has not been authoritatively determined, but apparently the burden is on the consular officer to prove his status as well as his exemption in the circumstances. In the United States, the US Department of State generally has left it to the courts to determine whether a particular act was within a consular officer's official duties.[35]

Submissions

On the bases of the foregoing disquisitions, I submit the following conclusions:

First, petitioner Liang, a bank official of ADB, is not entitled to diplomatic immunity and hence his immunity is not absolute.

Under the Vienna Convention on Diplomatic Relations, a diplomatic envoy is immune from criminal jurisdiction of the receiving State for all acts, whether private or official, and hence he cannot be arrested, prosecuted and punished for any offense he may commit, unless his diplomatic immunity is waived.[36] On the other hand, officials of international organizations enjoy "functional" immunities, that is, only those necessary for the exercise of the functions of the organization and the fulfillment of its purposes.[37] This is the reason why the ADB Charter and Headquarters Agreement explicitly grant immunity from legal process to bank officers and employees only with respect to acts performed by them in their official capacity, except when the Bank waives immunity. In other words, officials and employees of the ADB are subject to the jurisdiction of the local courts for their private acts, notwithstanding the absence of a waiver of immunity.

Petitioner cannot also seek relief under the mantle of "immunity from every form of legal process" accorded to ADB as an international organization. The immunity of ADB is absolute whereas the immunity of its officials and employees is restricted only to official acts. This is in consonance with the current trend in international law which seeks to narrow the scope of protection and reduce the privileges and immunities granted to personnel of international organizations, while at the same time aims to increase the prerogatives of international organizations.

Second, considering that bank officials and employees are covered by immunity only for their official acts, the necessary inference is that the authority of the Department of Affairs, or even of the ADB for that matter, to certify that they are entitled to immunity is limited only to acts done in their official capacity. Stated otherwise, it is not within the power of the DFA, as the agency in charge of the executive department's foreign relations, nor the ADB, as the international organization vested with the right to waive immunity, to invoke immunity for private acts of bank official and employees, since no such prerogative exists in the first place. If the immunity does not exist, there is nothing to certify.

As an aside, ADB cannot even claim to have the right to waive immunity for private acts of its officials and employees. The Charter and the Headquarters Agreement are clear that the immunity can be waived only with respect to official acts because this is only the extent to which the privilege has been granted. One cannot waive the right to a privilege which has never been granted or acquired.

Third, I choose to adopt the view that it is the local courts which have jurisdiction to determine whether or not a given act is official or private. While there is a dearth of cases on the matter under Philippine jurisprudence, the issue is not entirely novel.

The case of *M.H. Wylie, et al. vs. Rarang, et al.*[38] concerns the extent of immunity from suit of the officials of a United States Naval Base inside the Philippine territory. Although a motion to dismiss was filed by the defendants therein invoking their immunity from suit pursuant to the RP-US Military Bases Agreement, the trial court denied the same and, after trial, rendered a decision declaring that the defendants are not entitled to immunity because the latter acted beyond the scope of their official duties. The Court likewise applied the ruling enunciated in the case of *Chavez vs. Sandiganbayan*[39] to the effect that a mere invocation of the immunity clause does not ipso facto result in the charges being automatically dropped. While it is true that the Chavez case involved a public official, the Court did not find any substantial reason why the same rule cannot be made to apply to a US official assigned at the US Naval Station located in the Philippines. In this case, it was the local courts which ascertained whether the acts complained of were done in an official or personal capacity.

In the case of *The Holy See vs. Rosario, Jr.*,[40] a complaint for annulment of contract of sale, reconveyance, specific performance and damages was filed against petitioner. Petitioner moved to dismiss on the ground of, among others, lack of jurisdiction based on sovereign immunity from suit, which was denied by the trial court. A motion for reconsideration, and subsequently, a "Motion for a Hearing for the Sole Purpose of Establishing Factual Allegation for Claim of Immunity as a Jurisdictional Defense" were filed by petitioner. The trial court deferred resolution of said motions until after trial on the merits. On certiorari, the Court there ruled on the issue of petitioner's non-suability on the basis of the allegations made in the pleadings filed by the parties. This is an implicit recognition of the court's jurisdiction to ascertain the suability or non-suability of the sovereign by assessing the facts of the case. The Court hastened to add that when a state or international agency wishes to plead sovereign or diplomatic immunity in a foreign court, in some cases, the defense of sovereign immunity was submitted directly to the local courts by the respondents through their private counsels, or where the foreign states bypass the Foreign Office, the courts can inquire into the facts and make their own determination as to the nature of the acts and transactions involved.

Finally, it appears from the records of this case that petitioner is a senior economist at ADB and as such he makes country project profiles which will help the bank in deciding whether to lend money or support a particular project to a particular country.[41] Petitioner stands charged of grave slander for allegedly uttering defamatory remarks against his secretary, the private complainant herein. Considering that the immunity accorded to petitioner is limited only to acts performed in his official capacity, it becomes necessary to make a factual determination of whether or not the defamatory utterances were made pursuant and in relation to his official functions as a senior economist.

I vote to deny the motion for reconsideration.

[1] 48 SCRA 242 (1972).

[2] 190 SCRA 130 (1990).

[3] 238 SCRA 524 (1994).

[4] 241 SCRA 681 (1995).

[5] 262 SCRA 38 (1996).

[6] Supra note 1.

[7] Supra note 2.

[8] Supra note 3.

[9] Supra note 4.

[10] Supra note 5.

[11] ICMC vs. Calleja, supra note 2.

[12] John Kerry King, *The Privileges and Immunities of the Personnel of International Organizations* xiii (1949), citing: Suzanne Basdevant, *Les Fonctionnaires Internationaux* (Paris: 1931), Chapter 1.

[13] ICMC vs. Calleja, et al., supra, citing Articles 57 and 63 of the United Nations Charter.

[14] C. Wilfred Jenks, *Contemporary Development in International Immunities* xxxvii (1961).

[15] Id. at 17.

[16] J.K. King, supra note 12, at 81.

[17] See id. at 255.

[18] Id. at 25-26.

[19] Article 4, Vienna Convention on Diplomatic Relations.

[20] J.K. King, supra note 12, at xiii.

[21] Id. at 27.

[22] Id. at 254-257.

[23] Id. at 103.

[24] J.K. King, supra note 12, at 253-268.

[25] 1 Restatement of the Law Third 498-501.

[26] Ibid.

[27] J.K. King, supra note 12, at 258-259.

[28] Id. at 186.

[29] But see id. at 259. It is important to note that the submission of international officials to local jurisdiction for private act is not completely accepted in doctrine and theory. Jenks, in particular, has argued for complete jurisdictional immunity, as has Hammar skjold.

[30] Id. at 260-261.

[31] Id. at 189.

[32] Joseph L. Kunz, *Privileges and Immunities of International Organizations* 862 (1947), cited in J.K. King, id. at 254.

[33] 1 Restatement of the Law Third 512.

[34] Jenks, *supra* note 14, at 117-118.

[35] 1 Restatement of the Law Third 475-477.

[36] Salonga & Yap, *Public International Law* 108 (5th ed., 1992).

[37] 1 *id.* at 511.

[38] 209 SCRA 357 (1992).

[39] 193 SCRA 282 (1991).

[40] *Supra* note 3.

[41] TSN, G.R. No. 125865, October 18, 2000, p. 11; Rollo, p. 393.

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